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Synopsis of Contemporary Reports

1914-1923

ALL INDIA REPORTER

1914	1916	1918	1920	1921	1922	1923
41 I. A.	43 I. A.	45 I. A.	47 I. A.	48 I. A.	49 I. A.	50 I. A.
36 All.	38 All.	40 All.	42 All.	43 All.	44 All.	45 All.
12 A L J	14 A L J	16 A L J	18 A L J	19 A L J	20 A L J	21 A L J
38 Bom.	40 Bom.	42 Bom.	44 Bom.	45 Bom.	46 Bom.	47 Bom.
16 Bom L R	18 Bom L R	20 Bom L R	22 Bom L R	23 Bom L R	24 Bom L R	25 Bom L R
41 Cal.	43 Cal.	45 Cal.	47 Cal.	48 Cal.	49 Cal.	50 Cal.
18 C W N	20 C W N	22 C W N	24 C W N	25 C W N	26 C W N	27 C W N
19, 20 C L J	23, 24 C L J	27, 28 C L J	31, 32 C L J	33, 34 C L J	35, 36 C L J	37, 38 C L J
1914 P. R.	1916 P. R.	1918 P. R.	1 Lah.	2 Lah.	3 Lah.	4 Lah.
1914 P L R	1916 P L R	1918 P L R	1920 P L R	1921 P L R	1922 P L R	
1914 P W R	1916 P W R	1918 P W R	1920 P W R		1922 P W R	1923 P W R
15 Cr L J	17 Cr L J	19 Cr L J	21 Cr. L J	22 Cr L J	23 Cr L J	24 Cr L J
22 to 25 I C	32 to 36 I C	43 to 48 I C	54 to 58 I C	59 to 63 I C	64 to 68 I C	69 to 74 I C
37 Mad.	39 Mad.	41 Mad.	43 Mad.	44 Mad.	45 Mad.	46 Mad.
26, 27 M L J	30, 31 M L J	34, 35 M L J	38, 39 M L J	40, 41 M L J	42, 43 M L J	44, 45 M L J
15, 16 M L T	19, 20 M L T	23, 24 M L T	27, 28 M L T		30, 31 M L T	32, 33 M L T
	3, 4 M L W	7, 8 M L W	11, 12 M L W	13, 14 M L W	15, 16 M L W	17, 18 M L W
1914 M W N	1916 M W N	1918 M W N	1920 M W N	1921 M W N	1922 M W N	1923 M W N
10 N. L. R.	12 N. L. R.	14 N. L. R.	16 N. L. R.	17 N. L. R.	18 N. L. R.	19 N. L. R.
		1 N L J	3 N L J	4 N L J	5 N. L. J.	6 N L J
17 O C	19 O. C.	21 O C	23 O. C.	24 O C.	25 O C.	26 O C
1 O L J	3 O L J	5 O L J	7 O L J	8 O L J	9 O L J	10 O L J.
	1 Pat L J	3 Pat L. J	5 Pat. L J	6 Pat L. J.	1 Pat.	2 Pat.
				1921 PHCC	1922 PHCC	1923 PHCC
	1 Pat L W	4, 5 Pat L W	1 P L T	2 P L T	3 P L T	1 Pat L R
						4 P L T
8 L. B. R.	8 L. B. R.	9 L. B. R.	10 L. B. R.	11 L. B. R.	11 L. B. R.	1 Rang.
2 U. B. R.	2 U. B. R.	3 U. B. R.	4 U. B. R.	4 U. B. R.	4 U. B. R.	
7 Bur L T	9 Bur L T	11 Bur L T	13 Bur L T		1 Bur L J	2 Bur. J J.
8 S. L. R.	10 S L R	12 S L R.	14 S L R	15 S L R	16 S. L. R.	17 S. L. R.

Synopsis of Contemporary Reports 1924—1930 ALL INDIA REPORTER

1924	1925	1926	1927	1928	1929	1930
51 I. A. 46 All 22 A L J	52 I. A. 47 All 23 A L J	53 I. A. 48 All 24 A L J	54 I. A. 49 All 25 A L J	55 I. A. 50 All 26 A L J	56 I. A. 51 All 1929 A L J	57 I. A. 52 All 1930 A L J
48 Bom. 26 Bom L R	49 Bom 27 Bom L R	50 Bom. 28 Bom L R	51 Bom. 29 Bom L R	52 Bom. 30 Bom L R	53 Bom. 31 Bom L R	54 Bom. 32 Bom L R
51 Cal. 28 C W N 39, 40 C L J	52 Cal. 29 C W N 41, 42 C L J	53 Cal. 30 C W N 43, 44 C L J	54 Cal. 31 C W N 45, 46 C L J	55 Cal. 32 C W N 47, 48 C L J	56 Cal. 33 C W N 49, 50 C L J	57 Cal. 34 C W N 51, 52 C L J
5 Lah. 25 Cr L J 75 to 84 I C	6 Lah. 26 Cr L J 85 to 90 I C	7 Lah. 27 P L R 27 Cr L J 91 to 98 I C	8 Lah. 28 P L R 28 Cr L J 99 to 105 I C	9 Lah. 29 P L R 29 Cr L J 106 to 112 I C	10 Lah. 30 P L R 1929 Cr. C. 30 Cr L J 113 to 120 I C	11 Lah. 31 P. L. R. 1930 Cr. C. 31 Cr L J 121 I C to
47 Mad 46, 47 M L J 31, 35 M L T 19, 20 M L W 1924 M W N	48 Mad. 48, 49 M L J 31, 35 M L T 21, 22 M L W 1925 M W N	49 Mad 50, 51 M L J 23, 24 M L W 1926 M W N	50 Mad 52, 53 M L J 8, 39 M L T 25, 26 M L W 1927 M W N	51 Mad. 54, 55 M L J 27, 28 M L W 1928 M W N	52 Mad 56, 57 M L J 29, 30 M L W 1929 M W N	53 Mad 58, 59 M L J 31, 32 M L W 1930 M W N
20 N. L. R. 7 N L J 27 O C. 11 O L J	21 N. L. R. 8 N L J 28 O C. 12 O L J 2 O W N	22 N. L. R. 9 N L J 29 O C. 13 O L J 3 O W N	23 N. L. R. 10 N L J 1 & 2 Luck 4 O W N 1 L O	24 N. L. R. 11 N L J 3 Luck. 5 O W N	25 N. L. R. 12 N L J 4 Luck. 6 O W N	26 N. L. R. 13 N L J 5 Luck. 7 O W N
3 Pat. 1924 PHCC 2 Pat L R 5 P L T 2 Rang. 3 Bur L J 17 S. L. R.	4 Pat. 1925 PHCC 3 Pat L R 6 P L T 3 Rang. 4 Bur L J 18 S. L. R.	5 Pat. 1926 PHCC 7 P L T 4 Rang. 5 Bur L J 19 S. L. R.	6 Pat. 8 P L T 5 Rang. 6 Bur L J 20 & 21 S. L. R.	7 Pat. 9 P L T 6 Rang. 22 S. L. R.	8 Pat. 10 P L T 7 Rang. 23 S. L. R.	9 Pat 11 P L T 8 Rang. 24 S. L. R.

THE ALL INDIA REPORTER

1928

CALCUTTA SECTION

CONTAINING
FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF
THE CALCUTTA HIGH COURT REPORTED IN

- (1) I. L. R. 55 CALCUTTA (2) 47 & 48 CALCUTTA LAW JOURNAL
(3) 32 CALCUTTA WEEKLY NOTES (4) 9&10 ALL INDIA CRIMINAL REPORTS
(5) 29 CRIMINAL LAW JOURNAL (6) 106 to 112 INDIAN CASES

WITH
EXTRA JUDGMENTS

CITATION : A. I. R. 1928 CALCUTTA

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1928

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

CALCUTTA HIGH COURT

1928

Chief Justice :

The Hon'ble Sir George Claus Rankin, Kt., Bar-at-law.

Puisne Judges :

The Hon'ble Sir Charu Chander Ghose, Kt., Bar-at-law.
" " Phillip Lindsay Buckland, Bar-at-law.
" " Zahhadur Rahim Zahid Suhrawardy, Bar-at-law.
" " Arthur Herbert Cuming, I.C.S.
" Mr. Herbert Grayhurst Pearson, Bar-at-law.
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THE
ALL INDIA REPORTER
1928

CALCUTTA HIGH COURT
NOMINAL INDEX

Absence of Star denotes Cases of Provincial or Small Importance.

*** Indicates Cases of Great Importance.**

*** * Indicate Cases of Very Great Importance.**

A

Abdul Alim v. Mt. Abir Jan	368	*Azizor Rahman v. Ahidennessa Chaudharani	225
Abdul Barik v. Emperor	827	*Azizur Rahman v. Aliraja Choudhry	527
Abdul Hakim v. Annada Prasad Sen	669	B	
Abdul Halim v. Abdul Gafur	249(2)	Baikanta Nath v. Bhuban Chandra	273(2)
Abdul Munser Munshi v. Yakub Talukdar	703(2)	*Baikuntha Nath v. Sheik Azidulla	870
Abdul Rahim v. Tufan Gazi	584	*Banerjee, K. S. v. Jatindra Nath Paul	475
Abdul Rezak v. Emperor	269	Banerjee, S. N. v. Bengal Paint & Varnish Co.	531(1)
Abinas Chandra v. Pratul Chandra	448	Banerjee, S. N. v. H. S. Suhrawardy	772
Adam Ali v. Chandu Molla	876	Bangshiram Mandal v. Prasannomoyi Debi	166
Afrin Bibi v. Narimtulla Saha	666	Bani Kanta v. Hemanta Kumar	405
Aghore Nath Haldar v. Dwijapada Chatterjee	832	Bannerjee, K. C. <i>In re</i>	402
*Agui Kumar Das v. Mantazaddin	FB 610	Bansidhar Dobey v. Budangal Das	768
*Ahmadar Rahman v. Dwip Chand	281	*Barnard, M. v. G. H. Barnard	657
Ajaz Hossain v. Altaf Hossain	651	Barsik Nandi v. Gurudas Pal	107
Ajgar Shaik v. Emperor	700	Basanta Kumar Adak v. Khirode Chandra Ghose	25
Akhoy Kumar v. Corporation of Calcutta	320	Beoharum Chatterjee v. Benode Behari Chatterjee	510
Akhoy Kumar Dey v. Emperor	495	Begraj Gadhum v. E. I. Ry. Co.	697
Akhoy Sardar v. Lalchand Sardar	96	*Bejoy Lal v. Benarasidas Khandelwal	99
Akshoy Kumar v. Ashutosh Battacharjee	73	Bejoy Lal Seal v. Benarasidas	681
Ambar Ali v. Emperor	769	*B. N. Ry. Co. Ltd. v. Tara Prosad Maity	504
Ambar Ali v. Piran Ali	344	Benode Behari Mandal v. Jitendra Prosad Chatterji	748(2)
*Ambica Charan v. Kumud Mohun	893	Bepin Chandra Mondal v. Emperor	444
*Ambica Prosad v. Annada Prosad	250	Bhabesh Chandra v. Shyama Sundari	399(1)
Ambica Prosad Das v. Corporation of Calcutta	483	Bhadreshwar Srdar v. Emperor	416(2)
Ambica Ranjan v. Manikganj Loan Office Ltd.	468	Bharateswari Das v. Bhagaban Chandra	759
Ananda Bandhu v. Ambica Charan	412	Bhodai Sheikh v. Barada Kanta	116
*Anukul Chandra v. Dacca Dist. Board	485	*Bhola Nath Bose v. Mt. Nagendra Bala	810
*Archibald George Edgcombe v. Emperor	264	Bhudeb Chatterjee v. Asutosh Gangopadhyaya	705
Aroth v. Craig Jute Mills Ltd.	481	Bimala Charan v. Abdul Rahman	825
*Arunadoya Chakrabarty v. Mahomed Ali	188	*Bir Bikram Kishore v. Ali Ahmad	286
Ashita Ranjan v. Emperor	339	Bir Bikram Kishore v. Dasharath Rishi	563
Ashoke Kumar v. Corporation of Calcutta	542	Birendra Nath v. Tarini Kanta	191
Asim Krishna Deb v. Sailesh Chandra	174	Bishnu Chandra v. Behari Lal	279
Aswani Kumar v. Har Kumar	891	Bisweswar Das v. Guru Charan Das	727
Ataharuddin Taluqdar v. Murari Mohun	193	Bonomali Gope v. Fakir Chand Pal	46
*Agrabindo Nath v. Monorama Debi	670	*Brajeshwary Dasi v. Nityananda Das	365
Ayetonnessa Bibi v. Amjed Ali	717		

NOMINAL INDEX, 1928 CALCUTTA

Brindaban Chandra v. Mt. Giribala Datta	478	Gopal Chandra v. Manmohini Dasi	118
Brindarani Dassya v. Narendra Nath	229	Gopal Chandra v. Shashi Bhusan	852
Brojo Lal Saha v. Budh Nath	148	Gopeswar Sen v. Bijoy Chand Mahatab	
Budhu Tatus v. Emperor	183	Bahadur	854
C		G. I. P. Ry. Co., v. Chakravarti, Sons & Co.	170
Carmen v. O'Brien	97	G. I. P. Ry. Co., Ltd. v. Jesraj Patwari	65
Chaito Kalwar v. Emperor	240	Gregory, J. M., <i>In Re.</i>	50
Chamaria, H. R. & Co. v. Sonatan Pal	168	Gulzar Mondal v. Trailakyanath Shah	125
Chandra Kishore v. Biseswar Pal	216	Gurucharan Das v. Port Canning and Land Improvement Co. Ltd.	245
Chandra Nath v. Nagendra Nath	263(2)	H	
Chandra Tara Debi v. Srish Chandra	277	Hafez Uzir Ali v. Nisaimannessa Bibi	865
Chittagong Municipality v. Assam Bengal Ry. Co. Ltd.	738	Hara Chandra v. Mohananda Mondal	299
Choyenuddin Pramanik v. Emperor	271(1)	Haran Chandra v. Behari Lal	560
Chuni Lal v. Hiralal	378	Harbut Ray Chamaria & Co. v. Ujir Shaikh	765
Collins, E. I. v. W. G. Collins	806	Harendra Kumar Rai v. Secy. of State	808
*Commercial Properties Ltd., <i>In the matter of</i>	456	Harendra Nath v. Purna Chandra	199
Commissioners for the Port of Calcutta v. Suraj Mul	464	Hari Chaitanya v. Ramram Sinha	164
Corporation of Calcutta v. Ananta Dhar	336	*Hari Mohan Dalal v. Parmeshwar Shau	SB 646
Corporation of Calcutta v. Asoke Kumar De	743	*Hari Narayan Chandra v. Emperor	27
*Corporation of Calcutta v. Jalajbasini Debi	450	Haripada Datta v. Sashi Bhusan Basu	668
D		Haripada Saha v. Debnath Mandal	749
Dadu Bhuiya v. Duman Bhuiya	586	Harmukhrai Dulichand, <i>In the matter of</i>	SB 587
Daliluddi v. Matahar Ali	254	Hasaruddin Mahomed v. Emperor	775
Dasharathi Ghose v. Khondkar Abdul Hannan	68	Hatimullah v. Mahomed Abju	312
Daulat Ali Molla v. Hedail Molla	703(1)	*Hazrat Gul Khan v. Emperor	430
Deb Narayan v. Jagadish Chandra	684	Hefajuddin Talukdar v. Nabi Nasya	416(1)
Dharani Mohan v. Kshitipati Ray	62	Hemangini Debi v. Mundir Mridha	576
*Dibrugarh Dist. Club Ltd., <i>In the matter of</i>	SB 577	*Hemeswar Barua v. Poal Chandra Bora	754
Dinanath Kundu v. Janki Nath	392	*Howrah Amta Light Ry. Co. Ltd, <i>In the matter of</i>	SB 579
Doat Ali v. Emperor	230	Hriday Nath v. Niroda Sundari	834
Dorice, R. v. O. R. Stanislaw	248	I	
Durga Priya v. Durga Pada	204	*Imperial Tobacco Co. v. Albert Bonnan	1
Durga Prosad Sen Gupta v. Madhab Krishna Nandy	824	Indra Mohan v. Emperor	410
Durga Shankar v. Kamini Kumar	535	Isaf Nasya v. Emperor	24
Dutt P. N. Choudhuri v. J. H. Blades	843	J	
Dwarka Nath v. Atul Chandra	108	Jagdamba Debi v. Uma Shankar De	220
Dwijapada Halidar v. Emperor	401	Jaharlal Sadhukhan v. Chandra Kanta	265
Dwijendra Nath v. Jitendra Nath	419	Jahir Mandal v. Radha Rangini Devi	859
E		Jaladhar Mondal v. Amrita Lal	87
*E. I. Ry. Co. v. Shewbux Roy	491	Jamiruddees Naskar v. Basanta Kumar Roy	47
Etari Dasya v. Podei Dasya	307	Jatindra Nath v. Nagendra Nath	289
Emperor v. Ahammad Sheikh	815	Jatindra Nath v. Narendra Nath	152
*Emperor v. Kisor Mohan Chaudhuri	853	Jatindra Nath v. Suradhani Debi	102
— v. Komoruiddin Sheikh	233	Jatindra Nath v. Trailakaya Nath	142
*— v. Ram Chandra Roy	732	Jaynal Abedin v. Hyder Ali Khan	441
Etraj Mandal v. Emperor	879	Jewraj Khariwal v. Doyal Chand	211
*Ezra Meyer Aaron Cohen v. Debendra Lal Khan	89	Jharu Mondal v. Mahatabuddin Mondal	713
F		Jnanandra Nath v. Jitendra Nath	275
*Fatima Khatun, Mt. v. Fazlal Karim	303	Jnanendra Mohan v. Profullananda Goswami	812
Fazlur Rahman v. Sardar Ali	338	Jogendra Chandra v. Monmohini Debi	156
Fuli Bibi, Mt. v. Khokai Mandal	537	Jogesh Chandra Kundu v. Radha Govinda Rai	848
G		John Carapiet Galstaun v. Diana Sarkies	177(1)
*Gahar Ali v. Abdul Owahab	361	Jotirmoy Goswamy v. Gobinda Goswamy	273(1)
Gangasagar v. Commr. of Income Tax, Bengal	836	Juran Mandal v. Ram Mandal	737
Girish Chandra v. Secy. of State	55	Jyoti Prosad Singha v. Jogendra Ram Roy	878
Gobinda Chandra v. Abdul Rashid	235	Jyotish Chandra v. Har Chandra	234
Gobinda Ram Agarwala v. Dulu Pada Dutta	753(1)	K	
Gooool Chunder v. Jamal Biswas	553	*Kadira v. Emperor	466
Gohali Saha v. Debendra Nath	285	*Kailash Chandra v. Jogesh Chandra	868
Gohur Shailh v. Ahmad Ali	113	Kamala Prosad v. Chandra Nath	180
Gokuldas v. Chagan Lal	887	Kambho Bera v. Emperor	981
		Kanal Lal v. Makhani Lal	287

*Kanak Prova Devi v. Dharendra Nath Roy	861	Moti Lal v. Premj Lyall	114
Kandarpa Narain v. Bindu Bashini Dasi	730	Midnapore Zamindari Co., Ltd. v. Shib Nayayan	137
*Kanta Mohan v. Gopi Nath	355	*Minnat Ali v. Nabendra Kishore	253
Kanteswar Sarkar v. Indramani Dashya	512	Mitchell, A. B. v. J. C. Dutt	209
*Kanto Mohan v. Jadab Chandra	353	*Mohanlal v. Kasimuddin	302
Karali Prosad v. E. I. Ry. Co.	498	*Mohendra Chundra v. Emperor	359
Karma Urang v. Emperor	298	Mohesh Chandra v. Hemendra Nath	104
**Kasi Nath Ghosh v. Himmat Ali	720	Mohesh Chandra v. Mathura Chandra	360
Kasiraddin Paramanik v. Kasir Mandal	227	*Mohiruddin Mollah v. Gayan Nath	221
*Kedar Nath v. Emperor	FB 83	Mokbul Khan v. Emperor	690
Keramat Ali v. Emperor	862	Momin Talukdar v. Emperor	771
Kesifab Lal v. Emperor	272	Mon Mohan v. Emperor	261
*Keshub Chandra v. Joyfulnessa Bibi	397	Monmotha Nath v. Luchmi Debi	60
*Kessoram Poddar & Co. v. Secy of State	74	Monmotha Nath v. Rajeswar Rai	315
Khagendra Prasanna v. Sasi Mohan	406	Monmotho Nath v. Bepin Behari	582
Khairat Ali v. Wahed Ali	241(1)	Mujibar Rahaman v. Isub Surati	546
Khatemannassa Bibi v. Ugendra Chandra Mandal	804	Mukherjee, S. v. Haruntar Mahomed & Co.,	484
Khemadananda Kumar v. Rashamya Hal-dar	888	Muktaram Bakht v. Gomasta Mahato	654
Khenta Kamini v. Aswini Kumar	424	Mulchandra Jhoomer v. G. R. Martindale	756
Kiran Chandra Roy v. Jagannath Banik	472	Murlidhar Ram Narayan v. Corporation of Calcutta	387
Krishna Chandra v. Dina Nath	94	Muthiar Chettiar v. Chidambaran Chetty	686
Krishna Chandra v. Pabna Dhana Bhan-dar Co. Ltd.	722	Muzaffar Ahmed v. Karim Baksh	806
Krishna Kishore Adhicary, <i>In re</i>	21	N	
Krishna Lal v. Promila Bala Dasi	518	Nabu Sahu v. Kamdev Maity	179
Krista Kishore v. Pancharam Maity	341	Nsar Chandra Pal v. Murali Mondal	496
Kuarmony Singh v. Dashrathi Pati	570	Nahar Lal v. Baijnath Shah	385
L		Naimuddin Biswas v. Maniruddin Lashkar	184
Lachmi Chand v. Bepin Bihari	644	Narayan Bera v. Jharu Mandal	792
*Lalji Ram v. Corporation of Calcutta	243	Narayan Chandra v. Emperor	324
Latafat Hossain Biswas v. Emperor	745	Nawabali v. Emperor	752
Lila Singh v. Chandra Badan Singh	343	Niamat v. Jalil	715
Luxmi Industrial Bank Ltd. v. Dinesh Chandra Roy	609	Nibaran Chandra v. Abdul Hakim	418
M		Nibaran Chandra v. Kristo Mohan	597
**Machuni Bibi v. Jardine Menzies & Co.,	399(2)	Nil Kamal v. Kamakshya Charan	589
Macneil & Co., v. Debendra Nath	293	*Nil Kanta Ghosal v. Ram Chand Roy	835
Madan Gopal v. Sachindra Nath	295	Nilmani Mondal v. Chekan Mondal	408(1)
Madhab Chandra v. Fajnoo Ram	231	Nisi Kanta v. Brojendra Nath	298
Madhab Chandra Mandal v. Tilottamma Dasi	751	Nripendra Nath v. Dharendra Narayan	115
*Madhu Molla v. Babonsa Karikar	565	Nripendra Nath v. Emperor	321
*Madhu Sudan v. Chhalimaddin Ahammad	167	O	
Maffizuddin Bepari v. Jalaluddin	748(1)	*Olpadvolla, E. S. v. James Wright	673
Magnamoyi Rai v. Brojendra Lal	127	P	
Maharaj Bahadur Singh v. Achala Bala Devi	106	Payari Mohan v. Siddique Ahmed	531(2)
Maharaj Bahadur Singh v. Sachindra Nath Roy	328	Phanindra Krishna v. Promatha Nath	421
Mahendra Nath v. Charu Chandra	396	Port Canning and Land Improvement Co., Ltd. v. Jogendra Mandal	533
Mahendra Nath v. Khetra Mohan Bera	593	Priya Nath Manna v. Official Trustee of Bengal	43
*Mahesh Chandra v. Jogendra Lal	222	Prodip Singh Jamadar v. Ramani Mohan Sen	591
Mahim Chandra v. E. I. Ry. Co.,	544	Pulin Behary Saha v. Mathura Nath Saha	863
Mahomed Hossein v. Khana Kazi	606	Purna Chandra Khan v. Nalini Kanta Khan	741
*Mahomed Sagiruddin v. Emperor	551	R	
Mahomed Yusuf v. Ram Gobinda	177(2)	*Rabindra Nath v. Jogendra Chandra	691
Mahoruddi Sheikh v. Safed Ali	103	Radha Ballabh v. Panchkari Sil	153
Makbul Ali v. Sasi Kumar	305(2)	Radha Charan Rai v. Kallash Chandra	776
Makhan Lal v. Bejoy Gopal	892	Radha Kishan v. Gauhati Municipality	357
Manab Shaikh v. Mahomed Golam Nabi	488	*Radha Mohun v. Nipendra Nath	154
Mangal Chand v. River Steam Navigation Co., Ltd.	490	*Radha Rani Dasi v. Sukhdeb Bhatta-charjee	92
Manikya Bewa v. Pushpa Charan Majhi	850	Radharani Santra v. Ramesh Chandra	218
Man Mohan v. Hari Nath	408(2)	Rahimannassa Bibi v. Sk. Halim	814
Matangini Ghose, Mt. v. Mt. Monmohini Ghose	41	Rahimuddi v. Chadam	768
Mathura Nath v. Bageswari Rani	57	Rai Charan Pal v. Jadu Nath	376
		Raichuddin v. Waiz Bibi	49

Rai Mani Dasi v. Upendra Nandan Das	706	Serajul Islam v. Emperor	645
Raj Gopal Bhattacharji v. Sarat Kumari Debi	758	*Shaik Abdul Karim v. Thakurdas Thakur	844
Rajjab Ali v. Miajan	890	Shama Charan v. Ashutosh Dass	263(1)
Rakhal Chandra v. Baikuntha Nath	874	Shiba Kumari v. Daksha Bala Dassi	296
Rama Nath v. Harish Chandra	347	Shyam Sundar v. Titaghar Paper Mills Co. Ltd.	123
Rama Nath v. Tarak Nath	305(1)	Siba Kumari Devi v. Doshi Ghosain	146
Ramanath Bhattacharjee v. Jagannath Mondal	169	Sibesh Chandra Pakrasi v. Bibi Bhusan Roy	750
Ramchandra Saha v. Lakshmi Kanta	574	Siti Fakir v. Chand Bewa	389
*Ram Charan Goldar v. Hamid Ali	FB 819	Soneswar (Das) Pandit v. Kanakram	249(1)
*Ramesh Chandra v. Birajasundari Gupta	349	Soudamini Dassya v. Sheikh Basir Mamud	841
*Rameswar Khiroriwalla v. Emperor	367	**Sourindra Nath v. Nirmal Chandra	882
Ram Gopal Goenka v. Corporation of Calcutta	207	Srijan Gazi v. Abdul Sattar	885
Ram Gopal Goenka v. Narayan Das Chandra	446	Sris Chandra v. Bhaba Tarini Devi	695
Ramjan Ali Haji v. Hafiz Abdul Gaffur	864	**Stamp Act, <i>In the matter of</i>	SB 566
Ram Narayan v. Paraswanath Sen	516	Sultan Hasan v. Nanki Bibi	241(2)
Ram Prosad Maitra v. Emperor	569	Suniti Sundari v. Srikrishna Chakravarti	514
Ramshai Mull More v. Joylall	840	Superintendent & Legal Remembrancer v. Jahey Sheikh	228
Rash Behari Mandal v. Hemanta Kumar Ghose	52	Superintendent and Remembrancer of Legal Affairs v. Srish Chandra Ray	653
Rishee Case Law v. Golam Ali	548	Superintendent and Remembrancer of Legal affairs, Bengal v. Murray	557
*Rivers Steam Navigation Co., Ltd. v. Bisweswar Kundu	371	*Surendra Kumar v. Sushil Kumar	256
Robinkumar Pal v. Kusum Kamini	196	Surendra Nath Das v. Alauddin Mistry	828
*Rukeya Banu v. Nazira Banu	130	Surendra Nath Dutta v. Tripura Pada Bhattacharjee	215
S			
*Saberjan Bibi v. Kantari Bibi	753(2)	Suresh Chandra v. Emperor	309
Sabirer Ma v. Behari Mohan Pal	23	Suresh Chandra v. Kanti Chandra	436
Sadar Ali v. Abeda Bibi	549	Swarnamanjuri Dassi v. Secy. of State	522
*Sadar Ali v. Doliluddin Ostagar	FB 640	T	
Sadhu v. Emperor	260	Tamirannessa Bibi v. Kachhiman Bewa	202
Sadhu Kathalia v. Dharendra Nath	425	*Tara Chand v. Gobinda Chandra	271(2)
Sailabala Dasi v. Baidya Nath	580	Tarak Nath v. Moti Lal	559
Sailendra Nath v. Satish Chandra	136	*Tarapada Ghose v. Bagala Sundari	143
Sajjad Ahamad v. Trailakya Nath	479	**Tarini Charan v. Kedar Nath	FB 777
Salamchand Kannayaram v. Joogul Kisor Ramdeo	462	*Tarini Charan Sardar v. Srish Chandra Pal	880
Salim v. Hajira Bibi	325	Tata Iron and Steel Co. Ltd. v. Radha Moni Dasi	826
Sambhunath Basak v. Abdul Kader	247	Tilottama Dasi v. Madhu Sudan Giri	714
Samiuddin v. Emperor	500	*Tricumchand Dansing v. Chief Rev. Authority, Bengal	897
Sanjua Urao v. Matadin Agarwalla	322	Tunga Bidya Devi v. Panna Sashi Devi	556
Sarada Charan Sen v. Banka Behari Das	474	U	
Sarat Chandra v. Sarala Bala Ghose	63	Umesh Chandra v. Safiyatanaessa Khatun	267
Sarat Chandra Deb v. Dharani Mohan Roy	508	Upendra Lal v. Jogesh Chandra	186
Sarat Chandra Mitra v. Charusila Dasi	794	Upendra Nandan Das v. Banamali Charan	709
*Sarat Chandra Pal v. Barlow & Co.	FB 782	V	
*Sarat Kumar Roy v. Nabin Chandra Ram Chandra Shaha	FB 786	*Vakil, <i>In the matter of</i>	FB 817
Sarat Kumar v. Surendra Nath	428	**Vakil, S., <i>In the matter of</i>	FB 820
Saroj Bhandhu v. Mati Lal	112	*Vernon Milward Bason, <i>In the matter of</i>	FB 729
*Sasi Mohan Saha v. Hari Nath Saha	459	W	
Satindra Nath v. Emperor	438	Walter, V. J. v. M. J. Walter	600
Satish Chandra v. Rakhal Chandra	189	White, P. v. S. W. White	513
Satya Narain v. Emperor	675		
Secy. of State v. Breakwell & Co.	761		
*----- v. Kali Brahma Chatterjee	571		

THE
ALL INDIA REPORTER
1928

CALCUTTA HIGH COURT
SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.

* Indicates Cases of Great Importance.

* * Indicate Cases of Very Great Importance.

A

Administration

—Wife appointed as administratrix and granted permission to make permanent leases for necessary purposes—Permanent lease granted by her, but for purposes not necessary for administration, will be deemed to be by her as holder of a widow's estate and if not for necessity reversioners can set aside

412

Adverse possession

*—Claimant must have actual possession as against the person entitled to possession—Real tenant executing a sham kabuliyat in favour of a third person—Actual possession with the real tenant with knowledge of sham kabuliyatdar and continuing in possession as owner—No title by adverse possession can be claimed

882a

*—Principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor, does not apply in favour of a trespasser

882b

—Mortgagor and mortgagee—Mortgagee cannot set up adverse possession against the mortgagor by executing a kabuliyat in favour of the landlord

825c

Adverse possession

—Actual possession pleaded—Evidence of possession not satisfactory—Maxim that possession follows title is not applicable

765a

—A, B and C jointly inheriting a homestead though in separate occupation of different huts therein—Landlord getting ejectment decree but never executing it—C alone executing a kabuliyat in favour of landlord for a certain period—Landlord trying to eject all after that period—A and B can acquire title by adverse possession in respect of the shares in their possession

563

—Possession between tenants-in-common—Possession of a tenant-in-common is not adverse to his cotenant

396

—Vendor having vested right but entitled to possession after the death of a widow having a right of residence—Widow's possession cannot be adverse to the purchaser

250

—Wakf—Mutwali in possession—Wakf turning out to be void—Mutwali cannot claim to have been in adverse possession

130b

—Landlord and tenant—Knowledge or want of knowledge on the part of the landlord is im-

Adverse possession

material in regard to the acquisition of a tenant's interest in property by adverse possession 47

Appeal

—Competency — Appeal from preliminary order in execution — Execution subsequently dismissed — Appeal is still maintainable — Execution will proceed as per appellate judgment 804b

—Competency—Suit for mesne profits against co-trespassers—Decree passed against all — Decree in its entirety only can be challenged in appeal 180a

Arbitration Act (9 of 1899)

—S. 15—Award—An award is a decree for the purpose of enforcing that award only 840b

Assam Labour and Emigration Act (6 of 1901)

—S. 213—Emigration or assisting in the emigration is not an abetment within S. 213 339

Assam Land and Revenue Regulation (1 of 1886)

—S. 80—Date of confirmation in the certificate is not conclusive 870b

—S. 80—Purchaser at revenue sale suing for possession—Suit within 12 years from symbolical possession—Defendants defaulting proprietors — Suit is governed by Art. 142 or 144 and not by Art. 121 and is within time 870c

—S. 154 (1)—Right of the civil Court is not ousted by the section 130d

Assam Municipal Act (1 of 1923)

—S. 30—Chairman can delegate his powers only by written order—Act done by Vice-Chairman with Chairman's express or implied consent is not invalid 357c

—Ss. 220 to 223—Attention of sanctioning officer should be directed to person or persons to be proceeded against 357b

—S. 221—Person against whom sanction is not obtained cannot be convicted 357a

B**Benami Transaction**

—Transaction not contraven-

Benami Transaction

ing provisions of law—Courts are bound to give effect to it—

A benamidar can maintain a suit for recovery of possession against a trespasser 666-

Bengal Alluvion and Diluvion Act (9 of 1847)

—Plaintiff a co-sharer and patnidar — Diarah proceedings taken as to accretions—Zemindar refusing to take settlement — Payment of malikana—Plaintiff recorded as tenant through sub-tenants — Plaintiff is entitled to claim accretions as appertaining to his patni tenures, but he cannot be compelled to take settlement of the accreted lands 808c

Bengal Cess Act (9 of 1880)

—S. 4—Rent of Rs. 100 must be taken as applied to the whole of the land cultivated by the person in question 508a

—S. 41—Valuation roll is a factor in determining the amount of cess 406b

—S. 41 (3)—A cultiyating raiyat only can be assessed in a less onerous manner as regards rate than a holder of a tenure 508b

Bengal Estates Partition Act (8 of 1876)

—S. 149—The certain revenue officer who carries out the partition should not concern himself with the disputed question of title to the land under partition: only a civil Court has a right to decide that question 41

(5 of 1897)

—S. 81—Power of the Collector to split up a tenure should be exercised only where necessary for equitable partition 560a

—S. 81 — "Split up" means completely sever in parcels 560b

—S. 81—A co-sharer landlord, after partition of an estate under the Act, can evict a transferee prior to partition of a non-transferable holding 560c-

Bengal General Clauses Act (1 of 1899)

—S. 25—Prosecution of a person within the Howrah Municipal area under Ss. 466 and

Bengal General Clauses Act.

574, Calcutta Municipal Act of 1899, which had been extended to Howrah under a Government notification—Acquittal on the ground that the Act was repealed and no notification had been issued extending any part of the new Act to Howrah—Acquittal opposed on the ground that prosecution was competent under S. 25, General Clauses Act—Acquittal was held to be proper as any prosecution founded upon the notification must be under the new Act

484

Bengal Land Registration Act (7 of 1876)

—S. 78—Rent, suit for—Land in possession of tenants comprised in a number of estates—Cosharer proprietor's interest in respect of one estate partially registered in the collectorate—Rent proportionate to his entire estate realized by him for over 30 years without any objection—Inference is that the rent was due to him

115

Bengal Land Revenue Sales Act (11 of 1859)

- Payment of land revenue—Appropriation—General law of appropriation will apply only in the absence of specific provision in the Act on the point 68a
- S. 5—Notice under, is expedient when mortgage has been found to be a good one by judicial decision, but non-service of notice is not an illegality 722c
- S. 7—It is not a question between the defaulting proprietor and the Collector as to whether notice under S. 7 was served or not—Nonservice of notice under S. 7 is neither illegality nor irregularity vitiating sale 722b
- S. 8 and Bengal Towzi Manual, Rr. 102, 110, 114 and 115—Non-compliance with rules makes sale for arrears invalid 68b
- S. 13—Estate in arrear—Particular separate share in arrear should be sold but not the share not in arrear at the kist in question though in arrear in previous kist 722d

Bengal Land Revenue Sales Act

—S. 13—No arrears due for the kist for which an estate is sold—Sale is not valid 722c

Bengal Local Self-Government Act (3 B.C. of 1885)

—Election Rules 1 and 42—Civil Court has jurisdiction to set aside an election 750

Bengal Municipal Act (3 of 1884)

- S. 15—S. 15 is concerned with electoral franchise and not with taxation 832d
- S. 85—Separate occupiers of separate parts of one holding cannot be assessed for portions in their occupation 832c
- S. 85 (a)—Test for making a person liable to assessment for an occupation of "a holding" is the mode of user and not the length of occupation—Occupation by a servant must be ancillary to his duties 832a
- S. 85 (a)—"Holding" does not mean a part of a holding 832b
- S. 85 (a)—Defendants holding ijara of a market place within Municipality and issuing licences to others to sell wares on the land—Ijaradars are the persons who really occupy holding within Municipality 591a
- S. 85, Cl. (a)—Holding claimed jointly—Tax is to be assessed on each separately according to circumstances and property of each within Municipality 591b

Bengal Patni Regulation (8 of 1819)

- Purchase of patni tenure—No registration of name—Zamindar's right is not affected—Recorded tenant is still responsible for rent 94d
- S. 11 (3)—Occupancy raiyats cannot be ejected 52a
- S. 13—Girbidar is like usufructuary mortgagee—Patnidar cannot grant lease to girbidar's prejudice 826
- S. 14—Sale of patni in a rent decree—Surplus withdrawn by a creditor of one patnidar—Sale subsequently set aside—Zaminder made to pay whole.

Bengal Patni Regulation

purchase money—Suit lies by zamindar against the creditor—
Suit is governed by Art. 120 and not by Art. 62, Limitation Act 296

Bengal Public Demands Recovery Act (3 of 1913)

—S. 37—No public demand due
—The certificate is ultra vires
—Proceedings founded on it are null and void 808a

Bengal Survey Act (5 of 1875)

—S. 41—Survey officer unable to decide fact of possession from the evidence collected by him—His order that the boundary should be plotted as it stood in the revenue survey map was held to be not an order determining the fact of possession 576

Bengal Tenancy Act (8 of 1885)

—Jote is a general term with respect to a holding and it is not necessarily equivalent to a "raiyaoti jote" 880b

—Notification No. 964, T. R., dated 5th November 1898, extending Bengal Tenancy Act to Western Duars—A darchukanidar can establish that he is an occupancy tenant 322

—S. 7—Absolutely accurate rate is not possible 218b

—S. 7—Etmam tenure in Chittagong, not being from the time of permanent settlement—Rent can be enhanced 186b

—Ss. 15 and 16—Heirs transferring a patni tenure without complying with S. 15—Transferee is not debarred from recovering rent from tenants 220

—S. 29—A compromise decree passed in contravention of provisions of S. 29 is operative and binding until vacated by appropriate proceedings 606a

—S. 32—Scope—S. 32 does not prevent Court from comparing period immediately before suit with any other period during tenancy 841c

—Ss. 32 add 35—Both the sections must be read together—S. 35 gives discretion to the Court as to the extent to which

Bengal Tenancy Act

the enhancement should be allowed 570

—S. 35—Court has discretion to enhance rent 841b

—S. 46—Suit for ejectment—Court should first determine fair and equitable rent and decree for ejectment should not be passed if the tenant agrees to pay such rent 533

—S. 48—S. 48 applies even if the holding is not co-extensive—Under-raiyat of a part of holding agreeing to pay to raiyat higher than 150 per cent of the rent of whole holding—Raiyat cannot recover more than 150 per cent if under-raiyat offers to pay 150 per cent 885

—S. 50—A raiyat holding at a fixed rent is entitled to the benefit of S. 50 880c

—S. 50—Hudabandi papers—The hudabandi papers are admissible in evidence to rebut the presumption under S. 50, Ben. Ten. Act but do not by themselves charge a person with liability—They are admissible under S. 32, Evidence Act, S. 34 does not apply 854b

—S. 50—Purchase of holding by landlord in rent sale and re-settlement with the same tenant breaks the continuity 169b

—S. 50—Tenant transferring part of holding—Landlord recognizing transferee—New tenancy is created 169c

—S. 52—Measurement at partition under Estates Partition Act is no occasion upon which rent is assessed 553b

—S. 52—Time of creation of tenancy uncertain—Manner of assessment of rent not known—Nature of rent not known—Nothing to show whether there was measurement at inception of tenancy—Landlord must base claim upon some measurement on the basis of which rent was assessed 553c

—S. 52—Joint tenants—Right to abatement of rent must be asserted jointly by all 548c

—S. 52—The doctrine of suspension of rent depends solely upon

Bengal Tenancy Act

- the fact that the rent due is an entire sum in respect of the land demised 479b
- S. 52—Reduction in the area of holding—No stipulation in the patta that tenant would not be entitled to any reduction of rent—Tenant is entitled to the proportionate reduction of jama 406a
- S. 52 (1) (a)—Interpretation—The words "The area for which rent has been previously paid by him" mean the area with reference to which rent was assessed or adjusted 553a
- S. 85—A raiyat agreeing not to evict an under-raiyat except under certain contingencies contravenes the provisions of the section 478
- S. 85—Lease in contravention of provisions of S. 85—Tenant in possession on the basis of the kabuliyat—Dispossession by subsequent lessees—Tenant is entitled to recover land 376b
- S. 85—Application—S. 85 does not apply to homestead lands 156a
- S. 87—Abandonment—Tenant of a non-transferable occupancy holding leaving the village in Falgun 1324—Landlord giving a settlement of the holding in Baisakh 1325—Sub-lease by the tenant in Ashar 1325 and two days later sale of a portion of the holding—Period was too short for abandonment and the lease and sale did not amount to a transfer 891b
- S. 87—Part of holding sold in 1908—Subsequent partition in 1919 between cosharers of taluk—Portion sold falling to share of plaintiff—Plaintiff suing in 1922 to eject purchaser—Purchaser cannot be ejected as he is not trespasser—Suit is also barred as adverse possession began in 1908 and not at the date of partition 876
- S. 87—Abandonment—Mortgage of a non-transferable occupancy holding—Mortgagee subsequently foreclosing and getting possession—This amounts to abandonment 484a

Bengal Tenancy Act.

- S. 87—Abandonment—Transfer of a part only or not by way of sale—Landlord cannot recover possession in the absence of abandonment 848b
- S. 87—Suit for ejectment on the ground of abandonment—Mortgagee obtaining possession by foreclosure—Mortgagee must prove that inference of abandonment should not be drawn 848c
- S. 87—Sale of non-transferable holding—Part of it in tenants' possession—There is no abandonment and landlord has no right of re-entry 748(2)
- S. 88—Receipt for rent given by the agent—Landlord is not bound by every statement therein 315b
- S. 103-A and S. 103-B—Record-of-rights finally published—Presumption under S. 103-B arises—But order under S. 103-A directing the name of a particular person to be entered is a valuable evidence as to possession by such person 298.
- S. 103-B—Record-of-rights—Entry is presumed to be correct 751a
- S. 104 (j) and S. 111-A—Entry as to rent is conclusive—Entry as to being a tenant raises only a presumption 808b.
- S. 105—Suit to recover rent as settled in a proceeding under S. 105 for jama consisting of ten plots—Tenant contending that jama consisted of three plots and not of ten plots as alleged—No decision as regards the plots of which the jama consisted by the Revenue Officer—Decision under S. 105 was held to be not operative as res judicata and the civil Court was held to have power to go into the question as to the rent of the holding 472a
- S. 105—Rent entered in the record-of-rights—Application to enhance rent—No application to correct the entry under S. 106—Rate of rent is not concluded against the landlord by such an application if tenants agree to pay higher rent 399(1)
- S. 105—Suit in ejectment—Defendant cannot get advantage

Bengal Tenancy Act

- of stay of proceedings under S. 111 by merely raising a question of status 388
- S. 105 — Application made only against one of the joint tenants — Landlord's remedy under S. 105 is exhausted 146c
- S. 105 (1)—Application for substitution even after two months from the final publication of Record-of-Rights is valid 146b
- S. 107—Decree in proceedings under S. 105 fixing the area and the rent of the holding—Landlord suing the tenants on that basis—The decree was held to be conclusive between the parties and the tenants were held to be bound to pay the rent fixed by the Settlement Officer 479a
- S. 109 — Application under S. 105 for enhancement of rent under S. 30 (b) withdrawn—Subsequent suit for enhancement—Subject-matter different —S. 109 is no bar 841a
- Ss. 109-A, 105-A—(*Per Page, J.*) Application under S. 105-A —Custom of suspension of rent held not to exist—Decision not having been appealed against by tenant operates as *res judicata* in subsequent rent suit between the parties (*Cuming, J., contra.*) 706
- S. 109-A — Rent suit — No second appeal lies from the decision of a Special Judge, which settles a fair and equitable rent 496
- S. 109-A—Application covering matter other than that of settlement of rent—Second appeal lies 146a
- S. 148-A—A suit to fall under S. 148-A must be for the entire rent due and not a suit for the co-sharer's share of the rent only —Plaint should be looked at to see whether a case does or does not satisfy the test 347
- S. 150—Plea of excess shall not be taken cognizance of unless it is accompanied with deposit 874c
- S. 153, Expl.—Irregularity due to fraud or negligence also is covered by Explanation 859

Bengal Tenancy Act

- S. 153—'Amount claimed' includes not only statutory interest at 12½% and statutory damages but even 75% interest if agreed FB 777a
- S. 153 — Rent—When a decree is given at the rate of rent admitted by the defendants it is not a case of determination of the annual rent payable as mentioned in S. 153 512a
- S. 153—No declaration as to amount of rent in the decree—Question as to amount annually payable by tenant actually decided—Exception to S. 153 applies and the order is appealable 254
- S. 155—Lease—Miras karsha lease—Covenant for re-entry on breach of any condition—Landlord must give notice under S. 155 193a
- S. 155 (b)—Landlord and tenant — Tenant precluded from transferring the land in any way—Condition that if any such transfer was effected the landlord would have a right of re-entry—Landlord or a person claiming under him can eject the transferee from the tenant—Landlord need not give notice under S. 155 (b) 113
- S. 158—Court need not remand a case if the only object is to have enquiry under S. 158 43d
- Ss. 158-B & 177, (Chap. 14)—Sale by decree-holder in execution of a rent decree—It must be shown that he was the landlord on the date of the application for execution—Superior interest in occupancy holding sold—Subsequent sale in execution of a decree for rent transfers only right of tenant and not tenancy 768
- S. 158 (d)—Revenue officer is competent to ascertain the rate of rent and if there is none, to determine a fair and equitable rent 43b
- S. 158, Cl. (d)—Landlord can ask for a decree for back rents at a fair and equitable rate which is found for the years in suit 43c

Bengal Tenancy Act

- S. 160—A raiyat holding at a fixed rent is entitled to the benefit of S. 50 880c
- S. 167—Annulment of incumbance—Application for, after one year from sale—Purchaser must prove date when he got notice of sale 892
- S. 167—"Purchaser" includes assignees or transferees from a certificated purchaser—A real owner is not precluded from giving notice under S.167 448a
- S. 170—Applicability—Portion of the holding cannot be sold in execution 94a
- S. 170 (3)—Transferee of a holding allowed to make deposit without notice to landlord—Landlord withdrawing deposit is estopped from questioning transfer—Not giving notice is immaterial 730
- S. 173 (3)—Sale set aside—Appeal by auction-purchaser is not competent 202a
- S. 192—Prohibition to sub-let at a rate higher than that fixed by settlement—Contract to pay higher rent cannot be enforced 763
- Sch. 3, Art. 3—If at the time of actual taking possession the person so taking possession occupies position of landlord the article applies—Whether he occupied that position when he purchased interest of which he dispossessed the tenant is immaterial 586

Bengal Towzi Manual Rules

- S. 102 and 115—Non-compliance with rules makes sale of arrears invalid 68b

C

Calcutta Corporation Provident Fund Rules

- R. 19—Meaning explained 743b
- R. 19—Rule providing payment to the legal representative—Payment to uncle as de facto guardian was held not to be valid discharge 743c

Calcutta High Court Appellate Side Rules.

- Ch. 7, Rr. 2 and 3—R. 1, and not Rr. 2 and 3, applies to appeals from orders in appeal

Cal. H. C. Appellate Side Rules

under Presidency Towns Insolvency Act, S. 8 FB 768g

Calcutta High Court General Rules and Circular Orders (Civil)

- Ch. 1, P. 31, R. 93—Removal of property is illegal 815a
- Ch. 1, P. 31, R. 93—R. 93, as amended, has the force of law 815b

Calcutta High Court Original Side Rules

- O. 9, R. 13, Civil P. C., is applied by analogy—But R. 13 does not prevent Court in case of negligence from restoring suit on proper terms 864
- Ch. 2, Rr. 1 and 4—Criminal appeal from original side—Question whether a vakil can act is not concluded by Criminal Procedure Code but by the rules of the High Court 675c
- Ch. 2, Rr. 1 and 4—Criminal appeal from original side—A vakil cannot act unless a question of Hindu or Mahomedan law is involved 675d

Calcutta High Court Rules

- Variation of order—Practice and procedure indicated 756a
- Court may vary its own order settled, passed and entered by the Registrar 756b
- Ch. 13, R. 17—Leave to cross-examine deponents was granted 177(1)

Calcutta Municipal Act (3 of 1923)

- S. 27 (3)—Time to receive deposit money extended by Corporation—Candidate paying his deposit money after three days but within extended time—His nomination is still rendered void 209a
- Ss. 27 (3) and 46—Improper acceptance of a nomination is an admissible ground for the purposes of S. 46 209b
- S. 131—Onus is not on Corporation to prove increase in value of land 450c
- S. 140—There is no analogy between the Land Acquisition Collector making an award and an executive officer of the Municipality passing orders under S. 140 as to assessment 450a

Calcutta Municipal Act

- S. 141—Assessee not adducing evidence against assessment—Assessment should be confirmed 450e
- S. 142 (3)—Appeal to High Court—Question of fact can be gone into 450b
- S. 198—Person in Calcutta tendering for goods to be supplied to the Howrah Municipality—Sale of goods to the Municipality in pursuance of the tender—Such person cannot be held to be carrying on business in Howrah and so cannot be prosecuted for not having a license • 531(1)
- S. 385 (1) and S. 488 (1) and (2)—Conviction under S. 385 (1) read with S. 488 (1)—Continuing to work mill after conviction is not continuance of the offence—Second conviction is bad 387
- Ss. 406 and 488 — Accused found taking delivery of consignment of ghee discovered to be adulterated is not guilty of offence under S. 406 320a
- Ss. 406, & 424(1)—Compulsory sale is not sale within S. 406 320b
- S. 424—Where the procedure prescribed by S. 424 was not followed, conviction under S. 412 was not set aside 243c
- S. 488 (2), Sch. 17, R. 7—Re-thatching of roof with leaves and allowing it to remain in contravention of the requirements of R. 7 is not a continuing offence 336
- S. 533—S. 533 must be taken to be subject to the provisions of S. 200 (b), Criminal P. C. 483
- S. 538—Provisions are not applicable to a suit for payment of money of the Provident Fund 742a
- S. 538—Special period of limitation does not apply to a suit by the son for the recovery of Provident Fund of an employee of the Corporation 542a
- S. 557 (a)—New procedure prescribed by Act 5 of 1926 is to be applied to contravention

Calcutta Municipal Act

of the old Act as well as the new Act 207

Calcutta Port Act (3 of 1820)

- S. 84—Proceedings for contravention of S. 83 cannot be stopped by an injunction by a civil Court 464a.

Calcutta Rent Act (3 of 1920)

- Suit by landlord to eject tenant after giving notice—Rent Act in force when suit dismissed—Rent Act expiring at the hearing of the appeal—Act was held not applicable 436.

Calcutta Suppression of Immoral Traffic Act (13 B. C. of 1923)

- S. 6—Offence—Mere letting of rooms to prostitutes or collecting rents from them is not an offence 381a
- S. 6—(*Graham and Duval, JJ.*): Lessee sub-letting premises to prostitutes, collecting rent daily by sitting outside and actively associating with the business of the brothel—Conviction under S. 6 is proper (*Cammie, J., contra*) 381b.

Carriers Act (3 of 1865)

- Ss. 8 and 9—Common carrier is liable even in absence of contract for loss arising from its negligence 490
- S. 9—Negligence—Loss from an unknown cause is presumptive proof of negligence 371e
- S. 10—Condition—Contract—A contract with a carrier provided: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the company . . . within six months from the date of any default, loss or damage in respect" which such claim arises: *Held* that the condition was not unreasonable 371a

Civil Procedure Code (5 of 1908)

- S. 2 (2)—Order limiting right to recover mesne profits—Order is of nature of a decree and is appealable 204a
- S. 2 (2)—Decree on review is a new decree—Appeal lies from such decree 418

Civil P. C.

- S. 2 (12) — Defendants in wrongful possession but not proving that the land was being cultivated by previous tenants or that they could not cultivate—Mesne profits should be awarded on the basis that they were in khas possession 474
- **—S. 9—Commandeering order is an Act of State—Secy. of State cannot be sued in respect of it 74c
- S. 11—Execution proceedings—Omission to object to execution application being not in accordance with law operates as res judicata 861b
- S. 11—Compromise decree on the basis of a Commissioner's map—Court in subsequent suit cannot go into the correctness or otherwise of the map 852
- *—S. 11—Matter directly and substantially in issue, where not an abstract question of law but a mixed question of fact and law, is res judicata **FB 777b**
- S. 11—Alteration of law by subsequent decisions—Different interpretation of law by judicial decision does not affect the principle of res judicata but legislature might affect it: **32 Cal. 749, Overruled FB 777c**
- **—S. 11—Question of law—Res judicata does not depend on correctness of decision—Section does not deal with points or points of law or pure points of law—Decision is binding and not the reasoning **FB 777d**
- **—S. 11—Decision on a question of law, though erroneous, is res judicata except where causes of action in two suits are different 717a
- S. 11—Decision on question of fact is res judicata though erroneous 717b
- *—S. 11—Decision holding prior decision res judicata is conclusive 717c
- S. 11 — Decision against a defendant is binding on him though he did not appear 717d
- *—S. 11 — Subject-matter the same—Previous judgment upon merits after hearing some evidence on both sides though in 1928 Indexes (Cal.)—3 & 4

Civil P. C.

- plaintiff's absence is res judicata 271 (2)
- *—S. 11—Res judicata — The judgment against a creditor who sought to attach the property cannot operate as res judicata as against the judgment-debtor in a suit brought by judgment-debtor against the claimant 130c
- *—S. 11—Expl. (2)—Finding as to possession on a certain date in a suit under Specific Relief Act, S. 9, can operate as res judicata 758
- S. 20—Tort—Suit for damages for conversion of land—Some tort-feasors residing in Calcutta—Action can be maintained in Calcutta against them 887
- **—S. 35-A—Maliciously bringing a civil suit—Action may lie but not if the object is to defend one's own trade 1c
- S. 39—Section does not apply to a decree under the Presidency Small Cause Courts Act 265b
- S. 39—Application for transfer of decree to the District Court A—Judgment-debtor resident in district B—The District Judge of A having jurisdiction over districts both A and B—The application is in order 265c
- S. 47 — Application under S. 47—Setting aside sale asked for—Art. 181, Limitation Act and not Art. 166 applies 865a
- S. 47—Application to set aside sale—Stranger auction-purchaser interested in the result—S. 47 applies 865b
- S. 47 — Some property of decree-holder sold through mistake instead of judgment-debtor's property—Remedy is under S. 47 and not by a separate suit 865c
- S. 47—Decree by a benamidar—Execution by the true owner—Judgment-debtor challenging the ownership—Question should be decided under S. 47 835b
- S. 47 — Person, other than judgment-debtor, in possession of property sold in execution—Executing Court cannot decide his title 792b

Civil P. C.

- S. 47—Excess of decree paid to decree-holder under fraud and cheating — Application under S. 47 is the proper remedy and no separate suit lies 776b
- S. 47—Final decree for partition made—Dispute regarding adjustment contrary to final decree falls under S. 47 753 (2)
- S. 47—Adjustment before a decree—Cognizance cannot be taken by an executing Court—Separate suit to restrain the decree-holder from executing the decree must be filed 527b
- S. 47—Objection to attachment by purchaser of judgment-debtor's interest—S. 47 applies 94b
- S. 48—Solenama instalment decree passed in a mortgage suit in 1909 authorizing decree-holder to realize whole amount in case of default—Final decree, passed in 1911—Personal decree passed under O. 34, R. 6 in 1920 — Execution application in 1925 — Application was held to be time barred and personal decree not necessary in view of the solenama decree 688
- S. 48 — Application within three years of previous proceedings but after 12 years from the decree and asking for a new relief by attachment and sale of moveables is barred under S. 48 241 (2)b
- S. 55—Scope—Provisions of S. 55 are mandatory 62b
- S. 60—Scope — Creditors of the sons of the deceased assured can attach money payable under the policy 518b
- Ss. 65 and 66 — Purchase at auction sale—Sale not confirmed — New Code coming into operation in the meantime — The title of the purchaser had not become absolute and no suit under S. 66 can be maintained 338
- S. 66—A real owner can seek for a declaration of his real title against one who had no claim under a certificated purchaser 448b
- S. 79 — Payments made on contract not in conformity with the Act, cannot render similar

Civil P. C.

- subsequent contracts binding on Secretary of State 74d
- S. 80—"Cause of action" in S. 80 is not to be taken in a narrow sense but it must be stated with precision 74e
- S. 80 — Notice—Where the cause of action has not arisen at the time of the notice, the notice is invalid 74f
- S. 92 — Expression "where the direction of the Court is deemed necessary for the administration of any such trust" explained 368b
- S. 92—Appointment of mutawalli—Court can appoint one even without a suit under S. 92 368c
- S. 92—Removal of trustee—Grounds illustrated 225
- S. 94 (c) — Interlocutory injunction—Applicant must make out a prima facie case that he is entitled to relief 464c
- *—S. 95—Issue of injunction apart from malice or want of probable cause gives no cause of action for suit 1c
- S. 96 (3)—Nature of compromise in dispute—Appeal lies 108a
- S. 97 — Appeal from preliminary order in execution — Execution subsequently dismissed—Appeal is still maintainable—Execution will proceed as per appellate judgment 804b
- *—S. 97—Final decree passed—Appeal from preliminary decree is competent 720a
- *—S. 97—Mortgage suit — Appeal from preliminary decree after passing of final decree is maintainable 167a
- S. 100—Abandonment — Inference from facts found as to whether there was abandonment or not is a question of law 891a
- S. 100 — Plea of limitation should be allowed even for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred 870a
- S. 100—Finding in disregard of presumption from an entry in the Record-of-Rights can be interfered with 751b

Civil P. C.

- S. 100— Court must decide whether a tenancy is permanent or not as an inference of law 597b
- *—S. 100—Calcutta Municipal Act S. 142 (3)—Appeal to High Court—Question of fact can be gone into 450b
- S. 100—The proper effect of a proved fact is a question of law 315a
- S. 100—Agreement by both sides to proceed on the evidence before the Court and also before the Commissioner — Its violation by Court is a defect calling for interference in second appeal 136a
- S. 100—Pro-note — Question as to personal liability is one of law 123b
- S. 100—Mushaa—The question whether a gift is bad as offending against the doctrine of mushaa is a mixed question of law and fact 49
- S. 102—Suit for recovery of excess amount paid to decree-holder under fraud and cheating—Second appeal is entertainable 776a
- S. 105 (2)—Appeal from decree on a preliminary issue—Case remanded for decision on merits—Decree passed on merits after remand—Order of remand is not appealable 325
- S. 107—Question of relevancy of a document, though not raised in trial Court, can be considered by first appellate Court 512b
- S. 114—Decree on review is a new decree and appeal lies from that decree 418
- S. 115—Trial Court holding that he had no jurisdiction to direct a complaint to be made under S. 476, Criminal P. C.—Appellate Court not deciding the question of jurisdiction but itself acting under S. 476-B—Procedure is irregular 237
- S. 115—Limitation—An erroneous view of law on the question of limitation is not by itself a ground for revision 202b
- S. 115—Revision—An error on a question of limitation is not necessarily such an error as

Civil P. C.

- would bring the case within the purview of S. 115 189b
- S. 115 — (*Cuming, J.*) Valid partial award—Refusal of Court to pass decree on partial award --Order is interlocutory—Revision does not lie (*Roy, J., dissenting*) 174
- S. 115 — An interlocutory order is not usually interfered with in Calcutta High Court 114
- S. 132—Right of parda ladies is absolute 814
- S. 136—It is doubtful whether a Judge on the original side has a right to direct a District Judge within appellate jurisdiction of High Court to execute a warrant of arrest for contempt —Application to that effect refused—Proper course is to ask the original side Judge to ask for express injunction 462
- S. 144—Decree of trial Court reversed in first appeal—Decree executed in the meantime—First appellate decree affirmed in second appeal—Limitation for application for restitution begins from date of first appellate decree SB 646a
- S. 151—Powers of remand are not restricted to Civil P. C., O. 41, R. 23 812b
- S. 151—Remand under S. 151 —Appeal is competent 218a
- *—S. 151 — Application under R. 100, O. 21—Claim allowed in the absence of decree-holder—Whole case not placed before the Court—Case should be reheard under S. 151 179b
- O. 1, R. 1—Person interested to deny or denying plaintiff's title is not pro forma defendant 425
- O. 1, R. 1—Ex-parte rent decree can be set aside as against some of the defendants only 397b
- O. 1, R. 1 and 3, and O. 2, R. 3—Plaintiff suing to recover certain properties in his personal capacity from certain defendants and to recover another property in the capacity of she-bait from one of the defendants in the same suit—Plaint should be treated as comprising two

Civil P. C.

- suits and they should be tried separately 199
- O. 1, R. 8—Suit by a plaintiff on behalf of a community for recovery of rent on behalf of village deity—Amount of rent disputed—Other members added as plaintiffs but plaint not amended—Newly joined plaintiffs siding with the defendant—There is no change in the constitution of the suit and the plaintiff does not lose his representative character 741
- O. 1, R. 9—Parallel contract for the carriage of the same goods and for the same journey with different carriers—All are necessary parties to the suit for the recovery of compensation 490
- O. 1, R. 9—All persons in actual possession are necessary parties in ejectment suit 138c
- O. 1, R. 9—Suit for declaration of right of pasturage—Cause of action arises only against persons obstructing the right—Ultimate owners of the land are not necessary parties 23
- O. 1, R. 10—Appellant becoming insolvent—Official Assignee not proceeding with appeal—Party claiming to be entitled to the property of appellant under mortgage applying for substitution though silent until then—Substitution cannot be allowed 215
- *—O. 1, R. 11—"Person," means a party to a suit and not a stranger 143a
- *—O. 1, R. 11—Permission to conduct a suit on behalf of absent party without special authorization cannot be granted 143L
- O. 2, R. 2—Proceedings under S. 146, Ben. Ten. Act, for enhancement of rent pending—Decree obtained for rent at old rate—Subsequent suit, after decision of S. 105 proceedings allowing enhancement for difference is not barred 684
- O. 2, R. 3—Plaintiff suing to recover certain properties in his personal capacity from certain defendants and to recover another property as shebait from one of the defendants in the

Civil P. C.

- same suit—Plaint should be treated as comprising two suits and they should be tried separately 199
- *—O. 2, R. 3—Persons seeking individual reliefs—They can join in same suit if investigation is likely to be indential to a great extent if separate suits are brought 92
- O. 2, R. 6—Plaintiff suing several defendants—Defendant 1 was sued for removal from office of shebait—Suit against others for possession of debutter property separately purchased—Plaintiff should not be compelled to bring separate suits 514a
- O. 6, R. 17—An amendment to strike out the name of defendant dying prior to filing the suit, should be allowed where his heirs were already on record 152
- O. 9, R. 13—Calcutta High Court Original Side—The rule is applied by analogy but it does not prevent Court in case of negligence from restoring suit on proper terms 864
- O. 9, R. 13—Appeal against ex-parte decree—R. 13 not availed of—Propriety of the order refusing an adjournment can be raised in the appeal 812a
- O. 9, R. 13—Scope.—Court has discretion independently of O. 9, R. 13 772a
- O. 9, R. 13—Original Side—Negligence proved—Still Case can be restored 772b
- O. 9, R. 13—Order setting aside ex-parte decree cannot be assailed in appeal against the decree finally passed 397a
- O. 9, R. 13—Ex-parte rent decree can be set aside as against some of the defendants only 397b
- O. 13, R. 2—Admissibility—It is a matter of discretion with the Court to admit certain documents at the rehearing obtained on a review though they were not tendered in evidence in the first appeal 416(1)
- O. 17, R. 1—Application for adjournment should not be summarily disposed of 102

Civil P. C.

- O. 17, R. 2, and O. 26, R. 8—
Application to set aside ex-parte
decree—Defendant asking for
his examination on commission
—Application granted and evi-
dence taken—Defendant not
present on the day fixed for
hearing of the case though
ordered—No instructions to the
pleader—Application dismissed
for default—Case is governed by
O. 17, R. 2—Court is under no
obligation to read evidence on
commission 341
- O. 21, R. 2—Joint decree-
holder is not bound by payment
to the alleged legal representa-
tive which was certified by him
without notice to joint decree-
holder 759b
- O. 21, R. 2—R. 2 is not con-
fined to money decrees; it ap-
plies also to decrees for parti-
tion 715
- *—O. 21, R. 2—R. 2 contem-
plates an adjustment consisting
of stipulations already carried
out 527a
- O. 21, R. 2—Adjustment be-
fore a decree—Cognizance can-
not be taken by an executing
Court—Separate suit to restrain
the decree-holder from executing
the decree must be filed 527b
- *—O. 21, R. 2—Adjustment not
certified—Executing Court can-
not inquire even if fraud is im-
puted to the decree-holder 527c
- O. 21, R. 2—Adjustment noti-
fied to the appellate Court—
Statement that adjustment had
taken place not objected to by
decree-holder—Adjustment was
held to have been duly certified 527d
- *—O. 21, R. 15—Trial Court
passing decree for costs severally
—Appellate Court giving a joint
decree—Application for execu-
tion made by one of the joint
decree-holders for his share only
and entertained by the Court
keeps alive the entire decree 861a
- O. 21, R. 15—Joint decree-
holder is not bound by payment
to the alleged legal representa-
tive which was certified by him
without notice to joint decree-
holder 759b

Civil P. C.

- O. 21, R. 15—Joint decree—
Decree-holders giving up a por-
tion of the decree—Application
for the execution of the rest is
not illegal 559
- *—O. 21, R. 16—A true owner
can execute a decree obtained in
the name of benamidar 835a
- O. 21, R. 22—No notice is
necessary where proceedings are
in continuation of previous exe-
cution 241(2)a
- O. 21, R. 22—Sub-R. 2 does
not abrogate the mandatory
nature of the provisions of Sub-
R. 1 60a
- O. 21, R. 22(1)—Notice served
on judgment-debtor—Order dis-
missing application is not
against judgment-debtor 60c
- **—O. 21, R. 29—Words "pend-
ing suit has been decided" in-
clude an appeal and mean "fin-
ally decided" 222
- O. 21, R. 40 (3)—Security
must be proper 62a
- O. 21, R. 43—Removal of pro-
perty is illegal 815a
- O. 21, R. 58—Objection by
third party—Objections to at-
tachment raised by a third party
come under O. 21, R. 58 94c
- O. 21, R. 63—Order against
idols represented by shebait—
Prospective representative suing
after a year—Suit would be
barred 514b
- O. 21, R. 66—Judgment-debt-
or's failure to put forward any
objection even after receipt of
notice debars him from raising
it at any subsequent stage of
proceedings 328a
- O. 21, R. 90—Auction-pur-
chaser is not a person whose
interests are affected by the sale
and cannot apply under the
rule 828
- O. 21, R. 90—Party commit-
ting fraud must prove that other
party had knowledge of facts
constituting fraud beyond statu-
tory period 349a
- *—O. 21, R. 90—Sale cannot be
partially set aside on the ground
of irregularity or fraud—It must
be set aside in its entirety 349c

Civil P. C.

- O. 21, R. 90—Mere under-valuation does not entitle a judgment-debtor to have the sale set aside unless he has sustained injury 328b
- O. 21, R. 90—Decree-holder's willingness to return property to judgment-debtor for the price at which it was bought is a circumstance which may be taken into consideration whether judgment-debtor has suffered any injury at the sale 328d
- O. 21, R. 90 — Application under R. 90 — Failure to make auction-purchaser party—Application is not bad (*obiter*) 189a
- O. 21, R. 90—Order dismissing application to set aside sale merely for non-appearance of applicant is appealable 25
- O. 21, R. 92 — Sale conveys interest only of parties to the suit—Auction-purchaser cannot lay claim to the shares of persons not affected by the sale 349b
- O. 21, R. 92 (2) — No notice given — Order is not without jurisdiction 267a
- O. 21, R. 93—As long as the order setting the sale aside subsists it must attract the operation of R. 93 267b
- O. 21, Rr. 100 and 101 — A person purchasing non-transferable occupancy holding in decree against tenant — Landlord obtaining decree against recorded tenant and attaching holding—Purchaser is not judgment-debtor within R. 100, but one in possession on his own account 792a
- O. 21, R. 100 — Application under — Claim allowed in the absence of decree-holder—Whole case not placed before the Court —Case should be reheard under Civil P. C., S. 151 179b
- O. 21, R. 103—Suit under the rule should be subsequent to investigation under R. 100 179a
- O. 22—Suit for mesne profits against co-trespassers — Decree passed against all—It can only be challenged in its entirety in appeal 180a
- O. 22, R. 3—Manager of Court

Civil P. C.

- of Wards filing appeal on behalf of several cosharers—Death of one of them before filing appeal — Legal representatives not brought on record — Appeal is incompetent 824
- O. 22, R. 3—Death of party— Legal representative not brought on record—Abatement operates as a decree 184a
- O. 22, R. 4 — One of the appellants dying during pendency of second appeal—Legal representatives of deceased not brought on record — Appeal heard and case remanded—Fresh second appeal against decision after remand—Application for vacating the previous order of remand—Proper procedure laid down 654
- O. 22, R. 10 — Removal of a manager of an institution by the managing committee of a trust —Appointment of another—The latter is entitled to be substituted in place of the former 651b
- O. 23, R. 1—Court considering that application for withdrawal should not be granted— Proper course is to dismiss application and proceed with suit 273(1)
- O. 23, R. 3—Parties agreeing to withdraw their respective pleas on certain contingency—Contingency not occurring — There is no compromise within O. 23, R. 3 108a
- O. 23, R. 4—Adjustment before a decree—Cognizance cannot be taken by an executing Court—Separate suit to restrain the decree-holder from executing the decree must be filed 527b
- O. 24, R. 3 — Deposit of admitted amount stops running of interest 874b
- O. 26, R. 1—Right of purdah ladies is absolute 814
- O. 26, R. 1 — A commission ordered to be issued after being satisfied that the person is sick and unable to attend the Court —Such order cannot be revised 421a
- O. 26, R. 1—Commission issued on the ground of sickness— It cannot be used unless witness

Civil P. C.

- is prevented from giving evidence 421b
- O. 26, R. 8 — Application to set aside ex-parte decree—Defendant asking for his examination on commission — Application granted and evidence taken — Defendant not present on the day fixed for hearing the case though ordered — No instructions to the pleader — Application dismissed for default — Case is governed by O. 17, R. 2—Court is under no obligation to read evidence on commission 341
- O. 26, R. 10 (2)—The report and map prepared by a commissioner in one suit can be admitted in another suit on the commissioner being examined 63c
- O. 30, R. 1—Suit by a firm on pro-note executed in favour of one partner—Suit is maintainable 148a
- O. 32, R. 3 — Suit against a minor—Absence of appointment of guardian ad litem—Decree is a nullity as against him — Though mere absence of recording of formal order of appointment does not vitiate proceedings, where minor had good defence but no such defence is raised and guardian's interest is adverse, the proceedings may be vitiated 844
- O. 32, R. 3 — Subsequent to the admission of appeal to Privy Council, Deputy Registrar of High Court should not act for the minor respondent. (*Obiter*) 286a
- O. 32, R. 7—Compromise on behalf of minor — Court postponing its decision — Compromise not against minor's interests—Permission to withdraw from compromise was refused 247
- O. 33, R. 10—Court has discretion as regards costs 196b
- *—O. 34, R. 5 and 6 — Appeal from preliminary decree after passing of final decree is maintainable 167a
- O. 34, Rr. 14, 15 — Suit for contribution by a co-mortgagor after redemption of mortgage decreed — Separate suit for attachment and sale of property

Civil P. C.

- charged with the amount of contribution is not necessary 191
- O. 37, R. 3—No triable issue dependent on facts—Leave to defend in the ordinary way should be refused 123a
- O. 38, Rr. 9 and 11—Attachment ends when suit abates—When a suit abates and comes to an end on the death of a party, the attachment before judgment dies with it 234
- O. 39, R. 1, Cl. (a)—Law of granting injunction as against trespasser and as against co-sharer distinguished — Order granting injunction in the latter case must be made with caution 293a
- O. 40, R. 1—Receiver is the officer and representative of the Court — Limitation on his powers explained 402c
- *—O. 40, R. 1—Suit referred to arbitration—Court's power to appoint Receiver is not ousted 256a
- *—O. 40, R. 1—Executor to act in consultation with other heirs — This condition becoming impossible is a circumstance sufficient to justify appointment of Receiver 256b
- O. 41, R. 3—Memorandum of appeal from preliminary decree can be amended to cover final decree 167b
- O. 41, R. 4—Appeal by joint defendants against decree passed against them—Death of one defendant before hearing appeal — His legal representative not brought on record—Whole appeal abates—Civil P. C. O. 22, R. 4 184b
- O. 41, R. 22—Cross-objections — Where appeals relating to the matter in cross-objections are dismissed under O. 41, R. 11, cross-objections cannot be heard in the cross-appeal 882c
- O. 41, R. 23—Powers of remand are not restricted to Civil P. C. O. 41 R. 23 812b
- O. 41, R. 23—Unsatisfactory investigation by trial Court—Procedure to be adopted by the appellate Court laid down 749
- O. 41, R. 23—Local investigation by commissioner accepted

Civil P. C.

- by trial Court—Appellate Court if not satisfied with it can direct the trial Court to take evidence under Rr. 27, 28, 29 but cannot order retrial 748 (1)
- O. 41, R. 23—No appeal lies from remand order passed under inherent jurisdiction 305 (1)
- O. 41, R. 23—Court need not remand a case if the only object is to have enquiry under Bengal Tenancy Act S. 158 43d
- O. 41, R. 25—Issue not properly decided by the trial Court—Appellate Court may reverse the judgment but cannot send the issue for retrial • 546b
- *—O. 41, R. 25—Remand—Court can go back on the views expressed in the order of remand at the final determination of appeal 186a
- O. 41, Rr. 27, 28 and 29—Unsatisfactory investigation by the trial Court—Procedure to be adopted by the appellate Court laid down 749
- O. 41, Rr. 27, 28 and 29—Local investigation by commissioner accepted by trial Court—Appellate Court if not satisfied with it can direct trial Court to take evidence under Rr. 27, 28, 29 but cannot order retrial 748 (1)
- O. 41, R. 27—Certified copy of a document not offered in evidence at the primary Court on account of the point not having been disputed—Such document should be admitted in appeal 265a
- O. 41, R. 31—A judgment of the appellate Court must decide the points of fact—It should not be merely one of affirmance 408 (1)
- O. 41, R. 33—Decree passed against some sets of defendants being really a combination of several decrees against several sets of defendants—Only one set of defendants appealing—Decree cannot be set aside in appeal against all defendants 593c
- O. 41, R. 33—Power under, is limited to cases, where as the result of the appellate Court's interference in favour of the appellants, further interference

Civil P. C.

- is required to adjust the rights of the parties 488
- O. 41, R. 33—Suit by landlord to eject tenant after giving notice—Calcutta Rent Act in force when suit dismissed—Rent Act expiring at the hearing of the appeal—Rent Act was held to be not applicable 436
- **—O. 43, R. 1—Order refusing to set aside preliminary ex-parte decree—Final decree passed—Appeal from the order is still competent 720b
- *—O. 43, R. 1 (j)—Order dismissing application to set aside sale merely for non-appearance of the applicant is appealable 25
- O. 47, R. 1—Appellate decree being executed by lower Court—Executing Court from other materials finding that certain matters were not put before the appellate Court and so modifying the decree as the appellate Court would have done if the matters were put before it—Executing Court's act is without jurisdiction—Proper course is review 804c
- O. 47, R. 4—Decree on review is a new decree and appeal lies from that decree 418
- O. 47, R. 5—One of the appellants dying during the pendency of second appeal—Heir of deceased not brought on record—Appeal heard and case remanded—Fresh second appeal on the decision after remand—Application for vacating the previous order of remand—Proper procedure laid down 654
- O. 47, R. 7—Order going beyond the scope of application for review is without jurisdiction 73
- Sch. 2, Para. 1—Suit for partition—Reference to private arbitration on counsel's motion—Consent decree passed—Party objecting—Power of counsel limited—Decree must be set aside 378
- Sch. 2, Para. 1—All parties not joined in reference—Reference is not valid 249(2)

Civil P. C.

- Sch. 2, Para. 1 — Forms and steps prescribed in Sch. 2 must be complied with 108b
- Sch. 2, Para. 1 (1)—Executor cannot make reference to arbitration in contravention of the will 275b
- Sch. 2, Para. 21 — Award though interfering with strangers' rights is binding on parties 275a
- Companies Act (7 of 1913)**
 - S. 86—Articles of Association providing for election of directors annually—Non-election of directors for a particular year — Directors of previous years continuing—Suit by a share-holder for declaring the acts of the directors as void — Such a suit cannot lie as no legal right or character of share-holder is denied—Such a declaration should be refused also in Court's discretion — No meeting for electing directors having been held, old directors continue 868
 - S. 195—Order under S. 195 is not a judgment within Letters Patent. (Cal.), Cl. 15 295
 - S. 202—Order of Court under S. 195, Companies Act, is not a judgment within the meaning of Cl. 15, Letters Patent (Calcutta), and hence not appealable 295

Compromise

- Maintenance—One wife claiming property under a gift—Suit by husband to set aside the alleged gift—Compromise that certain sum should be paid annually by the wife to the husband and after his death to the second wife—Second wife making a will and appointing plaintiff as executor and beneficiary —Plaintiff suing for recovering arrears of maintenance—Plaintiff is not entitled to recover arrears, the maintenance charge being intended to be kept alive for the benefit of the family only and not for the strangers or assignees 556

Contract

- Verbal contracts—Where the statute says that the contract to be valid must be in writing,

Contract

- verbal contracts, even if established, have no effect 74a
- *—Commandeering order—Goods ordered by Government under—Contract is not ordinary commercial contract 74b
- Contract Act (9 of 1872)**
 - S. 23—Prohibition to sub-let at a rate higher than that fixed by settlement—Contract to pay a higher rent cannot be enforced 763
 - S. 23 — Agreement by father to give up entirely the control and custody of his child to the mother is illegal 600a
 - S. 25 — Guardian of infant cannot promise to pay debt barred by limitation 850b
 - S. 38 — Plea of tender holds good only if it is accompanied by deposit in Court 874a
 - S. 38—Valid tender amounts to actual payment 68c
 - S. 45 — Joint mortgagees — Payment to managing co-mortgagee operates as a valid discharge 125
 - Ss. 59 to 61—Payment of land revenue—General law of appropriation will apply only in the absence of specific provisions in the Act on that point 68a
 - S. 59—Valid tender amounts to actual payment 68c
 - S. 60 — The debts for which sums are applied must be proved to have lawfully existed 229
 - S. 69—Words "interested in the payment of money" explained 389a
 - S. 70 — Applicability of — Elements discussed 389b
 - S. 72 — Relief on the ground of mistake can be given in the case of sales held through the intervention of Court 865d
 - S. 74—Hire contract — Price to be paid if thing hired be not returned—S. 74 does not apply 57b
 - S. 129, Ill. (a) — Continuing guarantee explained 204a
 - S. 131—Whether death of a surety operates as a revocation of a continuing guarantee depends upon contract between parties in each case 204c
 - S. 135—Surety to pay decretal amount after contest in

Contract Act

- Court — Suit compromised and decree obtained—Surety is discharged 177(2)a
- S. 135—Surety bond providing that surety is to be proceeded against if debt could not be realized from debtor — Debtor must be proceeded against first 177(2)c
- S. 151 — Common carrier is liable even in absence of contract for loss arising from his negligence 490
- S. 187 — Where goods purchased by a person are received by another and dealt with by him, it is a sufficient inference, in law that the former is an agent for the latter 863a
- Ss. 215, 216—Agent arranging for loan for the principal — Agent lending his own money representing that the loan was from a third person—Mortgage executed on terms settled by agent—The transaction is voidable at the option of the principal 727
- S. 251—A partner is liable for a bonafide contract entered into by other partners 57a

Copyright Act (3 of 1914)

- S. 7—"Copy" defined — A copy has been defined as that which comes so near the original as to suggest the original to the mind of the spectator—Degree of resemblance is a question of fact 359a
- S. 7—Infringement of copyright of pictures — Offending pictures must be copies of substantial portions of copyright pictures 359b

Cosharers

- One of the defaulting proprietors can by purchase in a revenue sale get good title when the default and sale are not fraudulently obtained 870d
- Partition suit — Property partitioned previously should be separated—If it cannot be determined the suit should be dismissed 830
- One cosharer in sole occupation — Other cosharers cannot claim joint khas possession

Cosharers

- unless occupation amounts to ouster 574a
- Ouster means dispossession by one cosharer in assertion of hostile title 574b
- Separate occupation of a cosharer even after objection from his cosharers and in defiance of their claim to be in joint possession of the land — Cosharers who are excluded and ousted from joint possession can bring a suit to obtain joint possession of the property—Whether there is exclusion or ouster depends upon circumstances of each case 535
- Adverse possession — Possession between tenants-in-common—A person cannot be a tenant-in-common with one whom he never recognized as such 396
- Possession by a cosharer of common land in excess of his share without objection from other cosharers — He is not bound to pay profits accrued from the same 216a
- Terms "exclusion" and "ouster" explained—Physical possession is not necessary for proving an ouster 216b

Court-fees

- Admission as to computation is not binding on party 55b

Court-fees Act (7 of 1870)

- S. 7, Cl. 4 (c) and (d)—Suit for declaration and injunction—The value of injunction for purposes of Court-fees is really the value at which the injury to the plaintiffs should be assessed 55a
- S. 7 (11) (cc)—Determination of tenancy—Tenant not holding over, is a trespasser—Suit for ejectment cannot be valued under S. 7 (11) (cc) 753(1)
- as amended in 1922, Sch. 2, Art. 17, Cl. (6)—Art. 17 (6) applies to appeals against decrees from partition suits 878

Criminal Procedure Code (5 of 1898)

- S. 4 (p) — Assistant Sub-Inspector on tour is not "officer in charge of the police station" unless strictly within terms of S. 4 771a

Criminal P. C.

- S. 29-A—Claim to be tried as European British subject must be made before trial 97a
- *—S. 103 (2) — All search witnesses need not be called 27c
- *—S. 103 (3)—Absence of accused is not material 27d
- S. 107—A person can be proceeded against if, for any wrongful act on his part, other persons do things which occasion the breach of peace or disturb the public tranquillity 438
- Ss. 133, 137 and 139-A—Order under S. 133 — Claim denied—Opposite party asked to produce evidence — In the absence of any specific opportunity to adduce evidence under S. 137, order must be set aside 879
- S. 133—Order without giving party opportunity to prove his claim is bad 96
- S. 144—Mode of enjoyment of one's own property likely to lead to a breach of the peace—Order under S. 144 restraining that person temporarily from enjoying the property in that way is justified 446
- S. 145 — (*Cuming and Cammiade, JJ.*) Actual possession means actual physical possession — Symbolical possession obtained through a civil Court is not actual possession— (*Graham, J.*) Possession must be lawful 344
- **—S. 145 (1)—(*Per Full Bench*) —“Actual possession” means actual physical possession though wrongful — “Dispute” means actual disagreement at the time though the question is previously decided by civil Court (*Mukherji J., differing*) FB 610
- S. 146—No evidence on record—Order attaching property under S. 146 cannot be made 703(1)
- *—S. 154—Assistant Sub-Inspector on tour is not “officer-in-charge of the Police Station” unless strictly within the terms of S. 4 771a
- Ss. 161 and 172—Statements of a witness cannot be recorded under S. 172—Any statements

Criminal P. C.

- recorded are under S. 161—Defence must have a right to cross-examine 260
- S. 164—Any Magistrate is competent to hold the test of identification — Magistrate not empowered to deal with the matter under inquiry may prove the statement made before him under S. 157, Evidence Act 500a
- S. 197—An elected Chairman of a Municipality under the Bengal Municipal Act is a public servant within the meaning of S. 197 516
- Ss. 200 and 202—It is necessary for the Magistrate to pass order on the police report under S. 203 or S. 204 when he takes cognizance of a complaint under S. 190 (1) (a) and examines the complainant under S. 200 and orders a police enquiry under S. 202 24
- S. 200 (b)—Calcutta Municipal Act S. 533 must be taken to be subject to the provisions of S. 200 (b). 483
- S. 203—Complaint dismissed without examining complainant, he being absent on any of the dates—Case cannot be sent back for further inquiry 569
- S. 205—Pleader is to be engaged to safeguard interests of accused 27c
- S. 221, Cl. (2)—Person charged with specific offence—It is not necessary to give the ingredients of the offence with which the accused is charged 732b
- S. 233—Joinder of several offences in a single charge is only an irregularity 700b
- *—S. 236—Charge of a substantive offence but no charge of abetment of that substantive offence—Accused may be convicted of abetment of that offence if he is not prejudiced 466
- S. 242—Provision of law must be strictly followed 243b
- *—S. 244—No admission of guilt —Procedure under S. 244 adopted—Magistrate cannot afterwards take the plea of guilty from the accused 542a

Criminal P. C.

- S. 271—Court has discretion to enter upon evidence or not where accused pleads guilty 775b
- *—S. 276—Deficiency of jurors can be filled up only from persons present in Court 551a
- **—S. 276—Procedure in empanelling a jury described: A. I. R. 1927 Cal. 242 and A. I. R. 1927 Cal. 787, Overruled FB 83
- S. 297—Not treating the proper first information report as such, justifies retrial where accused is likely to have been prejudiced 771b
- S. 297—Charge should be accurate and within the limits of the criminal trial 769
- S. 297—Trial by jury—The only witness relied on by prosecution turning hostile—No evidence remaining to go to jury—Failure of Judge to so direct is a misdirection 690a
- S. 297—Misdirection—Where the Judge has not put it to the jury that when a case is based on circumstantial evidence the circumstances should be such that there can be no reasonable possibility of the innocence of the accused, it is a misdirection vitiating the trial 551b
- S. 297—Direction to the jury that there is a presumption of law that the witness who has spoken untruth must be believed in so far as he deposes to facts spoken to by other witnesses is a misdirection 551d
- S. 297—Charge to jury—Judge's duty is to place the evidence before the jury as he found it 500b
- S. 297—Charge to jury—Judge wrongly dealing with a certain statement as a confession amounts to serious misdirection 416 (2)b
- S. 297—Evidence summarized by both sides at great length—Jury taking notes of the same—Judge is not relieved from summing up 269a
- S. 297—Direction as to law of private defence—That private defence can be exercised even

Criminal P. C.

- with respect to person and property of another not explained to jury—Direction is bad 269b
- S. 297—Law of private defence not properly explained—Accused prejudiced—Conviction was set aside 269c
- S. 298 (2)—Scope—It is not the duty of the Judge to put to the jury hypothetical cases unsupported by any evidence 700c
- S. 298 (2)—Judge's telling the jury his view of facts is not only permissible but desirable 269d
- S. 299—Jury's verdict agreeing with whatever opinion the Judge might form—Jury sent again for consideration—Returning verdict of guilty—Judge not agreeing with the verdict but accepting it—Retrial ordered 827
- S. 302—Jury unanimous—Charging them again is illegal—Retrial was ordered 228
- S. 307—Majority of jury finding accused guilty twice—Trial Judge doubting as to accused's guilt but accepting the verdict and convicting them—Power of reference was held to have been rightly refused 444a
- S. 307—High Court in appeal thinking that the case ought to have been submitted—High Court cannot direct the case to be submitted—Sessions Judge's view is final 444b
- S. 307—Jury returning their unanimous verdict of guilty in spite of warning by the Judge that there are grave defects in prosecution case—It was held to be a proper case for reference 233b
- *—S. 307, Cl. (3)—Between the opinions of Judge and jury weight should be given to that of Judge's 732a
- Ss. 326 and 274—Trial by jury under S. 302, Penal Code—12 persons summoned as jurors—Nine jurors necessary—Eight appearing and seven chosen—Tribunal is illegally constituted—Proceedings are illegal 645
- Ss. 340 and 449—Criminal appeal from original side of High Court—Question whether a

Criminal P. C.

- vakil can act is not concluded by Criminal P. C. but by the rules of the High Court 675c
- S. 342—Accused jointly tried
- One giving one explanation—Judge can take another statement from the co-accused 675b
- S. 356—Trial by jury—One of the jurymen not knowing English—Charge translated to him in vernacular by Public Prosecutor and the defence muhktee allowed to object if he was not satisfied—Verdict of jury unanimous—Accused is not prejudiced 401
- S. 360—Provision not complied with—Deposition is inadmissible in subsequent trial 271(1)
- S. 360—Pleader engaged—Deposition may be read in pleader's presence during accused's temporary absence 27b
- *—S. 360 (3)—Witness deposing in vernacular—Deposition recorded in English—It need not be read over to him in English before interpreting in vernacular 27a
- S. 374—High Court has to form independent opinion.—Question of misdirection is therefore immaterial 430b
- S. 403—Trial under Ss. 407, 411 and 414, Penal Code—Subsequent trial under S. 54-A, Calcutta Police Act—Goods forming the subject in both cases identical—Second trial was held bad 240
- S. 439—Party in contempt—Party who was in contempt of Court, was not heard in revision 241(1)
- S. 449—Criminal appeal from the original side of the High Court—Question whether a vakil can act is not concluded by Criminal P. C. but by the rules of the High Court 675c
- Ss. 471 and 475—"Detained in custody" does not mean detained in the custody of friends and relatives—It is the local Government and not Magistrate who can deliver the accused to his relations for safe custody 653
- S. 476—Mere existence of contradiction in the evidence of

Criminal P. C.

- a person is not sufficient to make enquiry 862a
- S. 476—Finding as to expediency of enquiry is necessary 862b
- S. 476—Trial Court holding that he had no jurisdiction to direct a complaint to be made under S. 476—Appellate Court not deciding the question of jurisdiction but itself acting under S. 476-B—Procedure is irregular 237
- *—S. 476-B—There is only one appeal from the decision on an application for making complaint 281
- *—Ss. 491 and 561-A—High Court should not interfere with an order of its own Judge 367
- S. 499—Time not specified in the bond—Bond to the effect that the accused shall be produced "whenever called upon to do so"—Form was held to be not illegal 261
- S. 514—Proof of forfeiture and call for payment are necessary steps 261a.
- Ss. 528-A and 29-A—Claim to be tried as a European British subject must be made before trial 97a
- Ss. 528-A and 528-B—Magistrate is not obliged to ask accused whether he would claim to be tried as European British subject 97b
- S. 530—Irregularity—Where part of the evidence in a case is recorded by a Magistrate who has no jurisdiction and part of the evidence by a Magistrate who has jurisdiction, conviction is illegal and retrial is necessary 183
- S. 537—Question to witness in cross-examination answered in a particular way—Judge telling the foreman of the jury to ask the same question in another form—Witness giving an opposite answer—Judge directing the jury to consider what he had stated before and what he said later on in answer to the foreman's question if the jury thought that the witness did not understand the first question—Nothing on record from which it would be inferred that the

Criminal P. C.

witness did not understand the question—The procedure followed by the Judge was held wrong 551c

- *—S. 561-A—High Court should not interfere with an order of its own Judge 367

Criminal trial

—Usual practice in murder cases is not to accept the plea of guilty and the Court may and should take evidence as if the accused is not guilty 775a

- *—Facts material to constitute an offence must be stated in a charge—Allegations not essential though stated can be omitted without detriment to the accused as surplusage—Whether charge is good or bad is to be judged not after proof of facts but is to be seen at the beginning of the trial 675a

—Joint trial of two separate appeals though by the same accused is bad 230

—Prosecution proving prima facie case—Accused should not merely criticize but should adduce evidence in rebuttal 27g

Custom

—Alienation—A raiyat cannot bequeath his own non-transferable occupancy right 360

D**Decree**

—Setting aside—Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the ground of fraud 810b

—Setting aside—Appellate decree being executed by lower Court—Executing Court from other materials finding that certain matters were not put before the appellate Court and so modifying the decree as the appellate Court would have done if the matters were put before it—Executing Court's act is without jurisdiction—Proper course is review 804c

—Setting aside—Once a decree is passed the suit cannot be dismissed unless the decree is reversed on appeal—Any party can apply to have it enforced 539a

—Construction—A surety bond

Deed

should be interpreted in favour of surety 177(2)b

—Construction—Intention of maker must be found from expressions used—If two constructions possible, one making deed valid should be accepted 130g

Defence of India (Consolidation) Act (4 of 1915)

—Commandeering order—Goods ordered by the Government under—Contract is not ordinary commercial contract 74b

Divorce Act (4 of 1869)

—S. 7—S. 7 deals with procedure 657c

—S. 10—Decree for judicial separation—Petition for divorce is not maintainable on the same facts 806

*—S. 10—Joint presence of husband with another woman may prove adultery 657a

—S. 11—An interlocutory order is not usually interfered with under S. 115, Civil P.C., in Calcutta High Court 114

—Ss. 55 and 7—Provisions for the enforcement of orders under this Act are to be followed as provided in the Civil Procedure Code 513

Divorce Jurisdiction Act, (Indian and Colonial 1926, Geo V, 16 and 17 Ch. 40)

*—S. 1 (1), Proviso (a)—Wife domiciled in England but resident in India—Suit for dissolution tried in India—Mere adultery is sufficient ground for decree 657d

—S. 3—Parties resident in India but domiciled in England—Decree in Indian Court is valid 657c

Document

—See DEED

E**Easement**

*—Light—Person selling house having windows overlooking his adjoining land—Vendor cannot obstruct light from coming to such windows by building on the adjoining land—Subsequent vendee of the land is also bound by the obligation 505

Ejectment

- Trespasser cannot challenge validity of plaintiff's title which, though voidable by the true owner, is not avoided 299a
- Suit for—All persons in possession should be joined as defendants 138b

Evidence

- Admissibility — Question of relevancy of a document, though not raised in a trial Court, can be considered by first appellate Court 512b
- Admissibility—Evidence cannot be admitted about intention of parties when that intention is clearly expressed in deed 825a

Evidence Act (1 of 1872)

- S. 11—S. 11 is controlled by S. 32—When the fact of statement, whether true or false, is material, it is relevant under S. 11 893b
- Ss. 11, 13 and 32. Cl. (3)—Recitals in a sale certificate or a sale proclamation are not admissible under Ss. 11, 13 and 32, Cl. 3 893c
- S. 13—Recitals in a sale certificate or a sale proclamation are not admissible 893c
- S. 13—Mortgage-deed stating rent payable to superior landlord—Mortgage debt paid off—Superior interest purchased by mortgagee—Suit for recovery of rent at an enhanced rate—No proof of enhanced rent—Mortgage bond is admissible to prove the rent 703(2)
- S. 13—A decree not set aside by a competent Court can be used as evidence with regard to the matters dealt with by it 472b
- *—S. 13—Rent suit—Decree by another cosharer landlord is admissible (cf.—*A. I. R. 1928 Cal. 353—Ed.*) 355
- *—S. 13—Suit for rent—Decree by another cosharer is not admissible as to rate of rent—(cf.—*A. I. R. 1928 Cal. 355—Ed.*) 353
- S. 18—Admission — Recitals regarding the boundaries in a document not inter partes are statements made by third parties and cannot be admitted 63b
- *—S. 24—Confession—Statement of accused before a Magistrate: "I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take pity on me" was held not in itself inadmissible 500c
- S. 30—Statement, for being used against the co-accused, must be a confession in respect of an offence with which all are charged 416(2)a
- S. 32—Description of property in a sale certificate or proclamation is not a statement within S. 32 893a
- S. 32 and S. 11—S. 11 is controlled by S. 32. 893b
- S. 32—Hudabandi papers are admissible under S. 32 854b
- S. 32 — Admission—Recitals regarding the boundaries in a document not inter partes are statements made by third parties and cannot be admitted 63b
- *—S. 32, Cl. (2)—Entry in hudabandi papers by itself is insufficient for charging a person with liability (*Obiter*) 854c
- S. 32 (2)—Rent suit by landlord—Account books from the landlord's sherista tendered in evidence and admitted under S. 32 (2)—The fact that they were made in the absence of and without the assent of the tenants and were uncorroborated is not sufficient ground to consider them as of no value 408(2)
- S. 32, Cl. (3)—Recitals in a sale certificate or a sale proclamation are not admissible 893c
- S. 34—Hudabandi papers are admissible under S. 32—S. 34 does not apply 854b
- *—S. 35—Sale certificate is not a public or official book, register or record within S. 35 893a
- S. 35—Description of property in a sale certificate or proclamation is not a statement under S. 35 893a
- S. 35 — Chittas are admissible 63a
- *—S. 44—Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the ground of fraud 810b

Evidence Act

- S. 56—Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature 154c
- Ss. 60 and 67—Under S. 67 direct evidence of handwriting is not always necessary—S. 60 does not exclude circumstantial evidence of a thing which could be seen, heard and felt 498a
- S. 67—Under S. 67 direct evidence of handwriting is not always necessary 498a
- *—S. 92—Contract capable of different interpretations—Court must put a proper construction upon its terms and find with what intention a particular expression was used as a matter of pure construction 737b
- S. 92—Persons not claiming through settlor can show that waqf was illusory 253
- S. 99—Persons not claiming through settlor can show that waqf was illusory 253
- S. 101 — Affidavit of peon about proper service — Party impugning the fact must prove that there was no service 722a
- *—S. 114—Failure of a District Board to prove the actual acquisition and possession and the actual delivery of certain land to it by the Government—Intention of the Government to acquire the land and its taking some necessary steps in pursuance thereof proved—It was held to be not wrong to presume that necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken 485c
- S. 114—The evidence of an accomplice must be viewed with all the suspicion which ordinarily attaches to it 233a
- S. 114, Ill. (b)—Evidence of an approver sought to be corroborated with the evidence of confessing accused will not justify conviction of co-accused 745
- S. 115 — Suit by a minor without a next friend—Defendant, though aware of plaintiff's minority, not raising objection as to the maintainability of the

Evidence Act

- suit—He cannot raise this objection for the first time in appeal 537c
- S. 115 — Compromise beneficial to a party's interest — Party not taking advantage—Compromise does not constitute estoppel 334b
- S. 115—Packages not delivered to railway in good condition—Plea by consignor that they were in good condition will not be allowed 170b
- S. 115—Contract cannot be accepted as to part and rejected as to rest 170c
- *—S. 115—Equitable mortgagee entering into possession with consent of mortgagor—The former leasing the property to a third person — Auction-purchaser of the equity of redemption is bound by the mortgagor's consent and his suit for rent or damages against the third person is not maintainable 158
- S. 115—Permanent lease by a person professing to have a higher status than that of a raiyat, lessor cannot plead that he had no right to grant the lease—But estoppel will not apply if both parties knew real facts—True nature of tenancy is not easy to know 156b
- *—S. 115—Admission of waqf by mutwalli does not estop him from claiming a share in it as heir, if waqf is void 130f
- S. 116—Landlord and tenant —Where the tenancy under a person is once denied, the tenants would not be entitled to claim on a future occasion that the tenancy under the person was subsisting 312a
- S. 116—Landlord and tenant —Estoppel—Granting a lease by the holder of ganti interest in land—Lessor cannot assert his right as a raiyat — Purchaser of that interest is not so bound 87a
- S. 116 — Scope — Estoppel operates even after the termination of the tenancy 546a
- S. 154 — Witness cross-examined as hostile—He cannot be relied on as to part only 650b

Evidence Act

- S. 155—Report after 24 hours
- Officer having no power to investigate — Report though it can be used under S. 155 cannot be used under S. 157 732c
- * —S. 157—Statements by third persons cannot be used for corroboration 893d
- S. 157—Report after 24 hours
- Officer having no power to investigate — Report though it can be used under S. 155 cannot be used under S. 157 732c
- S. 157 — Any Magistrate is competent to hold the test of identification — Magistrate not empowered to deal with the matter under enquiry may prove the statement made before him under S. 157 500a

Execution of Decree

- Executor — Executing Court cannot insist on payment of probate duty from executor of deceased before allowing execution 835c

Execution Sale

- Rights of purchasers—A purchaser at an auction sale is not bound by the description given in sale proclamation — He can claim higher rights, that is, the rights of the judgment-debtor 880a
- Mistake—Relief on the ground of mistake can be given in the case of sales held through the intervention of Court 865d

- Setting aside—It is not wise and desirable to interfere with Court sales on slender grounds 328c

Explosive Substances Act (6 of 1908)

- S. 5 — House containing explosives—Temporarily residing in the house is no offence under S. 5 27h

F

Factories Act (12 of 1911)

- S. 42—Under S. 42 one proceeding is split into two proceedings — Manager or occupier initially charged with an offence under the Factories Act can go into the witness-box and give the evidence himself because he goes into the witness-box not as
- 1928 Indexes (Cal.)—5 & 6

Factories Act

- an accused in the case originally started but in his own right as a complainant on the complaint against the other person whom he has brought in 557

Finance Act (5 of 1927)

- ** —S. 5—Demand drafts are bills-of-exchange and are exempt from stamp duty SB 566

G

Government of India Act, (1915)

- * —S. 29 — Payments made on contracts not in conformity with the Act, cannot render such subsequent contracts binding on Secretary of State — Contract must be in strict conformity with statute 74d
- ** —Ss. 29 (b) and 32—Commandeering order is an act of State—Secretary of State cannot be sued in respect of it 74c

Guardians and Wards Act (8 of 1890)

- S. 7—Court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property 600b
- S. 7—Parents found unfit to be guardian—Court will interfere and deprive them of the custody of their children and appoint a suitable person as guardian to take care of them and to superintend their education 600d
- S. 17, Cl. (1)—Welfare of the minor — Court must look to child's welfare generally as regards moral, religious and physical well being 600e
- S. 26—Leave for the permanent residence of the child abroad and out of the Court's jurisdiction is not permitted except where it is manifestly advantageous to the child as regards the health and the like 600c

H

Hindu Law

- Alienation — Wife appointed administratrix and granted permission to make permanent leases for necessary purposes—Permanent leases granted by her but for purposes not necessary

Hindu Law

- for administration will be deemed to be by her as holder of a widow's estate and if not for necessity, reversioners can set aside 412
- Daughters inheriting the property of their father, dispossessed—Suit for recovery of possession and the mesne profits decreed—Death of one of them during an appeal against the final decree for mesne profits—Decree for mesne profits is a part of the estate of the father unless the deceased treated her share as distinct from paternal estate 759a
- Joint family—Absolute bequest to widow—Widow bequeathing the property to her son—Son gets it as personal property 285
- *—Partition—Subsequent suit for partition of property left out intentionally or by mistake without any objection in the previous suit for partition and still held in joint possession is tenable but not where by previous decree it is ordered to be joint 459
- Stridhan—Stridhan is not confined to six kinds given by Manu 794c
- Succession—Bandhus—One offering greatest spiritual benefit is preferred 289a
- Succession—Test about "nearness of blood" laid down 289b
- Succession—Distinction between full and half blood should be restricted to cases mentioned in texts 239c
- Succession—Bandhus—Father's half sister's son has precedence, over mother's sister's son 289d
- **—Widow—Adverse possession against—Reversioners are bound 670a
- Widow residing with her brother during the period for which arrears of maintenance are claimed—Claim cannot be disallowed 196a
- Will—Widow has no right to make will of moveable and immoveable property inherited from her husband 794a

I**Income tax Act (7 of 1918)**

- *—S. 26—An application under S. 26 made more than a year from the date of original demand but within a year from the revised order of assessment is within time 837
- (11 of 1922)
- *—S. 9—Assessee a company acquiring land, building houses and letting premises to tenants is not doing "business" under S. 10—Assessee is liable to income-tax under S. 9 and not under S. 10 456b
- *—S. 10—Profits—Destination of profits has got nothing to do prima facie with the question of liability to pay income-tax—What may be done with the profits after the tax has been paid upon them is immaterial SB 579a
- *—S. 10—Company running a Club—All share-holders not members of Club—All members not shareholders—Company making profit out of the Club is not a mere mutual trading society making "quasi profit" by trading with its own members and returning such "profits" to the members and is liable to pay income-tax on full amount of profit SB 577
- *—S. 10, sub-S. (2)—Agreement between District Board and Tramway Co. for free use of road for laying down tramway—Tramway Company agreeing to pay moiety of profits exceeding 4 p. c. upon capital for time being—Payment of half profits is not rent and cannot fall under Cl. (5), sub-S. (2)—It is not sum paid on account of local rate, nor is it "any expenditure (not being in nature of a capital expenditure) incurred solely for purpose of earning such profits or gains" SB 579b
- *—S. 16—Assessee a shareholder in a company—Company keeping aside for some years a certain sum to be distributed as bonus to the directors—Assessee objecting to such payment—Matters compromised after some

Income tax Act

- years and the assessee paying a lump sum as his share in the amount reserved—The amount is part of his income in the year of receipt and does not represent assessee's profits for the previous years **FB 729**
- Ss. 22 (4) and 23 (2)—Notice—The notices under Ss. 22 (4) and 23 (2) may be comprised in one document without committing any illegality **SB 587a**
- Ss. 23 (4) and 22 (2)—Return made by assessee—Notice under Ss. 23 (2) and 22 (4) served—Notice under S. 23 (2) complied with but not under S. 22 (4)—Assessment can be made under S. 23 (4) **SB 587b**
- S. 66 (2)—Findings of fact of the Commissioner are binding **456a**
- S. 66 (3) — Commissioner must, besides question of law, state necessary facts also **836**

Insurance

- Life Insurance—A mere nominee in a life insurance policy cannot enforce his claim against the company, he being no party to the contract and no interest is created in his favour **518a**

Interpretation of Statutes

- Affirmative Act—Affirmative Act giving new right does not destroy existing right unless legislature apparently intends that the two rights should not co-exist **808b**
- Suit by landlord to eject tenant after giving notice—Calcutta Rent Act (1920) in force when the suit was dismissed—Rent Act expiring at the hearing of the appeal—Act was held not applicable **436**
- Illustrations should not be rejected except on the ground of repugnancy with the section **204b**

J

Jurisdiction

- Estoppel—Conduct of parties cannot give Court jurisdiction which it does not possess **709b**
- It is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction **606b**

L

Land Acquisition Act (1 of 1894)

- S. 12—There is no analogy between Land Acquisition Collector making an award and an executive officer of the Municipality passing orders under Calcutta Municipal Act S. 140 as to assessment **450a**
- S. 23 — In calculating the price of property which is subject to lease, rent ought to be taken into consideration **522a**
- S. 23—Market value is one which a willing purchaser will pay to a willing seller **522b**
- S. 23—Market value — Land to be acquired likely to continue to produce rent—Rent is basis on which the value will be calculated **522c**
- S. 23—Reversion—The reversion in the case of a particular land should not be taken to be of less value than the bare land because of buildings on it **475a**
- S. 23 (5)—Person changing the place of business not in consequence of the acquisition of the land—He is not entitled to compensation **761**
- S. 30—Property leased for a long term with a progressive rate of rent — Apportionment can be made only in a rough way in the absence of direct evidence **475b**
- S. 31 — Trust property acquired—Question of dispute between the trustee and the beneficiaries must be left to the Court having jurisdiction to administer the estate **475c**
- S. 32—Compensation money acquired by an incompetent person is part of his real property **402a**
- S. 32 — Acquisition Court holds the compensation money subject to the orders of civil Court **402b**

Landlord and Tenant

- Sale by decree-holder in execution of a rent decree—It must be shown that he was a landlord on the date of application for execution — Superior interest in occupancy holding sold—Subsequent sale in execution of a decree for rent trans-

Landlord and Tenant

- fers only right of tenant and not tenancy 768
- Prohibition to sublet at a rate higher than that fixed by settlement—Contract to pay a higher rent cannot be enforced 763
- * —Rent agreed to be paid in paddy—Price of paddy mentioned—Tenant failing to deliver the paddy—He is liable to pay damages which would ordinarily be market price of the paddy 737a
- Abandonment—Mortgage of an entire non-transferable occupancy holding—Mortgagee purchasing it in execution of his mortgage decree—Landlord is entitled to khas possession • 669
- Origin of tenancy unknown—Tenant must prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy 597a
- Permanent tenure—Court must decide whether a tenancy is permanent or not as an inference of law 597b
- Permanent lease at a fixed rental granted in respect of a transferable raiyati—Implication is that raiyati is transferable without the consent of the landlord 531(2)b
- Doctrine of suspension of rent depends solely upon the fact that the rent due is an entire sum in respect of the land 479b
- Rent—Tenant dispossessed from a portion of the property—Whether suspension of the entire rent should be ordered or only abatement of rent should be allowed depends on facts of each case 428
- Lease—Construction—Stipulation that rent should not be changed on any ground—Decrease of two-thirds land by diluvion—Tenant was held not entitled to any abatement of rent 419
- Lease whether permanent—Surrounding circumstances and entire terms of lease must be looked into—Tenant taking leases for different terms—Last lease called *bemindi* in different

Landlord and Tenant

- form and purporting to give a high premium and high rate of rent—Lease was held to be permanent lease 392a
- Tenancy commences from the date mentioned in the document of tenancy unless shown otherwise 392c
- Lease not produced—Tenant can establish his tenancy from possession and other circumstances 376a
- Ejectment suit—To succeed, landlord must prove his title 343
- Receipt for rent given by landlord's agent—Landlord is not bound by every statement therein 315b
- Suit for ejectment—Tenant setting up defence that he has a right of permanent tenancy must prove that he has such right 315c
- Four holdings amalgamated into one, three holdings being tenancies-at-will and fourth holding being a permanent tenure—Facts that an unaltered rent has been paid for 57 years and that there existed a pucca building on a small portion of it at some distant time are sufficient to make the amalgamated holding a permanent tenure 315d
- Where the tenancy under a person is once denied, the tenant is not entitled to claim on a future occasion that the tenancy under the person was subsisting 312a
- Forfeiture arises when the tenant expressly repudiates the tenancy 312b
- Deed of kabuliyat—Construction 305(2)
- Tenancy-at-will—Notice to quit given according to Transfer of Property Act, S. 106—Tenant is liable to be ejected 279
- Non-transferable occupancy holding—Sale of—Acceptance of rent by landlord from transferee described as marfatdar in receipt—Question of landlord being estopped from suing for khas possession depends on facts of each case 273(2)
- Rent, suit for—Lease of lands in addition to land in actual

Landlord and Tenant

- possession of lessee and lessor entitled under lease to charge rent for area in actual possession—Suit is not bad for non-inclusion of other land, and failure by landlord to give possession of the other land is no defence 245
- Abandonment—A landlord is not entitled to treat a holding abandoned where the original tenant is in possession as a sub-lessee without some act of repudiation of tenancy to him 193b
- Enhancement of rent on the ground of increase in area—Landlord must show what was the area at inception of tenancy 169a
- Rent payable partly in kind and partly in cash—Market price of grain fixed in patta—Suit for rent—Landlord is not entitled to value of paddy at current rate but at rate fixed in the patta 166
- Tenant encroaching on land of a stranger contiguous to his—Landlord is not entitled to get rent for the land so encroached on 142
- Abatement of rent—A tenant paying rent for the entire land demised when he was in possession of only a part of it cannot ask for abatement of rent after the lapse of 60 years as he must be deemed to have lost his right 'by acquiescence and laches' 137
- Suit for rent—Tenant pleading dispossession must prove it 136b
- Rent payable in kind—Money to be paid in lieu of kind fixed—Tenant can choose between payment of rent in money or kind—Landlord cannot insist on the payment of market value of grain payable as rent 112
- Question of bona fides of settlement depends on whether it was taken from person actually in possession 104b
- Tenant agreeing to pay rent to superior landlord but making default in payment—Superior landlord obtaining decree and selling the lessor's right in execution—Tenant purchasing them does not acquire independent title to himself 103

Landlord and Tenant

- *—General covenant to repair extends to newly erected buildings 89
- Payment of rent by heir of under-ryot to superior landlord without direction from the ryot—No right is created in favour of the former 87b
- The gomasta is not authorized to settle tenants on the land 87c
- Suit against a person for damages for use and occupation does not amount to recognition of tenancy 87d
- Khudkasht means resident hereditary cultivator—Land waste and infested with wild animals—Tenants living in adjacent villages are khudkasht 52b
- Relationship may be governed by contract as well as by status 43a

Land Tenure

- Jote is a general term with respect to a holding and it is not necessarily equivalent to a "rai-yati jote" 880b

Lease

- Assignment—The test to determine whether a certain transaction amounts to an assignment is whether the whole interest of the lessee has been granted 681
- *—Allowing sub-letting but prohibiting assignment—Mortgage is no assignment—Assignment means parting with interest completely 99

Legal Practitioner

- Suit for partition—Reference to private arbitration on counsel's motion—Consent decree passed—Party objecting—Power of counsel is limited—Decree must be set aside 378
- Compromise empowered by vakalatnama—It is uncommon for pleaders to enter on this authority into compromise, especially in cases where pardanashin ladies are concerned 334a

Legal Practitioners Act (18 of 1879)

- *—S. 13—The conduct of a pleader should not be inconsistent with the position he holds in the administration of justice 853

Legal Practitioners Act

******—S. 13 — Pleader accepting the client's vakalatnamah and papers but not filing the appeal—No specific agreement exempting him from liability in case of non-payment of fees—Pleader also not subsequently trying to file an application to get extension of time—Pleader's action amounts not to ordinary negligence but to grave professional misconduct **FB 820**

*****—S. 13 (b)—Fraudulent acts of clerk—Pleader is not necessarily guilty of professional misconduct **FB 817**

Letters Patent (Calcutta)

******—Cl. 10 — Pleader accepting client's vakalatnama and papers but not filing the appeal—No specific agreement exempting him from liability in case of non-payment of fees—Pleader also not subsequently trying to file an application to get extension of time—Pleader's action amounts not to ordinary negligence but to grave professional misconduct **FB 820**

—Cl. 12—Suit for damages for conversion of land—Some tortfeasors residing in Calcutta—Action can be maintained in Calcutta against them **887**

******—Cl. 15 (Amended in 1927)—Condition of certificate is attached to a judgment of single Judge only—Right of appeal on difference of a Bench being deleted, no appeal lies from refusal to grant a certificate in such a case **FB 819**

******—Cl. 15 (Amended 1927) — Amendment does not apply to suits instituted prior to its coming into force **FB 640**

—Cl. 15—Order of Court under Companies Act, S. 195, is not a judgment **295**

Limitation Act (9 of 1908)

*****—Construction—No exceptions should be made on the ground of hardship **SB646b**

*****—Construction—Third column should be interpreted to date the cause of action from the date on which the remedy becomes available **SB646c**

Limitation Act

—S. 1—The Act does not apply to defences **810a**

—S. 3 — Plea of limitation should be allowed even for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred **870a**

—S. 5—Pleader's act or default is not binding upon the client **468a**

—S. 5—A mistake of a pleader cannot always and under all circumstances afford ground for extension of time under S 5—Appeal filed in a wrong Court on the advice of a pleader—Appeal filed in proper Court after limitation—Time was extended **468b**

—S. 5 — Construction — Court should exercise its discretion on facts in each case **249(1)**

*****—S. 10—Plaintiff suing to enforce personal right of management of trust—Defendant not claiming right adverse to trust—S. 10 does not apply **670d**

—S. 12 — Copy unnecessary—Time cannot be excluded **46b**

—S. 14—Time spent in a Court not declining to entertain the suit cannot be deducted **46a**

—S. 19 — Plaintiff depositing certain sum with defendant 1 and father of defendant 2—Defendant 1 admitting deposit in written statement in partition suit by mother of defendant 2 as next friend — Defendant 1 and mother of defendant 2 accepting by joint petition award made on reference of partition suit to arbitration by which defendants' liability with regard to deposit was declared—Written statement coupled with award and joint petition amounts to promise by defendant 1 to pay debt **850a**

—S. 19—Acknowledgment made in a document to which creditor is not a party is valid **850c**

—S. 21 — Acknowledgment not stating amount of liability acknowledged by guardian is not proper **850d**

—S. 22—S. 22 applies to cases where a new plaintiff has been introduced and not to cases

Limitation Act

- where there is only an amendment with regard to the description of the plaintiff 485b
- Arts. 29, 36, 48 and 49—Suit for value of crops wrongfully attached, cut and removed—Case comes under Arts. 48 or 49 and not 29 or 36 106
- * —Arts. 30 and 31—Suits against carriers in respect of goods delivered for carriage are governed by Arts. 30 and 31, — Onus of proving loss more than one year before suit lies on defendants 371d
- Art. 36 — Suit to recover price of goods lost by the carrier — Delivery, so as to give carrier lawful possession, must be proved 306
- Art. 36 — Suit for value of crops wrongfully attached, cut and removed—Case comes under Arts. 48 or 49 and not 29 or 36 106
- * —Art. 36—Goods detained by customs officer at defendant's request — Suit is governed by Art. 36 and not Art. 49 1b
- * —Art. 40—Issue of injunction apart from motive or want of probable cause gives no cause of action for suit 1c
- Art. 48 — Suit for value of crops wrongfully attached cut and removed—Case comes under Arts. 48 or 49 and not 29 or 36 106
- Art. 49 — Suit for value of crops wrongfully attached, cut and removed—Case comes under Arts. 48 or 49 and not 29 or 36 106
- Art. 49 — Goods detained by customs officer at defendant's request — Suit is governed by Art. 36 and not by Art. 49 1b
- ** —Art. 99 — Payment of decree amount by one co-judgment-debtor and acceptance by Court —Suit for contribution—"Date of payment" is the date of acceptance of deposit of the money by the Court to the credit of the decree-holder 361
- Art. 120 — Sale of putni in rent decree—Surplus withdrawn by creditor of one patnidar—Sale subsequently set aside — Zemindar made to pay whole purchase money — Suit lies by zemindar against the creditor

Limitation Act

- and is governed by Art. 120 and not by Art. 62 296
- Art. 121—Purchaser at a revenue sale suing for possession — Suit within 12 years from symbolical possession — Defendants defaulting proprietors — Suit is governed by Art. 142 or Art. 144 and not by Art. 121 870c
- Art. 141—Applicability—Art. 141 does not apply to moveable property 670c
- Art. 142—Purchaser at a revenue sale suing for possession — Suit within 12 years from symbolical possession — Defendants defaulting proprietors — Suit is governed by Art. 142 or Art. 144 870c
- Art. 142—Possession through tenants — Actual realizing of rents must be proved 765b
- Art. 142—Plaintiff must prove title and possession within 12 years—When land is incapable of possession plaintiff must prove his title as well as possession at least some time even beyond 12 years and show that no one else was in possession since 118a
- Art. 142—Suit for ejectment on actual possession and dispossession—Whether plaintiff can subsequently put forward a case of constructive possession depends on circumstances 118b
- Art. 142—Waste land — Possession is presumed to follow title—No dispossession beyond 12 years of suit—No question of limitation arises 104a
- Art. 143 — Forfeiture by remarriage—Remarriage must be valid 714
- Art. 144—See also LIM. ACT, ART. 142
- Art. 144 — Defendant in possession of plaintiff's property from 1897 for management — Defendant asserting hostile title in 1915—Plaintiff suing in 1922 for recovery of possession — Plaintiff's suit was held not time barred as his title was not extinguished by the defendant's adverse acts 582
- Art. 146-A—"Road"—used in Art. 146-A includes the portion

Limitation Act

which is used as road as also the lands kept on two sides as parts of the road for the purpose of the road 485a

—Art. 166—Application under Civil P. C., S. 47—Setting aside sale asked for—Art. 181 applies 865a

—Art. 166—Application to declare void a sale in contravention of O. 21, R. 22 (1), Civil P. C., is governed by Art. 181 and not by 166 60b

—Art. 181—Application for setting aside a sale under S. 47, Civil P. C.—Art. 181 applies 865a

*—Art. 181—Decree of trial Court reversed in first appeal—Decree executed in the meantime—First appellate decree affirmed in second appeal—Limitation for application for restitution begins from date of first appellate decree SB 646a

—Art. 181—Application to declare void a sale in contravention of O. 21, R. 22 (1), Civil P. C., is governed by Art. 181 and not by 166 60b

*—Art. 182, Cl. (5)—Step-in-aid—Order for issue of warrant—Inference that Court acted on some application of a decree-holder can be drawn—Such application is a step-in-aid 302

—Art. 183—To constitute "revivor" there must be a determination that decree-holder has a subsisting right to execute the decree 686

M**Mahomedan Law**

—Wakf—Appointment of a manager by committee under agreement—Power of dismissal reserved by the managing committee—Such a person is not really a mutwali and is liable to dismissal 651a

—Pre-emption—Invocation of witnesses is a necessary formality for talab-i-ishtishhad—If this is done in first demand, no second demand is necessary 584a

—Pre-emption—Invocation of witnesses—No prescribed form is necessary but the fact that first demand was made must be indicated 584b

Mahomedan Law

—Marriage—Option of puberty

—Marriage effected by a guardian other than the father or grandfather—The minor has the right of repudiation 549a

—Marriage—Repudiation—There is need for obtaining a judicial decree to confirm repudiation, but it is not compulsory to obtain it in a proceeding apart from that in which the question of validity of marriage is raised 549b

—Repudiation of marriage—Imam Mahmood does not make a knowledge of right of option a condition for the girl to repudiate a marriage. (*Obiter*) 549d

—Practice—Powers of District Judge as kazi can be invoked in connexion with matters of public and religious trust 368a

—Wakf—Duty of kazi in respect of wakf is to appoint new trustee where he finds that there is no one to administer trust property 368d

—Agreement for talak may be entered into after marriage 303a

—Wakf made prior to 1913—Illusory bequest to charity—Real object to benefit settlor's family—Wakf is not valid nor is made valid by Mussalman Wakf Validating Act (6 of 1913) 130a

—Wakf—Mutwalli has no legal estate in the property 130c

Majority Act (9 of 1875)

—S 2 (1)—"Capacity to act"—Scope explained—A minor can delegate to his wife the power of divorce 303b

Malicious Prosecution

*—"Prosecution" includes such civil actions as may be the subject of a suit for malicious prosecution—Application under S. 195, Criminal P. C., to grant sanction to prosecute rejected—Such application was held to be prosecution giving rise to a claim for damages for malicious prosecution 691a

—Prosecution not mala fide in the beginning—Its continuance after knowledge that the facts upon which it was based were

Malicious prosecution

not true may give rise to a claim for damages 691b

- *—Maliciously bringing a civil suit—Action may lie but not if the object is to defend one's own trade 1e

Married Women's Property Act (3 of 1874)

- S. 6—Policy effected in 1910
—Hindu widow claiming assured's money as a nominee—Widow was held not entitled to money as the Act did not apply (see Act 13 of 1923) 518c

Master and Servant

- *—Contract of service—The mere proclamation of strike does not terminate the relationship of of master and servant 491a
*—The master is not liable for a criminal act of his servant deliberately done of his own choice and done to effect a purpose of his own unless it is facilitated by master's negligence 491c
—A servant has no implied authority to engage a stranger to do work on behalf of his master so as to render the master liable for the stranger's act 410b

Maxim

- The doctrine of ejusdem generis ought to be cautiously applied 209c

Merchandise Marks Act (4 of 1889)

- S. 15—"Offence" means the offence charged—Time of the original infringement is immaterial 495

Minor

- Contract by minor—See SPECIFIC RELIEF ACT S. 41.

Motor Vehicles Act (8 of 1914)

- S. 6—Motor driven without owner's knowledge by an unlicensed driver—Owner is not liable—Nor is he liable even if his licensed driver had permitted the unlicensed driver to drive 410a

Mussalman Waqf Validating Act (6 of 1913)

- Waqf made prior to 1913—Illusory bequest to charity—Real object to benefit settlor's family—Waqf is not valid nor is made valid by the Act 138

N**Negotiable Instruments Act, (26 of 1881)**

- Construction of an instrument
—What the Law Merchant was before the Act was enacted should not be considered 148c
—S. 78—Suit by firm on promissory note executed in favour of one partner—Suit is maintainable 148a
*—S. 78—Holder and owner different persons—Owner is not prohibited from bringing a suit 148b

O**Opium Act (1 of 1878)**

- S. 9 (c) and (f)—Accused convicted for having possessed opium in excess of quantity shown in the stock register and hidden in the premises—Cases of opium supplied by the treasury proved to be often of over weight—Excess not to be assumed to be due to selling under weight—Conviction was set aside 324

P**Partition Act (4 of 1893)**

- S. 4—The word "family" used in S. 4 ought to be given a liberal and comprehensive meaning—The object of the section is to prevent a transferee of a member of a family, who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live 539b
—S. 4—The term "house" includes all that is necessary for convenient occupation of the house but not that which is only for the personal use and convenience of the occupier 539c

Part Performance

- Agreement for sale—Proof by parol evidence—This evidence reinforced by the fact of possession and payment of revenue—Making use of the unregistered document for proving agreement to sale is not illegal 754b

Penal Code (45 of 1860)

- S. 84—Test of insanity—To ascertain whether a person is incapable of knowing the nature of the act or that he is doing what

Penal Code

- is either wrong or contrary to law, a very common test is to ask, in the circumstances, whether the man would have committed the act if a policeman would have been at his elbow 238
- S. 100—Detailed circumstances must be set out—No case for private defence is possible when the accused denies the striking of the blow 700a
- S. 107—Assam Labour and Emigration Act (1901), S. 213—Emigration or assisting in the emigration is not an abetment within S. 213 339
- S. 109—Accused ordering to beat certain men—As a result of beating some persons dying—Accused is guilty of abetment of murder 752
- S. 120-B—Incriminating articles found in a house—Other facts also suggesting implication of all inmates in conspiracy—Innocence of person present there must be proved 27f
- S. 302—Usual practice is not to accept the plea of guilty and the Court may and should take evidence as if the accused is not guilty 775a
- Ss. 302 and 109—Accused ordering to beat certain men—As a result of beating some persons dying—Accused is guilty of abetment of murder 752
- *—S. 302—(*Per Cuming, J.*) Non-proof of motive is immaterial—(*Per Mukerji, J.*) Motive, though not necessary to bring home the charge, is relevant to prove intention 430a
- *—S. 302—A plunging knife into B's stomach—(*Per Cuming, J.*) A is presumed to intend the natural consequences of his act and therefore A must be held to have intended to cause death or such bodily injury as is likely to cause death—(*Mukerji, J. contra*) 430c
- S. 400—The essence of the section is the agreement habitually to commit dacoity, not the actual commission or attempted commission of dacoities—The existence of such an agree-

Penal Code

- ment and the participation of any person in that agreement may be inferred from the circumstances 309
- S. 409—Accused being a lessee from Government to collect rent and deposit it in treasury—Failure to deposit within agreed time is not an offence under S. 409 821
- *—S. 411—Mere suspicion on accused's part that property was dishonestly acquired is not enough 264
- S. 448—House trespass—Intention is the chief ingredient—Circumstances under which the alleged act was done must be looked into, to determine the intent 263(1)
- S. 478—Goods subject of the mark in question must be proved to be manufactured by complainant and to be reputed to be his manufacture alone 235
- *—S. 486—Use of another firm's bottles innocently and according to common practice—No conviction under S. 486 can stand 873
- S. 497—Letter written by complainant's wife to accused, but not proved to have been received by accused is not sufficient evidence 248
- Police Act (5 of 1861)**
- S. 30—Notification under, is inoperative after occasion for it has passed away 272
- Practice**
- New plea cannot be allowed in second appeal—A new and speculative case, never advanced before, cannot be allowed in second appeal 870e
- Pleadings—Variation—Plaintiff pleading express authority of the principal in making purchases by an agent is not precluded from setting up a case of implied authority 863b
- New plea, making further evidence necessary, cannot be allowed in second appeal 854a
- Procedure of putting both parties in the witness-box without putting them on oath is irregular 227

Practice

- New plea—Suit for ejectment on actual possession and dispossession—Whether plaintiff can subsequently put forward a case of constructive possession depends on circumstances—Court has discretion 118b

Precedents

- *—Binding effect—The interpretation which their Lordships of the Privy Council put upon a prior Privy Council case is binding upon all the Courts of India 670b
- Stare decisis—The principle of stare decisis ought to apply to a doubtful question of law, the decision on which may have affected the material relations of many persons and the legitimacy of their offsprings 549c

Presidency Small Cause Courts Act (10 of 1882)

- S. 39—Decree under Civil P. C.—S. 39 does not apply 265b

Presidency Towns Insolvency Act (3 of 1909)

- S. 6—Registrar if empowered under S. 6 is a Court for the purposes of S. 36 FB 786a
- S. 6 (2)—Registrar can order discharge on an unopposed application 50a
- *—S. 8 (1)—Application under sub-S. (1) should be made to the Court passing the order FB 786b
- S. 8 (1)—Registrar can rescind the order of discharge made by him whether application is opposed or not 50b
- S. 8 (2) (a)—Application to Judge to discharge Registrar's order is appeal—Order of Judge treating it as review under sub-S. (1) is appealable to Division Bench under sub-S. (2) without leave of Judge and Division Bench should dispose of the case on merits: 66 I. C. 715= A I. R. 1921 Cal. 58=48 Cal. 1089, Overruled FB 786c
- S. 9 (e)—Attachment in execution of award is not one in execution of a decree 840a
- S. 9, Cl. (e)—Cl. (e) does not apply to a person against whom an adjudication order is taking operation 644

Presy. Towns Ins Act

- **—S. 18—Proceedings in a District Court against the same debtor—Proceedings cannot be stayed by a Judge of the High Court sitting in insolvency FB 782a.
 - **—S. 18—"Other proceedings" does not include insolvency proceedings FB 782b.
 - S. 31—Re-adjudication is not independent of original insolvency but revival of the latter 21a
 - S. 31—Re-adjudication order may be made if it is to creditor's benefit 21c
 - S. 36—The Registrar if empowered under S. 6 is a Court for the purpose of S. 36 FB 786a.
 - *—S. 36—Section is not to be used as extra method of discovery in addition to those under Civil Procedure Code FB 786e
 - *—S. 36—Witness—Witness is not entitled to get costs of his attorney or counsel FB 786f
 - Ss. 52 and 91—Discharge in first insolvency—Insolvent adjudicated a second time—Discharge in first insolvency rescinded—Assets acquired after first discharge and second adjudication are divisible in second insolvency and Official Assignee can represent creditors in first insolvency at such distribution 50c
 - S. 90 (5)—Scope—Where order under S. 36 was made to attend on 2nd May 1927 but was served on 4th July 1927 and the person ordered appealed on 20th July 1927, time ought to be extended FB 786d
 - S. 93—Composition scheme approved by Court—Debtor dying before its annulment—Any person interested in the scheme may continue proceedings 21b
- ## Principal and Agent
- *—Notice to agent of facts arising out of agency is notice to principal—But parties to contract can stipulate against this presumption 371d
 - *—General agency implying delegation to do all acts connected

Principal and Agent

with a particular trade—Principal cannot set up secret and private instructions to the agent 371c

Privy Council Practice

*—Appeal admitted—High Court has no power to order appellant to Privy Council to put the guardian ad litem in funds for arguing the case before the Privy Council, on behalf of the minors 286b

Probate and Administration Act, (5 of 1881)

—S. 4—Executor having once elected to act as such cannot refuse or renounce—Test of determining such election by acts laid down 275c

—Ss. 7 and 9—Executor can be deemed to be appointed by necessary implication 161a

—S. 70—Execution purchasers of interest of testator's son can object to grant of letters 277a

Promissory Note

*—Liability—Executor's description as Managing Director in the body does not exclude his personal liability 123c

Provident Funds Act, (9 of 1897)

—S. 3, Cl. (b).—Cl. (b) takes effect in absence of any special rule of a particular fund—Special rule providing payment to the legal representative—Payment to uncle as de facto guardian was held not to be valid discharge 743c

—S. 3 (1) (b).—"Representative" means a legal representative of the deceased 542b

—S. 5—Provisions of Calcutta Municipal Act (1923), S. 538, are not applicable to a suit for payment of money of the Provident Fund 743a

—S. 5—A person alleging to be an uncle of a deceased employee in the Calcutta Corporation taking payment of the Provident Fund—Son suing the corporation for the same—Corporation was held to have no business to pay to the uncle, he not being a representative of the deceased

Provident Fund Act

under R. 19 framed under the Provident Fund Act 542c

Provincial Insolvency Act, (5 of 1920)

—Act is not retrospective—Application by debtor before its passing are to be dealt with under the old Act of 1907 221

—S. 4—Court has jurisdiction to require proof of claim by a creditor to be a secured creditor 609

—S. 42 (1) (a)—Insolvent's assets not of requisite value—There must be a finding that insolvent was not responsible for the deficiency 843

—S. 70—Court has discretion to satisfy itself in any way it thinks proper before ordering insolvent's prosecution 211

—S. 75 (3)—Order of the District Judge under S. 68 is appealable—No revision lies 263(2)

Provincial Small Cause Courts Act (9 of 1887)

—S. 27—Suit valued at less than Rs. 100 tried by Munsif in his ordinary jurisdiction—No appeal lies 153b

—Sch. 2, Art. 11.—Suit framed as money suit—General prayer in plaint for relief to which plaintiff may be entitled—Suit cannot be treated as one under Art. 11 593a

—Sch. 2, Art. 13.—The words "by reason of interest in immovable property" contemplate payments to which a person is entitled as representing his interest in immovable property and not because he possesses some interest in such property 709a

*—Sch. 2, Art. 29.—Suit by a partner after the dissolution of the partnership must be for general account—Maintainability of a suit between partners without taking accounts depends upon circumstances of each case 127

—Sch. 2, Art. 31.—Suit for recovery of money wrongfully realized is not excluded unless accounts are asked for 424

—Sch. 2, Art. 35 (ii).—Suit for recovery of excess amount paid to decree-holder under fraud and

Pro. Sm. Cause Courts Act

- cheating—Second appeal is entertainable 776a
- * —Sch. 2, Art. 35 (ii)—Suit for damages for loss of animal on the ground that the animal was killed due to negligence of the Railway Company in not fencing the line, in driving too fast and not taking precautions in frightening away the animal—Allegations do not constitute mischief and the article has no application 504a
- Sch. 2, Art. 35 (ii)—Suit for damages for taking away paddy—No offence under Ch. 17, Penal Code, disclosed—Suit is cognizable by Small Cause Court 405
- Sch. 2, Art. 35 (ii)—A suit brought by the landlord for the price of the trees cut bona fide by the tenant is cognizable by the Small Cause Court 153a
- Sch. 2, Arts. 41, 42 and 44—Suit for contribution not cognizable by Small Cause Court must fall within either Art. 41, 42 or 44 593b
- Sch. 2, Art. 41, (*Per Mukerji, J.*) Common liability is essence of right of contribution—Action for contribution is suit by one of several parties who discharges common liability—Word "sharer" and "joint property" in Art. 41 are to be understood with reference to common liability and not in sense of "undivided sharer in property" and "property in which shares are undivided" (*Cuming, J. contra*) 593e
- Sch. 2, Art. 42, (*Per Mukerji, J.*) Purchaser of portion of mortgaged property redeeming mortgage is in the position of joint mortgagor—Fact that decree had been obtained on mortgage is immaterial (*Cuming, J. contra*) 593f

R

Railways Act, (9 of 1890)

- S. 16—No restriction imposed upon the company as regards their right to use locomotives only at scheduled times or at a speed less than scheduled speed

Railways Act

- Inconvenience to public is not a ground of action 504b
- S. 72—Notice—Sufficiency of notice must be determined on facts of each case 697a
- S. 72—To hold railway liable, theft by the railway servants or their wilful neglect has to be proved—Theft by an outsider has no place 697b
- S. 72—Wilful neglect has to be proved by party alleging it 697c
- S. 72—"Wilful neglect" means act done deliberately and intentionally 697d
- S. 72—Railway is not liable for damages if requirements under S. 151, Contract Act, are fulfilled 697e
- S. 72—"Loss" explained—(*Obiter*) The term "loss" should be construed as including cases where the article consigned is lost to the consignor as such article 697f
- S. 72—A consigning a wagon of coal to a certain station for the use of a railway company—Company rejecting the coal as unsuitable for consumption—Re-sale by A to C—C again selling to B—Company issuing a fresh invoice though the coal was used up by them—B suing for damages—B was held to have every right to sue because he had perfectly a good contract with C who had a perfectly good contract with A 544
- S. 72—Risk-note—Terms "theft" and "robbery" are not synonymous 498b
- 72—Loss of goods due to not padlocking a van carrying the goods—Omission deliberate and intentional—Railway Company is liable for wilful neglect 498c
- * —S. 72—Risk-note—Loss of consignment due to looting by railway servants on strike—To absolve the Railway Company from liability, it must be proved that the Railway Administration took as much care of the lost consignment as a man of ordinary prudence would under similar circumstances 491d

Railways Act

- S. 72—Common carrier is liable even in absence of contract for loss arising from his negligence 490
- S. 72—Risk-note signed by actual sender of goods is binding on the consignor—Signing one's own name with addition of agent for company is signing within the meaning of the section 170a
- S. 72—Packages not delivered in good condition—Plea that they were in good condition will not be allowed 170b
- S. 72—Risk-note *B* signed by an illiterate person—Contract is complete—It is no duty of Railway Company to see literacy or otherwise of sender of goods 170d
- S. 72 (2)—Risk-note form *B*—Liability of railway is reduced 65a
- S. 72 (2)—Risk-note form *B*—Burden of proof is on railway to bring themselves within the risk-note 65b

Registration Act (16 of 1908)

- S. 17—Hissanama, not amounting to a partition deed or a deed of gift but merely a memorandum purporting to acknowledge certain shares need neither be stamped nor registered 705
- S. 21—Mortgage of several immovable properties—Description of one property that could not be identified invalidates the whole deed 385a
- *—S. 32—Executant dead—All legal representatives need not join in presenting the document—Any one of such persons may present the document for registration 565
- S. 48—Subsequent purchaser knowing prior agreement to sell gets no right to the property 754c
- *—S. 49—Agreement for sale proved by parol evidence—This evidence reinforced by the fact of possession and payment of revenue—Making use of the unregistered document for proving agreement to sell is not illegal 754b
- S. 49—Mortgagor's right and interest assigned in consideration of mortgagee giving up his claim for over Rs. 100 on unregistered deed—Mortgagee cannot sue

Registration Act

- mortgagor for possession on the document 107
- S. 60—Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature 154c

S**Sea Customs Act (8 of 1878)**

- Provisions are for protection of merchants as well as public—Customs officers can act on their own initiative 1j

Specific Performance

- *—Agreement for sale—Possession delivered under an unregistered kobala—Limitation for specific performance dates from knowledge of sale to subsequent purchaser 754a

Specific Relief Act (1 of 1877)

- *—S. 9—Finding as to possession on a certain date in a suit under the Specific Relief Act S. 9 can operate as *res judicata* 758
- S. 17—Whole contract not enforceable owing to plaintiffs' conduct—Specific performance of part should be refused 584c
- *—S. 41—Section applies only when plaintiff is suing to cancel an instrument 537a
- S. 41—Contract by minor—Restoration was not ordered 537b
- **—S. 42—Articles of Association providing for election of directors annually—Non-election of directors for a particular year—Directors of previous years continuing—Suit by a shareholder for declaring the acts of the directors as void—Such a suit cannot lie as no legal right or character of shareholder is denied—Such a declaration should be refused also in Court's discretion—No meeting for electing directors having been held, old directors continue 868
- S. 42—Declaration for the status as a voter in order to insert his name in the register of voters—Conditions not fulfilled entitling him to have his name inserted—Declaration cannot be claimed 736
- S. 42—Person interested to deny or denying plaintiff's title is not *pro forma* defendant 425

Specific Relief Act

—S. 53—Convenience — While passing an order of injunction the Court should look into the balance of convenience caused to the parties 293b

—S. 56 (e)—Where the legislature has indicated a mode of procedure before a Magistrate, a civil Court will not interfere by way of injunction or declaration of rights 464b

—S. 56 (j)—Plaintiff must show diligence and must not be guilty of laches 510

Stamp Act (2 of 1899)

*—S. (2) — Demand drafts are bills-of-exchange and are exempt from stamp duty FB 566

—S. 45—Hissanama, not amounting to a partition deed or a deed of gift but merely a memorandum purporting to acknowledge certain shares need neither be stamped neither registered 705

Succession Act (10 of 1865)

—S. 187—Letters of Administration with will annexed—Probate should be granted unless the estate is completely administered and, therefore, no action is necessary on the part of the Court 277b

—(39 of 1925)

—S. 222 (2)—Executor can be deemed to be appointed by necessary implication 164a

—S. 225 (2) — Probate already granted—Direction to appoint a common manager in the will — District Judge has no power to appoint under that direction 164b

—Ss. 229 and 224 — Widow named as executrix along with other executors in husband's will— Executors applying for probate—Widow joint as opposite party disputing will but praying that if will be proved she be granted probate along with others—Court cannot refuse grant to her 580

—S. 237—Application for probate of a draft of a will — Applicant not able to prove that the will has been lost or mislaid since the testator's death — Applicant is not entitled to the probate 307a

Succession Act

—S. 263 Explanation — Wilful withholding of legacies is not a just cause—Remedy by legatees described 695b

—S. 263 (d) — Distribution of legacies only left to be done — Grant does not become "useless and inoperative" 695a

T

Tax

—Validity — An assessment based on no material whatever cannot be considered a valid assessment 450d

Tort

*—Negligence—Damages due to fire from a locomotive engine— Railway Company authorized to run it—Reasonable care taken for preventing such fire— Company is not liable 571

*—Negligence— A driver of a Railway Company is not bound to be on the look out to see if any trespassers are on the line — Driver's failure to whistle in consequence of which any loss is sustained is no negligence on the part of the driver 504c

*—Negligence — No statutory provision to fence a railway line — Animal straying and killed on the railway line — No evidence that accident was caused by any negligence on the part of the driver — The company is not liable 504d

—Master's liability—A servant has no implied authority to engage a stranger to do work on behalf of his master so as to render the master liable for the stranger's act 410b

—Malicious proceedings—Wilful wrong— Defendant falsely claiming paddy as his own— Proceedings taken under S. 107, Criminal P. C. — Paddy taken by police and handed over to a third person for safe custody— Damage caused — Defendant was held responsible 231

—Joint tort-feasors—Rule as to joint liability is not inflexible 180b

*—Suit for damages can lie against some only of the wrong-doers 138a

Tort

- *—Detention of goods by customs authorities — Indemnity given by opposite party to Court — Action for damages lies by application in suit by opposite party — No separate suit lies 1a
- *—Even damages beyond proximate or natural damages due to undertaking of opposite party can be claimed if notice of all circumstances to, or fraud or malice by, opposite party is shown 1d
- ** —Damages—Maliciously bringing a civil suit—Action may lie but not if the object is to defend one's own trade 1e
- * —Damages—Threats intended to wilfully injure trade—Action lies 1f
- Master and servant—False and malicious statements by servant within scope of authority—Master is liable 1g
- ** —Slander of goods — Specific damage must be proved 1h
- Slander of goods—In a case of slander of goods the burden of proof of falsity of the statements is on the plaintiff alleging falsity 1i
- Transfer of Property Act (4 of 1882)**
 - S. 3 (Amended by Act 27 of 1926)—Attestation—Amendment is retrospective 154b
 - S. 52—Rent suit—Transfer of durputni pending the suit—Doctrine of lis pendens was held not applicable 441
 - S. 55—A trespasser cannot challenge the validity of a sale as between vendor and vendee 299b
 - S. 58 — Mortgage-deed containing the word "bikrita" and also a clause that mortgage shall become out-and-out sale after expiry of certain period is not out-and-out sale at the inception 825b
 - *—S. 59—Mortgagor's acknowledgment of the execution of a document before the Sub-Registrar, and the Sub-Registrar's endorsement thereon, amount to its proper attestation 154a
 - *—S. 74 — Purchaser under

Transfer of Property Act

- puiusne mortgagee's decree entering into possession, but dispossessed by purchaser under prior mortgagee's decree—Suit by former for possession—Defendant should be allowed to be redeemed in the same suit 116
- S. 95—(*Mukerji, J.*) Purchaser of part of mortgage property redeeming mortgage is in the position of joint mortgagor —Fact that decree had been obtained on mortgage is immaterial (*Cuming, J. Contra*) 593f
- S. 95—Suit for contribution by a co-mortgagor after redemption of mortgage decreed—Separate suit for attachment and sale of property charged with the amount of contribution is not necessary 191
- S. 100—Person paying off existing charge or mortgage debt is allowed to stand in the shoes of the mortgagee and given a charge on the property 593d
- S. 106—Tenancy at will—Notice to quit given according to S. 106—Tenant is liable to be ejected 279
- S. 107—In Bengal a lease evidenced only by a kabuliyat creates lease as much as by a patta executed by landlord and accepted by tenants 392d
- S. 111—Forfeiture arises only when the tenant expressly repudiates the tenancy 312b
- S. 111—Forfeiture may arise even when tenant does not deny tenancy but sets up title of third person 312c
- S. 111 (g)—Denial of title, to work forfeiture, must be prior to suit for ejectment—Denial by one co-tenant does not work forfeiture—Suit for ejectment is not sustainable—Landlord can recover rent from all tenants 713
- Trespass**
 - A trespasser cannot challenge the validity of a sale as between vendor and vendee 299b

W**Will**

- Construction — *Prima facie* "money" means moneys in hand

Will

or receivable at call, but the term will receive a wider or more restricted construction according to the context 794b

—Custom—A raiyat cannot bequeath his non-transferable occupancy right 360

—Revocation—No rule can be laid down as to circumstances under which presumption of revocation of will can arise 307b

Words

—“Jote” is a general term with respect to a holding and is not necessarily equivalent to a “raiyaoti jote” 880b

*—Meaning of “money”—Prima facie “money” means moneys in hand or receivable at call but the term will receive a wider or more restricted construction according to the context and the intention of the testator to be collected from the will as a whole 794b

—“Daimi” conveys the notion of fixity of rent 531(2)a

—The word “strike” does not represent any legal definition or description 491b

—“Sarasari” and “bemiadi”—

Words

“sarasari” lease no doubt connotes the idea of a temporary settlement—But coupled with the expression “bemiadi” it can only mean a permanent lease but variable as to rent 392b

—“Kayemi” does not connote zamindari interest in land by any person—It means “a permanent occupancy holding” 385b

Workmen's Compensation Act (8 of 1923)

—S. 11 (6)—The phrase “that the workman has not been regularly attended by a qualified medical practitioner” should be construed as if it read “by another qualified medical practitioner” 481

**—S. 12—Work undertaken by A as part of his business—Part of work entrusted to B—B sub-contracting for the same with C—One of C's workmen killed by accident—The principal for the purposes of S. 12 is A, and he can be indemnified by B—Compensation cannot be obtained under the Act for any further sub-contracting of the contract 399(2)

ABBREVIATIONS EXPLAINED

A. I. Cr. R.	...	...	All India Criminal Reports.
All. or A.	...	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	...	Allahabad Law Journal.
A. I. R. 1928 All.	...	...	All India Reporter, 1928 Allahabad.
Bom. or B.	...	...	Indian Law Reports, Bombay Series.
Bom. L. R.	...	...	Bombay Law Reporter.
A. I. R. 1928 Bom.	...	...	All India Reporter, 1928 Bombay.
Bur. L. T.	...	...	Burma Law Times.
Cal. or C.	...	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	...	Calcutta Law Journal.
C. L. R.	...	...	Calcutta Law Reports.
C. W. N.	...	...	Calcutta Weekly Notes.
A. I. R. 1928 Cal.	...	...	All India Reporter, 1928 Calcutta.
Cr. L. J.	...	...	Criminal Law Journal.
I. A.	...	...	Law Reports, Indian Appeals.
I. C.	...	...	Indian Cases.
Lah. or L.	...	...	Indian Law Reports, Lahore Series.
A. I. R. 1928 Lah.	...	...	All India Reporter, 1928 Lahore.
Lah. L. J. or L. L. J.	...	...	Lahore Law Journal.
L. B. R.	...	...	Lower Burma Rulings.
A. I. R. 1921 L. B.	...	...	All India Reporter, 1921 Lower Burma.
L. R. A.	...	...	The Law Reporter, Allahabad.
Luck.	...	...	Indian Law Reports, Lucknow Series.
Mad. or M.	...	...	Indian Law Reports, Madras Series.
M. L. J.	...	...	Madras Law Journal.
Mad. Cr. C.	...	...	Madras Criminal Cases.
M. L. T.	...	...	Madras Law Times.
L. W. or M. L. W.	...	...	Madras Law Weekly.
M. W. N.	...	...	Madras Weekly Notes.
A. I. R. 1928 Mad.	...	...	All India Reporter, 1928 Madras.
N. L. J.	...	...	Nagpur Law Journal.
N. L. R.	...	...	Nagpur Law Reports.
A. I. R. 1928 Nag.	...	...	All India Reporter, 1928 Nagpur.
O. C.	...	...	Oudh Cases.
A. I. R. 1928 Oudh	...	...	All India Reporter, 1928 Oudh.
O. L. J.	...	...	Oudh Law Journal.
O. W. N.	...	...	Oudh Weekly Notes.
P. R.	...	...	Punjab Record.
P. L. R.	...	...	Punjab Law Reporter.
P. W. R.	...	...	Punjab Weekly Reporter.
Pat. or P.	...	...	Indian Law Reports, Patna Series.
P. H. C. C.	...	...	Patna High Court Cases (Suppl. to C. W. N.)
A. I. R. 1928 Pat.	...	...	All India Reporter, 1928 Patna.
A. I. R. 1928 P. C.	...	...	All India Reporter, 1928 Privy Council.
Pat. L. J.	...	...	Patna Law Journal.
Pat. L. T.	...	...	Patna Law Times.
Pat. L. W.	...	...	Patna Law Weekly.
R. or Rang.	...	...	Indian Law Reports, Rangoon Series.
A. I. R. 1928 Rang.	...	...	All India Reporter, 1928 Rangoon.
Sar.	...	...	Saraswati's P. C. Judgments.
S. L. R.	...	...	Sind Law Reporter.
Suther.	...	...	Sutherland's P. C. Judgments.
A. I. R. 1928 Sind	...	...	All India Reporter, 1928 Sind.
U. B. R.	...	...	Upper Burma Rulings.
A. I. R. 1921 U. B.	...	...	All India Reporter, 1921 Upper Burma.
W. R.	...	...	Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	Applied	Disc.	...	Discussed.	F. B.	...	Full Bench.
Appr.	...	Approved.	Diss. from	...	Dissented from.	P. C.	...	Privy Council.
Cons.	...	Considered.	Expl.	...	Explained.	Ref.	...	Referred to.
Dist.	...	Distinguished.	Foll.	...	Followed.	S. B.	...	Special Bench.

THE ALL INDIA REPORTER

1928 CALCUTTA COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First and Second Tables**. It shows serially the pages of the ALL INDIA REPORTER for 1928 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing serially the pages of INDIAN LAW REPORTS, CALCUTTA SERIES, for the year 1928 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 55 CALCUTTA.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 55 Calcutta=All India Reporter.

(ILR)	A. I. R.	(ILR)	A. I. R.	(ILR)	A. I. R.	(ILR)	A. I. R.	(ILR)	A. I. R.
1	1927 PC 195	201	1927 C 902	495	1928 C 892	608	1927 C 952	758	1928 C 286
26	" C 652	210	" " 870	448	" " 130	616	1928 " 25	765	" " 281
35	" " 956	219	" " 850	464	" " 479	619	" " 496	777	" " 462
35	1928 " 183	228	" " 802	473	" " 772	624	" " 68	783	" " 211
37	1927 " 768	238	1928 PC 27	482	" " 307	638	1927 " 964	794	" " 645
78	" " 692	249	" C 256	488	" " 196	642n	1922 " 104	798	" " 468
95	" " 828	262	" " 295	499	1927 " 853	646	1928 " 544	808	" " 737
91	1928 " 177	269	1927 " 868	506	1928 " 325	653	" " 535	821	" PC 137
96	" " 60	279	" " 628	512	" " 222	659	" " 533	826	" C 344
104	1927 " 884	285	" " 889	519	" PC 16	666	" " 180	836	" " 237
108	" " 817	340	" " 766	532	" " 38	676	" " 548	841	1929 " 50
118	" " 714	355	1928 " 315	538	1927 C 887	680	" " 553	858	1928 " 675
126	" PC 164	371	" " 83	545	" " 885	689	1927 " 737	879	" " 732
132	1928 C 65	392	" " 41	551	1928 " 148	701	1928 " 441	892	" " 412
142	" " 170	396	" " 216	565	" " 837	712	" " 537	903	" " 670
154	" " 204	403	" PC 10	574	" " 166	720	" PC 49	918	" " 794
164	" " 199	417	1927 C 702	578	" " 686	725	" " 96	944	" PC 172
178	" " 209	423	" " 724	590	" " 425	730	" C 600	944	" " 836
180	1927 " 347	428	1928 " 322	602	" " 116	748	" " 421	953	" " 836

I. L. R. 55 Calcutta=All India Reporter—(Concl'd.)

ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.	ILR)	A. I. R.
957	1928 C 761	1037	1928 PC 193	1110	1929 C 117	1216	1929 C 110	1292	1929 C 63
964	" " 207	1048	" " 200	1120	" " 69	1291	1928 " 743	1305	1928 " 508
971	" " 577	1053	" C 609	1153	1928 " 289	1241	" " 844	1312	" " 862
978	" " 464	1057	" " 456	1167	" " 854	1259	" " 481	1315	" " 518
987	" " 729	1067	1929 " 88	1181	" " 584	1266	" " 882	1328	1929 " 197
994	" " 522	1070	1928 " 448	1190	1929 " 96	1274	1929 " 192	1341	" " 193
1008	" " 565	1077	" " 446	1193	1928 " 593	1277	" " 195	1351	" " 190
1013	1929 " 22	1084	1929 " 78	1206	" " 484	1280	" " 191	1355	1928 " 808
1029	1928 " 597	1030	" " 101	1210	1929 " 68	1284	1928 " 368		

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1928 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

47 Calcutta Law Journal=All India Reporter.

CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.
1	1927 PC 242	124	1928 C 385	284	1928 PC 128	396	1928 PC 38	510	1928 PC 103
7	" " 246	134	" Notes 73a	288	" " 127	403	" " 64	517	" " 108
12	1928 C 68	136	1927 PC 252	292	" " 135	412	1927 " 185	526	" C 416
21	" " 193	144	1928 " 30	295	" " 115	418	1928 " 75	530	" " 436
27	1927 " 279	150	" " 10	300	1927 " 272	424	" " 49	536	1926 " 1228
32	1928 " 170	162	" " 27	302	1928 " 80	429	" " 44	539	1928 PC 98
38	1927 " 952	171	" " 2	315	" C 450	436	" C 459	542	" " 106
43	1928 " 83	183	" " 35	327	1927 PC 275	442	" " 321	545	" C 503
59	1927 " 887	189	" " 20	328	" " 264	444	" " 438	550	" PC 54
62	1928 " 189	198	" " 33	333	" " 270	449	" " 401	569	" C 412
66	1927 " 821	208	" C 207	337	" " 262	452	" " 446	576	1927 PC 266
69	" " 850	211	" " 230	339	1928 " 77	457	" " 408	577	1928 " 8
75	" " 818	214	" PC 24	347	" C 298	460	" " 410	583	" C 365
82	1928 " 184	222	" " 39	351	" " 349	464	" " 406	587	" " 518
87	" " 179	238	" C 344	358	1927 " 702	467	" " 341	595	" " 703
90	1927 PC 250	240	" " 430	362	1928 " 302	471	" " 309	603	" " 574
96	1928 " 1	250	" " 211	365	" " 293	480	" Notes 25c	607	" PC 137
101	1927 " 248	258	1927 PC 173	369	" " 296	483	" C 444	611	" C 697
107	1928 C 191	263	1928 " 83	372	" " 303	488	" PC 68	618	" " 560
112	" " 186	265	" C 289	376	1929 " 50	500	" " 86	623	" " 654
118	" " 154	277	" " 237	376	" " 22	503	" " 99	628	" PC 152
122	" " 183	282	" " 234	387					

48 Calcutta Law Journal=All India Reporter.

CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.	CLJ)	A. I. R.
1	1928 PC 130	119	1928 PC 172	276	1928 C 741	397	1928 PC 254	541	1928 Notes 85d
11	" " 139	125	" " 174	279	" " 705	405	" " 251	546	" C 748
23	" " 162	131	" Notes 57f	281	1929 " 123	412	" " 308	548	1929 " 136
28	" C 720	135	" C 666	288	1928 " 815	415	" " 219	550	1928 " 843
32	" " 498	138	" " 700	293	" " 357	418	" " 202	551	" Notes 88c
37	" " 491	143	" Notes 50e	298	" " 782	431	" " 258	554	1929 C 157
45	" " 504	148	" C 653	307	1929 " 1	436	" " 180	555	" " 165
54	" " 531	150	" " 640	327	1928 " 777	451	" " 208	557	1928 PC 243
55	" PC 16	158	" PC 190	339	" " 691	473	" C 769	567	" " 200
64	" " 177	163	" " 193	347	" " 876	477	" " 827	570	" " 165
69	" " 146	171	" " 187	350	" " 180	479	" Notes 68d	574	1929 C 159
88	" " 112	177	" " 197	357	1929 " 11	481	" " 76e	577	" " 163
90	" C 569	184	" C 717	364	1928 " 765	489	1929 C 149	581	1928 " 859
92	" " 339	190	" " 483	368	1929 " 93	500	1928 PC 221	586	1929 " 99
97	" " 880	198	" " 610	374	" " 83	511	" Notes 43c	590	" " 166
102	" " 668	262	" " 695	386	1928 Notes 70e	523	1929 C 145	594	" " 162
104	" PC 185	266	" " 727	390	1929 C 91	531	" " 144	596	" " 158
106	" " 156	268	" PC 234	392	" " 108	534	" " 80	597	" " 155

32 Calcutta Weekly Notes=All India Reporter.

CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.	CWN)	A. I. R.
1	1927 PC 146	264	1928 C 209	515	1928 C 743	759	1928 C 448	1004	1929 C 14
3	" " 257	268	" " 441	519	" " 349	762	" PC 112	1009	1928 PC 87
10	1928 C 772	272	" " 285	525	1927 " 548	769	" " 106	1015	" C 566
16	1927 " 956	275	" " 344	535	1928 " 481	771	" C 597	1020	1929 " 26
28	" PC 287	280	" " 260	538	" PC 20	776	1929 " 135	1023	1928 " 459
30	" " 195	281	1927 PC 252	544	" " 24	778	1928 " 870	1027	" " 848
44	1928 C 378	287	1928 C 837	548	" C 289	783	" Notes 59a	1030	" " 361
48	" " 196	291	" " 216	556	" " 761	790	" PC 162	1035	" " 516
53	" " 170	295	" " 419	559	1929 " 22	796	" " 137	1038	" PC 180
57	1927 " 683	299	" " 184	565	1928 PC 80	799	" Notes 5b	1050	" C 885
61	" PC 176	304	" " 215	569	" " 35	805	" C 491	1055	1929 " 33
76	1928 C 65	305	1927 PC 248	574	" C 729	811	1929 " 17	1060	1928 " 768
81	1927 " 857	309	1928 C 328	576	" " 464	815	1928 Notes 38d	1062	" " 339
88	" PC 227	317	" Notes 25b	580	" " 854	817	" PC 172	1065	" PC 156
93	" " 204	319	" C 675	587	" " 880	821	" " 139	1077	" C 876
98	1928 C 202	328	" " 230	591	" " 387	828	" C 717	1079	" " 892
101	" " 812	329	1927 PC 238	593	" PC 54	832	" Notes 27a	1082	" " 874
105	1926 " 1177	336	1928 C 686	608	" C 840	835	" C 968	1084	" " 868
108	1928 " 275	342	" " 238	610	" " 508	839	" " 700	1087	" " 389
112	" " 338	345	" " 430	612	" Notes 52c	842	" " 320	1091	" " 483
114	" " 462	353	" " 681	613	" C 446	843	" " 703	1093	" PC 227
117	1927 PC 244	359	" " 68	616	" " 500	845	" PC 103	1101	1929 C 97
119	" " 230	366	" Notes 34e	621	" PC 10	850	" " 174	1105	1928 " 878
125	1928 C 123	372	" C 468	629	" " 38	854	" C 756	1107	" " 861
128	" " 421	378	" " 450	634	" C 518	858	" " 720	1109	" Notes 25c
132	" " 388	387	1927 " 760	640	" " 549	860	1929 " 20	1111	" C 891
133	1929 " 42	391	1928 " 312	644	" Notes 30e	863	1928 " 882	1113	" " 753
140	1928 " 286	396	" " 485	646	" C 565	867	" " 546	1115	" " 873
144	" " 228	400	" " 424	650	" PC 130	870	" " 684	1117	" PC 200
145	1927 PC 210	402	" PC 2	657	" " 64	872	" " 690	1120	" " 202
153	" " 229	411	" C 864	665	" C 844	874	" PC 152	1130	" C 640
154	1928 C 89	413	" " 456	673	" " 444	880	" " 177	1136	1929 " 141
160	1927 " 966	418	" Notes 27e	677	" PC 44	885	" C 199	1138	" " 190
162	1928 " 272	421	" C 522	681	" " 49	889	" " 367	1140	" " 80
164	" " 281	427	" " 609	684	1929 C 63	894	" Notes 61a	1146	1928 PC 219
170	1927 PC 208	429	" PC 8	691	1928 " 577	897	" PC 146	1149	" " 165
173	" " 234	434	" C 527	693	" Notes 14d	906	" " 193	1153	" C 819
179	1928 C 513	439	1929 " 50	696	" C 336	913	" C 670	1155	1929 " 137
181	" " 222	449	1928 Notes 24c	699	" " 495	922	" " 557	1160	" " 121
184	" " 315	452	" C 399	702	" Notes 56d	925	" PC 33	1163	1928 " 584
192	1927 " 952	454	" " 207	705	" PC 98	929	" " 303	1166	1929 " 133
195	1928 " 381	457	" PC 1	708	" " 86	932	" C 806	1170	1928 " 591
203	1927 PC 224	459	1927 C 796	710	" C 587	935	1929 " 214	1172	1929 " 92
208	1928 C 887	467	Too old	716	" " 644	940	1928 " 832	1173	1928 " 610
221	" " 83	472	1928 C 479	720	" Notes 65e	945	1929 " 57	1221	" Notes 74e
233	1927 PC 121	476	" " 484	727	" " 26a	952	1928 Notes 60d	1228	1929 C 123
237	" " 242	477	" " 438	729	" C 580	953	" PC 208	1233	1928 " 186
241	1928 C 385	481	" Notes 73a	731	" " 416	971	" C 646	1238	1929 " 90
244	" Notes 62a	482	" PC 16	733	" PC 108	983	" PC 68	1240	1928 Notes 80b
248	" C 130	490	1929 C 69	738	" " 99	993	" C 695	1242	1929 C 115
257	1927 PC 246	507	1928 " 397	742	" C 657	996	" " 365	1244	1928 Notes 84c
260	" " 250	509	" PC 27	757	" " 579	999	1929 " 47	1245	" " 82b

9 & 10 All India Criminal Reports =All India Reporter.

A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.	A. I. Cr. R.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1928 Allahabad.

29 Cr. L. J. & 106 to 112 Indian Cases=All India Reporter.

Cr. L.J. & I.C.	A. I. R.	Cr. L.J. & I.C.	A. I. R.	Cr. L.J. & I.C.	A. I. R.	Cr. L.J. & I.C.	A. I. R.	Cr. L.J. & I.C.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1928 Lahore.

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1928 CALCUTTA SECTION with corresponding references of other REPORTS, JOURNALS AND PERIODICALS, including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1928 CALCUTTA.

Column No 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

A. I. R. 1928 Calcutta=Other Journals

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals
1	46 C L J 455	96	31 C W N 963	164	105 I C 626	216	55 Cal 396
	106 I C 277		28 Cr L J 853	166	106 I C 25		32 C W N 291
21	54 Cal 650		104 I C 635		55 Cal 574		109 I C 747
	105 I C 90		9 A I Cr R 41	167	106 I C 128	218	...
23	104 I C 845	97	54 Cal 1041	169	106 I C 136	220	...
24	54 Cal 303		107 I C 353	170	55 Cal 142	221	...
	8 A I Cr R 238		29 Cr L J 245		47 C L J 32	222	32 C W N 181
	28 Cr L J 577		9 A I Cr R 471		32 C W N 53		107 I C 79
	102 I C 545	99	54 Cal 948		106 I C 247		55 Cal 512
25	104 I C 759		110 I C 296	174	106 I C 93	225	...
	55 Cal 616	102	105 I C 851	177(1)	54 Cal 1075	227	107 I C 469
27	46 C L J 368	103	105 I C 779		103 I C 380	228	32 C W N 144
	29 Cr L J 49	104	46 C L J 575	177(2)	55 Cal 91		107 I C 90
	106 I C 545		107 I C 95		109 I C 538		29 Cr L J 238
41	9 A I Cr R 228	106	105 I C 763	179	47 C L J 87		9 A I Cr R 451
	105 I C 149	107	46 C L J 573		107 I C 729	229	...
	55 Cal 392		107 I C 474	180	106 I C 300	230	47 C L J 211
43	105 I C 133	108	46 C L J 353		55 Cal 666		32 C W N 328
46	46 C L J 452		106 I C 509		48 C L J 350		20 Cr L J 512
	106 I C 324	112	105 I C 756	183	55 Cal 65		109 I C 240
47	105 I C 85	113	105 I C 786		47 C L J 122	231	107 I C 479
49	104 I C 126	114	54 Cal 1038		29 Cr L J 464	233	...
50	54 Cal 858		107 I C 475		109 I C 175	234	47 C L 282
	106 I C 326	115	46 C L J 584	184	47 C L J 82		109 I C 164
52	54 Cal 788		107 I C 91		32 C W N 299	235	...
	106 I C 71	116	46 C L J 570		107 I C 726	237	47 C L J 277
55	105 I C 80		107 I C 355	186	47 C L J 112		10 A I Cr R 167
57	46 C L J 362		55 Cal 602		107 I C 730		55 Cal 836
	106 I C 516	118	31 C W N 808		32 C W N 1293		29 Cr L J 483
60	46 C L J 579		105 I C 369	189	47 C L J 62		109 I C 211
	105 I C 65	123	46 C L J 566		107 I C 733	238	32 C W N 342
	55 Cal 96		32 C W N 125	191	47 C L J 107	240	...
62	54 Cal 782		106 I C 848		107 I C 724	241(1)	...
	106 I C 66	125	105 I C 751	193	47 C L J 21	241(2)	...
63	105 I C 61	127	46 C L J 561		107 I C 735	243	...
65	46 C L J 428		106 I C 843	196	32 C W N 48	245	...
	32 C W N 76	130	32 C W N 248		105 I C 725	247	107 I C 477
	106 I C 252		105 I C 647		55 Cal 488	248	...
	55 Cal 132		55 Cal 448	199	55 Cal 164	249(1)	...
68	47 C L J 12	136	46 C L J 558		32 C W N 885	249(2)	...
	105 I C 15		106 I C 841		109 I C 755	250	...
	32 C W N 359	137	105 I C 741	202	32 C W N 98	253	...
	55 Cal 624	138	46 C L J 433		106 I C 561	254	107 I C 470
73	105 I C 4		106 I C 261	204	55 Cal 154	256	55 Cal 249
74	54 Cal 969	142	105 I C 737		109 I C 752		109 I C 759
	107 I C 360	143	46 C L J 530	207	47 C L J 208	260	32 C W N 280
83	47 C L J 43		106 I C 854		32 C W N 454		29 Cr L J 531
FB	32 C W N 221	146	46 C L J 555		10 A I Cr R 174		109 I C 355
	55 Cal 371		106 I C 836		29 Cr L J 509	261	...
	108 I C 577	148	105 I C 549		109 I C 237	263(1)	...
	29 Cr L J 437		55 Cal 551		55 Cal 964	263(2)	107 I C 467
	10 A I Cr R 57	152	105 I C 284	209	55 Cal 173	264	...
87	105 I C 641	153	46 C L J 552		32 C W N 264	265	...
89	46 C L J 607		106 I C 859		109 I C 739	267	107 I C 476
	32 C W N 154	154	47 C L J 118	211	47 C L J 250	269	...
	107 I C 86		105 I C 422		55 Cal 783	271(1)	...
92	103 I C 811	156	105 I C 290		111 I C 372	271(2)	...
94	54 Cal 1064	158	46 C L J 515	215	32 C W N 304	272	32 C W N 162
	107 I C 357		107 I C 72		109 I C 282		106 I C 718

A. I. R. 1928 Calcutta=Other Journals—(Contd.)

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals
272	29 Cr L J 126	844	10 A I Cr R 160	416(2)	39 Cr L J 527	485	32 C W N 396
273 (1)	107 I C 469		55 Cal 826		109 I C 351		113 I C 24
273 (2)	...		29 Cr L J 503	418	107 I C 751	488	113 I C 32
275	32 C W N 108		109 I C 281	419	32 C W N 295	490	108 I C 591
	107 I C 70	347	108 I C 41	421	32 C W N 128	491	48 C L J 37
277	...	349	47 C L J, 351		106 I C 880		32 C W N 805
279	...		32 C W N 519		55 Cal 748		112 I C 303
281	32 C W N 164		108 I C 33	424	32 C W N 400	495	32 C W N 699
	29 Cr L J 119	353	112 I C 787		107 I C 722	496	55 Cal 619
	106 I C 711	355	112 I C 785	425	55 Cal 590		111 I C 79
	55 Cal 765	357	48 C L J 293	428	108 I C 587	498	48 C L J 32
285	32 C W N 272		112 I C 780	430	47 C L J 240		111 I C 792
286	32 C W N 140	359	38 C W N 179		32 C W N 345	500	32 C W N 616
	106 I C 867		112 I C 784		29 Cr L J 546		10 A I Cr R 223
	55 Cal 758	360	112 I C 128		109 I C 482		29 Cr L J 497
289	47 C L J 265	361	32 C W N 1030		10 A I Cr R 259		109 I C 225
	32 C W N 548		49 C L J 5	436	47 C L J 530	504	48 C L J 45
	108 I C 246	365	47 C L J 583		110 I C 715		108 I C 37
	55 Cal 1153		32 C W N 996	438	47 C L J 444	508	47 C L J 545
293	...		110 I C 720		32 C W N 477		32 C W N 610
295	55 Cal 262	367	32 C W N 889		29 Cr L J 844		55 Cal 1305
	104 I C 764	368	32 C W N 835		111 I C 396	510	113 I C 22
296	47 C L J 369		55 Cal 1284	441	55 Cal 701	512	109 I C 25
	110 I C 49		110 I C 416		32 C W N 268	513	32 C W N 179
298	47 C L J 347	371	...		111 I C 340		107 I C 68
	109 I C 241	376	...	444	47 C L J 483	514	112 I C 649
299	47 C L J 365	378	32 C W N 44		32 C W N 673	516	32 C W N 1035
	107 I C 744		106 I C 309		10 A I Cr R 504	518	47 C L J 587
302	47 C L J 362	381	32 C W N 195		29 Cr L J 819		32 C W N 634
	109 I C 588		29 Cr L J 917		111 I C 323		55 Cal 1315
303	47 C L J 372		111 I C 725	446	47 C L J 452	522	32 C W N 421
	110 I C, 52	385	47 C L J 124		32 C W N 613		55 Cal 994
305 (1)	107 I C 746		32 C W N 241		108 I C 590		112 I C 706
305 (2)	107 I C 468	387	32 C W N 591		29 Cr L J 423	527	32 C W N 434
306	107 I C 723		29 Cr L J 361		10 A I Cr R 82		113 I C 9
307	55 Cal 482		108 I C 241		55 Cal 1077	531 (1)	48 C L J 54
	110 I C 283		10 A I Cr R 7	448	32 C W N 759		10 A I Cr R 565
309	47 C L J 471	388	32 C W N 132		108 I C 585		29 Cr L J 786
	10 A I Cr R 371		106 I C 875		55 Cal 1070		111 I C 114
	29 Cr L J 705	389	108 I C 46	450	47 C L J 315	531 (2)	...
	110 I C 449		32 C W N 1087		32 C W N 378	533	55 Cal 659
312	32 C W N 391	392	55 Cal 435		109 I C 618		111 I C 222
	113 I C 13		110 I C 368	456	32 C W N 413	535	55 Cal 653
315	55 Cal 355	396	107 I C 741		55 Cal 1057		111 I C 74
	32 C W N 184	397	32 C W N 507	459	47 C L J 436	537	55 Cal 712
	107 I C 81	399 (1)	108 I C 255		32 C W N 1023		111 I C 349
20	32 C W N 842	399 (2)	32 C W N 452		110 I C 60	539	109 I C 67
321	47 C L J 442		113 I C 18	462	32 C W N 114	542	...
	29 Cr L J 641	401	47 C L J 449		107 I C 65	544	55 Cal 646
	110 I C 97		29 Cr L J 638		55 Cal 777		111 I C 70
322	55 Cal 428		109 I C 910	464	32 C W N 576	546	32 C W N 867
	111 I C 276		10 A I Cr R 344		55 Cal 978		49 C L J 1
324	112 I C 901	402	107 I C 738		112 I C 712	548	55 Cal 676
325	55 Cal 506	405	107 I C 721	466	29 Cr L J 1093		111 I C 111
	110 I C 347	406	47 C L J 464		112 I C 677	549	32 C W N 640
328	32 C W N 303		110 I C 340	468	32 C W N 972	551	...
334	108 I C 44	408 (1)	108 I C 245		55 Cal 798	553	55 Cal 680
336	32 C W N 696	408 (2)	47 C L J 457		111 I C 708		111 I C 107
338	32 C W N 112		110 I C 338	472	...	556	...
	107 I C 67	410	47 C L J 460	474	108 I C 584	557	32 C W N 922
339	48 C L J 92		10 A I Cr R 414	475	108 I C 253	559	...
	32 C W N 1062		29 Cr L J 694	478	...	560	47 C L J 618
	10 A I Cr R 572		110 I C 326	479	55 Cal 464		112 I C 202
	111 I C 123	412	47 C L J 569		32 C W N 472	563	109 I C 296
	29 Cr L J 795		107 I C 747	481	32 C W N 535	565	32 C W N 646
341	47 C L J 467		55 Cal 892		55 Cal 1259		55 Cal 1008
	111 I C 430	416 (1)	108 I C 246	488	48 C L J 190		112 I C 721
343	108 I C 43	416 (2)	32 C W N 731		32 C W N 1091		32 C W N 1015
344	47 C L J 233		47 C L J 526	484	32 C W N 476	566SB	...
	32 C W N 275		10 A I Cr R 219		55 Cal 1206	569	48 C L J 90

A. I. R. 1928 Calcutta = Other Journals—(Concl'd.)

A.I.R.)Other Journals			A.I.R.)Other Journals			A.I.R.)Other Journals			A.I.R.)Other Journals		
569	11 A I Cr R	48	668	48 C L J	102	737	118 I C	87	820FB	...	...
	29 Cr L J	798	669	...		741	48 C L J	276	824	110 I C	871
	111 I C	126	670	55 Cal	908	743	32 C W N	515	825	...	...
570	109 I C	905		32 C W N	918		55 Cal	1281	826	110 I C	644
571	33 C W N	50		112 I C	496	745	33 C W N	58	827	48 C L J	477
574	47 C L J	608	675	55 Cal	858	748(1)	110 I C	448		113 I C	70
	111 I C	19		32 C W N	319	748(2)	48 C L J	546	828	...	...
576	112 I C	823		29 Cr L J	1022	749	110 I C	427	830	110 I C	638
577SB	32 C W N	691		112 I C	350	750	...		832	55 Cal	1266
	55 Cal	971	681	32 C W N	353	751	110 I C	445		32 C W N	940
	112 I C	732	684	32 C W N	870	752	...		835	...	...
579SB	32 C W N	757		110 I C	395	753(1)	32 C W N	1113	836	55 Cal	953
580	32 C W N	729	686	55 Cal	578	753(2)	...		837	111 I C	828
	110 I C	542		32 C W N	396	754	...			55 Cal	565
582	...			110 I C	404	756	32 C W N	854		32 C W N	287
584	109 I C	284	690	32 C W N	872	758	...			110 I C	124
	32 C W N	1163	691	48 C L J	339	759	33 C W N	193	840	32 C W N	608
	55 Cal	1181		33 C W N	79	761	55 Cal	957	841	...	...
586	112 I C	618	695	32 C W N	993		32 C W N	556	843	48 C L J	550
587SB	32 C W N	710		48 C L J	262		109 I C	315	844	55 Cal	1241
591	32 C W N	1170	697	47 C L J	611		...			32 C W N	665
593	109 I C	247		112 I C	197	763	...			32 C W N	1027
	55 Cal	1193	700	48 C L J	138	765	48 C L J	364	848	...	...
597	32 C W N	771		32 C W N	839	768	32 C W N	1060	850	111 I C	1
	55 Cal	1029	703(1)	32 C W N	843	769	48 C L J	473	852	...	...
	112 I C	180	703(2)	...			33 C W N	55	853	55 Cal	1167
600	55 Cal	730	705	48 C L J	279	771	...		854	32 C W N	580
	111 I C	543		112 I C	326	772	55 Cal	473		108 I C	883
606	...		706	...			32 C W N	10		48 C L J	581
609	32 C W N	427	709	47 C L J	595		106 I C	91	859	32 C W N	1107
	55 Cal	1053		109 I C	277	775	...		861	55 Cal	1312
	113 I C	105	713	...		776	...		862	110 I C	817
610FB	48 C L J	193	714	...		777FB	48 C L J	327	863	32 C W N	411
	32 C W N	1173	715	...			33 C W N	126	864	...	...
640FB	48 C L J	150	717	48 C L J	184	782FB	48 C L J	298	865	32 C W N	1084
	32 C W N	1130		32 C W N	828		33 C W N	15	868	32 C W N	778
	113 I C	49	720	48 C L J	28	786FB	33 C W N	21	870	32 C W N	1115
644	32 C W N	716		32 C W N	858	792	...		873	32 C W N	1082
645	55 Cal	791	722	...		794	55 Cal	918	874	48 C L J	347
	29 Cr L J	927	727	48 C L J	266		112 I C	508	876	32 C W N	1077
	111 I C	735		112 I C	369	804	...			32 C W N	1105
646SB	32 C W N	971	729FB	55 Cal	987	806	32 C W N	932	878	33 C W N	201
651	...			32 C W N	574	808	55 Cal	1355	879	48 C L J	97
653	48 C L J	148		112 I C	718	810	110 I C	571	880	32 C W N	587
	29 Cr L J	847	730	...		812	...			32 C W N	863
	111 I C	399	732	55 Cal	879		106 I C	542	882	32 C W N	1050
654	47 C L J	623		10 A I Cr R	456	814	...		885	32 C W N	208
	112 I C	225		29 Cr L J	823	815	48 C L J	288	887	32 C W N	1111
657	32 C W N	742		111 I C	327		33 C W N	174	891	32 C W N	1079
666	48 C L J	135	736	...		817FB	...		892	110 I C	521
	112 I C	458	737	55 Cal	808	819FB	32 C W N	1153	893		

Note—Cases not bearing parallel references against them are not reported elsewhere.

THE ALL INDIA REPORTER

1928 CALCUTTA

S. L. R. ALPHABETICAL INDEX

of Cases reported in

I. L. R. 55 CALCUTTA

WITH REFERENCES TO THE PAGES OF

The All India Reporter

[138 Cases]

Names of Parties	I.L.R. pp.	A.I.R. pp.
Abdul Alim Abed v. Abir Jan Bibi ...	1284	1928 C 368
Abdul Rahim v. Maidhar Gazi ...	1181	" " 584
Abdur Rahim v. Mahomed Barkat Ali ...	PC 519	" PC 16
Abinas Chandra Majhi v. Pratul Chandra Ghose ...	1017	" C 448
Aghore Nath Haldar v. Dwijapada Chatterjee ...	1266	" " 32
Ahamadar Rahman v. Dwip Chand Chowdhury ...	765	" " 281
Ambar Ali v. Piran Ali ...	826	" " 344
Ambika Ranjan Majumdar v. Manikgunge Loan Office, Ltd. ...	798	" " 468
Ariff G. H. C. v. Jadu Nath Majumdar ...	1090	1929 C 101
Aroth v. Craig Jute Mills, Ltd ...	1259	1928 C 481
Atarmoni Dasi v. Bepin Behari Dhur ...	1341	1929 C 193
Aurabinda Nath Tagore v. Manorama Debi ...	903	1928 C 670
Balmakunda Bisseswarlal v. B. N. Ry. Co., Ltd, ...	26	1927 C 652
Banerjee M. v. Anukul Chandra Mitra ...	85	" " 823
Banerjee S. N. v. H. S. Suhrawardy ...	473	1928 C 772
Bangshiram Mandal v. Prasannamoyi Debi ...	574	" " 166
Banka Behari Deb v. Birendra Nath Dutt ...	219	1927 C 850
Basanta Kumar Adak v. Khirode Chandra Ghose ...	616	1928 C 25
Benoy Krishna Mukherjee v. Satish Chandra Giri ...	PC 720	" PC 49
Bhagwan Singh v. Darbar Singh ...	PC 725	" " 96
Bharat Chandra Pal v. Gauranga Chandra Pal ...	545	1927 C 885
Bhodai Shaik v. Lakshminarayan Dutt ...	602	1928 C 116
Bhuban Chandra Pradhan v. Emperor ...	279	1927 C 628
Bir Bikram Kishore Manikya v. Ali Ahamad ...	758	1928 C 286
Bissessar Das Daga v. Vas ...	PC 230	" PC 27
Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co....	551	" C 148
Budhu Tatua v. Emperor ...	65	" " 183
Chaitram Sagormull v. Hardwari Mull & Co. ...	499	1927 C 853
Chandra Keshore Chakravarty v. Biseswar Pal ...	396	1928 C 216
Commercial Properties, Ltd., <i>In re</i> ...	1057	" " 456
Commissioner for the Port of Calcutta v. Suraj Mull Jalan ...	978	" " 464

Names of parties.		I.L.R.	pp.	A.I.R.	pp.
Corporation of Calcutta v. Asoke Kumar De	1231	1928	C 743
Corporation of Calcutta v. Shaikh Keamuddin	228	1927	C 802
Dasharathi Ghose v. Khondkar Abdul Hannan	624	1928	C 68
Debendra Nath Roy v. Kartic Prasad Das	1210	1929	C 68
Dhirendra Nath Deb v. Dharani Mohan Roy	1305	1928	C 508
Dibrugarh District Club, Ltd., <i>In re</i>	971	"	" 577
Dinanath Kundu v. Janaki Nath Roy	435	"	" 392
Durga Priya Chowdhury v. Durga Pada Roy	154	"	" 204
Durga Sankar Sarma Roy v. Kamini Kumar Sarma Roy	653	"	" 535
Efari Dasya v. Podie Dasya	482	1928	C 307
Emperor v. Ram Chandra Roy	879	"	" 732
Fazoo Mia v. Sultan Ahamad Choudhury	108	1927	C 817
Fuli Bibi v. Khokai Mondal	712	1928	C 537
Gangasagar Ananda Mohan Saha v. Commissioner of In-					
Come-Tax, Bengal	953	1928	C 836
Girimoni Dasi v. Tarini Charan Porel	538	1927	C 887
Gocool Chunder Law v. Jamal Biswas	680	1928	C 553
Gopeswar Sen v. Bejoy Chand Mahatab	1167	"	" 854
G. I. P. Ry. Co. v. Chakravarti Sons & Co,	142	"	" 170
—v. Jes Raj Patwari	132	"	" 65
Guran Ditta v. Ram Ditta	PC 944	"	PC 172
Harendra Kumar Roy Chowdhry v. Secretary of State	1355	1928	C 808
Harendra Nath Singha Ray v. Purna Chandra Goswami	164	"	" 199
Heeralal Agarwalla & Co. v. Joakim Nahapiet & Co., Ltd...	182	1927	C 647
Hemendra Nath Sen v. Emperor	1274	1929	C 192
Jabbar Ali Sardar v. Monmohan Pandey	1216	1929	C 110
Jatindra Nath Roy v. Nagendra Nath Roy	1153	1928	C 289
Jaynal Abedin v. Hyderali Khan Pani	701	"	" 441
Jewraj Khariwal v. Dayal Chand Jahury	783	"	" 211
Jogendra Lal Sarkar v. Mohesh Chandra Sadhu	1013	1929	C 22
Johurmull Bhutra v. Kedar Nath Bhutra	113	1927	C 714
Jugal Kishori Debi v. Baidya Nath Roy	608	"	" 952
Juran Mandal v. Ram Mandal	808	1928	C 737
Kamala Prosad Sukul v. Kishore Mohan Pramanik	666	1928	C 180
Kanai Lal Saha v. Makhan Lal Saha	836	"	" 237
Kadar Nath Mahato v. Emperor	FB 371	"	" 83
Keramat Ali v. Emperor	1312	"	" 862
Krishna Lal Sadhu v. Pramila Bala Dasi	1315	"	" 518
Lal Mohan Poddar v. Emperor	423	1927	C 724
Latifa Khatun v. Tofer Ali	201	"	" 902
Laxmi Industrial Bank, Ltd. v. Dinesh Chandra Roy			
Choudhury	1053	1928	C 609
License Inspector, Howrah Municipality v. Manager, Tar			
Mahammad & Co.	1206	"	" 484
Madan Gopal Daga v. Sachindra Nath Sen	262	1928	C 295
Madhu Molla v. Babonsa Karikar...	1008	"	" 565
Mahendra Nath Kamilya v. Khetra Mohan Bera	1193	"	" 593
Mahendra Nath Srimani v. Kailash Nath Das	841	1929	C 50

Names of Parties	I.L.R. pp.	A.I.R. pp.
Mahesh Chandra Sadhu v. Jogendra Lal Sarkar	... 512	1928 C 222
Mahim Chandra Roy v. A. H. Watson	... 1280	1929 C 191
Mahim Chandra Sarkar v. E. I. Ry. Co.	... 646	1928 C 544
Mahomed Yakub Miah Majumdar v. Namar Ali	... 104	1927 C 884
Mangobinda Dutta v. Boisogomoff	... 642n	1922 C 104
Manir Ahamed Chowdhury v. Jogesh Chandra Roy	... 1277	1929 C 195
Manmatha Nath Ghose v. Lachmi Debi	... 96	1928 C 60
Martand Rao v. Malhar Rao	... PC 403	" PC 10
Matangini Ghose v. Monmohini Ghose	... 392	" C 41
Mitchell, A. B. <i>Re</i> v. J. C. Dutt	... 173	" " 209
Monmatha Nath Mitra v. Rajeswar Ray Choudhuri	... 355	" " 315
Motilal v. Ujjar Singh	... PC 821	" PC 137
Muhammad Yusaf v. Ram Gobinda Ojha	... 91	" C 177
Muthiar Chettiar v. Chidambaran Chetty	... 578	" " 686
Nadiar Chand Guin v. Satis Chandra Sukal	... 638	1927 C 964
Nafar Chandra Pal Chaudhury v. Nur Ali	... 619	1928 C 496
Nepra v. Sayer Pramanik	... 67	1927 C 763
Nibaran Chandra Dhara Modak v. Kristo Mohan Kundu	... 1029	1928 C 597
Nirmala Sundari Dassi v. Deva Narayan Das Chowdhury	... 269	1927 C 868
Phanindra Krishna Dutt v. Pramatha Nath Malia	... 748	1928 C 421
Port Canning and Land Improvement Co., Ltd., v. Jogendra Mandal	... 659	" " 533
Promode Nath Sinha Roy v. Harishee Bagdhi	... 1084	1929 C 78
Puran Chand Nahatta v. Monmotho Nath Mukerji	... PC 532	1928 PC 38
Rajeswar Prosad Bhakat v. Anil Kumar Roy	... 35	1927 C 956
Ram Chandra Kapali v. Sadaya Chandra Raha	... 1351	1929 C 190
Ramesh Pada Mondal v. Kadambini Dassi	... 417	1927 C 702
Rameswar Prosad Kessur Prosad v. Bamapada Ghose & Sons	... 1292	1929 C 63
Ramgopal v. Dhanji Jadhavji Bhatia	... PC 1048	1928 PC 200
Ram Gopal Goenka v. Corporation of Calcutta	... 964	" C 207
Ram Gopal Goenka v. Narayan Das Chandra	... 1077	" " 446
Ram Saran Mandal v. Radha Raman Mandal	... 1067	1929 C 88
Ram Sundar Saha v. Raj Kumar Sen Chowdhury	... 285	1927 C 889
Rishee Case Law v. Golam Ali Mirdha	... 676	1928 C 548
Rohini Kumar Pal v. Kusum Kamini Pal	... 488	" " 196
Rukeya Banu v. Najira Banu	... 448	" " 130
Sadhu Kathalia v. Dharendra Nath Roy	... 590	1928 C 425
Sajjad Ahamad Chaudhury v. Trailakhya Nath Chaudhury	... 464	" " 479
Salam Chand Kannyram v. Joogul Kissore Ramdeo	... 777	" " 462
Saleh Mahomed Umer Dossal v. Nathoomal Kessamal	... PC 126	1927 PC 164
Sanjua Urao v. Matadin Agarwalla	... 428	1928 C 322
Sarat Chandra Mitra v. Charusila Dasi	... 918	" " 794
Sassoon & Sons, Ltd., v- International Banking Corporation	... PC 1	1927 PC 195
Satya Narain Mohata v. Emperor	... 858	1928 C 675
Secretary, Cantonment Committee, Barrackpore v. Satis Chandra Sen	... 340	1927 C 786
Secretary of State v. Breakwell & Co.	... 957	1928 C 761
_____ v. Parbati Charan Shaha	... PC 1037	" PC 193
_____ v. Sati Prasad Garga	... 1328	1929 C 197
Serajul Islam v. Emperor	... 794	1928 C 645
Shayk Abdul Karim v. Thakurdas Thakur	... 1241	" " 844

Names of Parties	I.L.R. pp.	A. I. R	pp.
Sheikh Salim v. Hajira Bibi	506	1928 C	325
Subhas Chandra Bose v. R Knight & Sons	1121	1929 C	69
Sudhir Chandra Dās v. Raseswari Chaudhurani	1110	" "	117
Surendra Kumar Roy Chowdhury v. Sushil Kumar Roy Chowdhury	249	1928 C	256
Surendra Nath Rath v. Sambhu Nath Dobey	210	1927 C	870
Susil Kumar Biswas v. Rajani Kanta Chakravarti	689	" "	737
Susila Kumar Choudhury v. Annada Prasanna Lahiri	78	" "	692
Swarna Manjuri Dassi v. Secretary of State	994	1928 C	522
Tarakeswar Das Gupta v. Ambica Charan Bhattacharjee... ..	892	1928 C	412
Titan Pramanik v. Chintan Pramanik	1190	1929 C	96
Tricumchand Dansing v. Chief Revenue Authority, Bengal	565	1928 C	837
Vernon Milward Bason, <i>In re</i>	987	1928 C	729
Victor Justin Walter v. Marie Josephine Walter	730	" "	600

LIST OF CASES OVERRULED AND REVERSED

A. I. R. 1928 CALCUTTA

Alimunissa v. Shama Charan, (1905) 32 Cal. 749=1 C. L. J. 176=9 C. W. N. 466.	Overruled in	A. I. R. 1928 Cal. 777 (F.B.).
Bholanath Hazra v. Emperor, (1927) 44 C. L. J. 541=28 Cr. L. J. 194 A. I. R. 1927 Cal. 242=99 I. C. 930.	"	A. I. R. 1928 Cal. 83 (F.B.).
Roshan Ali v. Emperor, (1927) 31 C. W. N. 1102=46 C. L. J. 160= A. I. R. 1927 Cal. 787=28 Cr. L. J. 889=104 I. C. 905.	"	A. I. R. 1928 Cal. 83 (F.B.).
Sukh Lal Karnani v. Official Assignee, Calcutta, (1921) 48 Cal. 1089=25 C. W. N. 750=A. I. R. 1921 Cal. 58=66 I. C. 715.	"	A. I. R. 1928 Cal. 786 (F.B.).
Surendra Narayan Singh v. Bijoya Sinha Dadhuria, (1925) 89 I. C. 785=30 C. W. N. 233=41 C. L. J. 527=A. I. R. 1925 Cal. 962=52 Cal. 655.	Reversed in	A. I. R. 1928 P.C. 234.

THE
ALL INDIA REPORTER
1928

CALCUTTA HIGH COURT

**** A. I. R. 1928 Calcutta 1**

RANKIN, C. J., AND C. C. GHOSE, J.

Imperial Tobacco Co.—Defendants—
Appellants.

v.

Albert Bonnan—Plaintiff—Respondent.

Appeal No. 45 of 1926, Decided on 21st January 1927, from the original civil suit decree of Pearson, J., D/- 25th January 1926. [Reported in A. I. R. 1926 Cal. 757.]

* (a) *Tort—Detention of goods by customs authorities — Indemnity given by opposite party—Action for damages lies by application in suit by opposite party—No separate suit lies.*

Instructions for the observance of customs officers published under authority of the Government of India in the Merchandise Marks Manual provide that if the "informant" is willing to give an indemnity bond the Collector, unless he is of opinion that there is clearly no reasonable cause for detention, will detain the goods for a month in order to allow of a suit being brought and if a suit is instituted will detain them until a final decision by the highest appellate Court to which the matter is taken. Such an indemnity bond is an undertaking to the Court and it does not amount to contract with the other party, nor does it ground any action at common law. It is to be enforced by application to the Court to which it was given and in the suit or proceeding in which it was given. The right to ask for an enquiry as to damages thereunder may be lost by delay but there is no rule that an enquiry must be asked for when the injunction is dissolved or when the suit is decided. Although the granting of an enquiry as to damages is a matter upon which the Court exercises its judicial discretion, it is not necessary that the party aggrieved by the interlocutory injunction should show that his opponent suppressed material facts or otherwise obtained the injunction by improper means. No limitation is provided by Indian Statute Law for such an application. Where plaintiff has brought an independent suit instead of an application,

the Court has jurisdiction to treat his suit as though it were an application made in the previous suit where both proceedings are in the same Court and have been dealt with by the same Judge. Where an independent suit is necessary a mere application may have to be dismissed; but where the plaintiff has adopted a more formal and elaborate procedure than he should have adopted in applying to the correct Court, no lack of jurisdiction is involved and the question becomes one of costs and of discretion: *Graham v. Campbell* (1871) 7 Ch. D. 490, *Ref.* [P 4 C 2, P 6 C 2]

(b) *Limitation Act, Art. 36—Goods detained by customs officer at defendant's request—Suit is governed by Art. 36 and not Art. 49.*

A suit for damages against defendant at whose instance plaintiff's goods were detained by customs authorities is governed by Art. 36 and not by Art. 49. [P 5 C 1]

(c) *Civil P. C., S. 95—Issue of injunction apart from want of probable cause gives no cause of action—Limitation Act, Art. 40.*

Apart from malice or want of probable cause, a plaintiff cannot recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights: [16 C. L. J. 34, *Diss.*]. If A maliciously and without probable cause brings a suit against B and without suppression of facts, misstatements or other improper means, obtains an interlocutory injunction, an action will not lie at common law for the damage done to his business by the injunction: [42 Cal. 550, *Foll.*] The granting of an injunction is a judicial act in the fullest sense: it is not a ministerial order or an order of course or mere process or a necessary incident of any particular jurisdiction. There is nothing in the second sub-S. of S. 95 of the Code or in Art. 40, Limitation Act, 1908, which is inconsistent with the above proposition.

[P 6 C 1, P 7 C 1, 2]

(d) *Tort—Damages claimable by virtue of undertaking of opposite party can be claimed if notice to or fraud by opposite party is shown.*

Damages to be paid by virtue of an undertaking are not necessarily confined to proximate and natural damages but may be enlarged either by reason that the opposite party had notice of all the circumstances or by reason

that the case is one for the giving of exemplary damages in view of fraud or malice. [P 8 C 1]

**** (e) Tort—Damages—Maliciously bringing a civil suit—Action may lie but not if the object is to defend one's own trade—Malicious prosecution—Civil P. C., S. 35-A.**

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is a question of the remoteness of the damage. The mere institution of the proceedings may, having regard to their character, involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case the bringing of an ordinary action however maliciously and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution. Injury to plaintiff's business is not a ground for maintaining such a suit. The second question is as to what is meant by malice. There is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him, provided that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. In some cases malice is postulated as an element, meaning thereby that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another but not as connoting personal enmity or spite or some other evil motive. *Wren v. Weild* (1869), 4 Q. B. 730 and *Sorrell v. Smith* (1925) A. C. 700, *Foll.*

[P 9 C 1, 2, P 10 C 1]

*** (f) Tort—Damages—Threats intended to wilfully injure trade—Action lies.**

Threats to litigate or threats to boycott are unlawful only where the purpose of the threat is "wilfully and ultraneously to injure the trade of another" as distinct from the purpose to forward one's trade: *Sorrell v. Smith* (1925) A. C. 700, *Foll.*

[P 11 C 2]

(g) Tort—Master and servant—False and malicious statements by servant—Master is liable.

A person is doubtless responsible for the statements of agent or servant acting within the scope of his authority, provided that they were false statements made maliciously or without lawful occasion.

[P 13 C 1]

**** (h) Tort—Slander of goods—Specific damage must be proved.**

To entitle plaintiffs for damages for slander of his goods proper particulars would have to be shown in each case, the loss of the particular customer or dealer to whom they were spoken or some other really specific damage flowing from the publication to him: *Leetham v. Rank* (1912) 57 S. J. 111, *Foll.* [P 13 C 1, 2]

Per C. C. Ghose, J.—In an action for damages for slander of goods the precise words complained of must be set out in the statement of claim. It is not sufficient to allege that the slanderer used such and such words or to that effect. Plaintiff must also prove (1) that the statement complained of was made of and concerning his goods; (2) that it was false; (3) that

it was published maliciously i. e., with the intention of injuring him and (4) that he has suffered special damage thereby. A trader is entitled to commend his own goods and state that they are better than the goods of another and if he does so, no action will lie against him, whatever damage may ensue from such statement. It is otherwise where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior in quality to his own, but goes further and makes an untrue statement of fact about his rival's goods; for example, where he states that they are rotten or unmerchantable. In such a case like this, an action on the case will lie, provided it can be proved that such statement was published maliciously and that special damage has ensued. It is not malice if the object of the trader is to push his own business. To make the act malicious it must be done with the direct object of injuring the other person's business. Therefore, the mere fact that it would injure that other person's business is no evidence of malice.

[P 17 C 2 ; P 18 C 1]

(i) Tort—Slander of goods.

In a case of slander of goods the burden of proof of falsity of the statements is on the plaintiff.

[P 14 C 2]

(j) Sea Customs Act, (1878)—Provisions are for protection of merchants as well as public—Customs officers can act on their own initiative (Ghose, J.)

The provisions under the Sea Customs Act are in some cases to be read with the provisions of the Indian Merchandise Marks Act (Act 4 of 1889), relating to false trade description and they are intended not only for the protection of manufacturers and merchants against the piracy of their marks, but also for the protection of the public against the supply of goods of an inferior or unknown quality under cover of a well-known brand. Under the Sea Customs Act, as amended by the Merchandise Marks Act, although ordinarily action thereunder is taken upon information received from the manufacturer or merchant aggrieved, there is nothing to prevent the customs officers from acting upon their own initiative.

[P 16 C 2]

L. P. E. Pugh and *W. W. K. Page*—for Appellants.

C. Bagram and *S. C. Mitter*—for Respondent.

Rankin, C. J.—This suit was instituted in January 1925 for the recovery of about seven and half lakhs of rupees as damages for a variety of acts done by the defendant company. It was stated in the plaint that no part of the cause of action arose before February 1922.

The plaintiff towards the end of 1921 bought a large quantity of Gold Flake cigarettes on the terms that they should not be sold in Great Britain. The goods were two years old, they were made up in packets or cartons of tin, and 25,000 cigarettes in their cartons were packed in a strong tin-lined case. This brand of

cigarettes is very well known as having originally been the manufacture of W. D. & H. O. Wills of Bristol whose successors in business are the British American Tobacco Company Limited. The goods so bought by the plaintiff had (under a temporary arrangement necessitated apparently by the war) been manufactured in America and were part of a very large number of cigarettes which had originally been intended for troops but which were now being disposed of. They had been manufactured by the British American Tobacco Company Limited itself and were thus genuine Gold Flake cigarettes and not counterfeit. The plaintiff bought them cheap at eight or nine shillings per thousand.

His case is that he contracted to buy 860 cases being $21\frac{1}{2}$ million cigarettes, that he disposed of some (apparently 194 cases) in Egypt and elsewhere, and that early in 1922 he came to India not merely to dispose of 666 cases already contracted for but also with a view to establish a continuing market in these war stocks of which further supplies in very large quantities were available or would become available.

Now "Gold Flake" cigarettes were and are sold in large quantities in India by the defendant company which is a "subsidiary" or "associated" company of the British American Tobacco Company Limited, the latter company holding at least 80 per cent of its shares. The defendant company had in 1910 acquired the business and trade-mark rights of the British American Tobacco Company Limited so far as India, Burma and Aden are concerned. For years it alone had been selling Gold Flake cigarettes in India and its price to dealers was Rs. 26 per thousand. It obtained its goods from the British American Tobacco Company in Great Britain though it had itself the right to manufacture. It sold fresh goods of British make taking back from dealers any unsold goods that were old and unlikely to be sound. It brought out its "Gold Flake" cigarettes not only in tin-lined cases but in sealed tins of fifty packets in such cases.

The plaintiff's venture was a very promising one. He could afford to sell at a price far below the defendant company's price of Rs. 36 per thousand. If he could dispose, at a start, of some 16

million cigarettes at Rs. 20 per thousand he would do very well for himself and if he could continue so to do he would do very well indeed. There were, however, at least two danger spots. So long as the public would regard his merchandise as good Gold Flake cigarettes they would prefer his article because of the price. But old cigarettes do not "stand up to the monsoon" so well as might be wished and when once the tin-lined case was opened, if not before, there was certain to be deterioration after June. That was one risk. The second was this. It was all very well to throw the defendant company out of the Indian market despite their purchase of the Gold Flake trade-mark and business but the defendant company might conceive themselves entitled to object and this might mean litigation. How far either of these risks had been considered by the plaintiff in advance it is difficult to say. Whether they were considered in combination I do not know at all.

The venture began well. The plaintiff having arrived in Bombay on the 7th February 1922 with samples sold no less than 220 cases to a Bombay firm Messrs Irani Hormuz Sheriar & Company at Rs. 23-8-0 per thousand. His counsel on this appeal has referred to the correspondence passing between the offices of the defendant company at Calcutta and Bombay and between them and their London advisers as showing that he was "tearing their trade in Gold Flake cigarettes to shreds." It seems to me that at first the defendant company's advisers in India did not appreciate this partly because they thought the goods would not last but in fact it is clear that the matter was one of great importance to the defendant company. Mr. Abbott's letter of 15th March, Mr. Macnaghten's cable received on 5th April and the cable of 10th April (which has been ruled out by the learned Judge for reasons which I do not appreciate) show what happened. The company's solicitors in India did not think they could do anything. Mr. Macnaghten in England advised that they could. He knew all about the defendant company's trade-marks and in a matter of this sort and of this importance it was most reasonable to take advice in London. It was after all a question of trade-mark law and Mr. Macnaghten was their legal adviser. It seems idle to suggest that the

plaintiff has a grievance because the defendant company took advice from him.

The defendant company decided to take steps to establish that the plaintiff's scheme was an invasion of their rights. They thought it wise to take a formal assignment of the marks by way of perfecting their equitable title under the indenture of 1910 and this was not completed till the 10th May 1922. Meanwhile they applied under the Sea Customs Act to the Collector of Customs at Calcutta and at Bombay on 12th April and 1st May. The applications are in evidence and state that the goods are liable to confiscation because

we consider that the importation of the above goods into India is an infringement of our trade-mark.

Indemnity bonds were given to the Collectors in the usual course and letters written to the plaintiff asking for an assurance that the goods would not be sold in India and threatening legal proceedings to restrain this. Matters really stood over to abide the result of an interview between the plaintiff and the defendant company's directors which took place on the 8th May. Suits were filed by the defendant company in Calcutta on 11th May and in Bombay on 22nd May. On 2nd May 1922 the Collector of Customs at Bombay ordered the detention of the goods till 1st June as the defendant company said there was an infringement of their trade-mark and in order to enable them to file a suit. On the 3rd May plaintiff's solicitors objected and after taking advice from the Government law officer the Collector released the goods by his letter of the 5th May.

The Collector of Customs, Calcutta, did nothing till 22nd April when he wrote to the clearing agents Samuel Fitze and Company asking what they had to say. On 11th May an interim injunction had been obtained from the Court. From an order recorded by the Collector upon another matter—the assessment of the plaintiff's cigarettes for duty—we know exactly how he dealt with the case. He was under no misapprehension as to the fact that the plaintiff's goods had been manufactured by the British American Tobacco Company and were in that, the ordinary sense, genuine, but he thought there was a *prima facie* case for holding that the trade-mark imported that the goods were the defend-

ant company's and that accordingly its use by other dealers was pro tanto a counterfeit. This contention is certainly far-fetched and indeed erroneous and that the goods were not really within the provisions of the Sea Customs Act, S. 18, at all. The relevant clause speaks of goods having applied thereto a counterfeit trade-mark within the meaning of the Indian Penal Code or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889.

Any detention in Calcutta after 11th May was by virtue of the interim injunction of that date. The detention under the Sea Customs Act was from 1st to (say) 7th May in Bombay and from 12th April to 11th May in Calcutta.

The chief importance of this matter lies in the fact that the learned Judge thinks that the defendant company, in applying for detention of these goods under the Sea Customs Act, were acting maliciously. It is clear that the facts as to the origin of the goods were made quite clear to the Collectors of Customs and were not in any wise misstated in either application, both of which gave as the ground "infringement of our trade-mark rights." But it is said that if one looks at Cl. (d), S. 18 of the Act it is apparent that the defendant company were maliciously accusing the plaintiff of a criminal offence and fraud, and were asking for a detention to which they knew they had no right.

It is desirable to add that there do not appear to be any regulations under S. 19-A, Sea Customs Act, but proceedings of the character now in question are governed in practice by certain "instructions for the observance" of Customs officers published under authority of the Government of India in the Merchandise Marks Manual.

As I read these instructions they provide that if the "informant" is willing to give an indemnity bond the Collector, unless he is of opinion that there is clearly no reasonable cause for detention, will detain the goods for a month in order to allow of a suit being brought and if a suit is instituted will detain them until a final decision by the highest appellate Court to which the matter is taken.

The learned Judge has held that the plaintiff cannot now recover damages against the defendant company for the detention of his goods by the Collectors of Customs at Bombay or Calcutta. In his

opinion Art. 36, Limitation Act, applies and Art. 48 does not apply. S. 24, Limitation Act does not assist the plaintiff here if only because it is impossible to hold that the special damage flowing from these detentions in May and June 1922 did not result before the end of that year. The only contention therefore which need be referred to is that urged upon us by the plaintiff's counsel that Art. 49 applies because though the detention was by the Collectors nevertheless the defendant company moved them to detain and are responsible for the detention as for their own act. In my opinion this argument fails whether as construction of Art. 49 or otherwise. It is quite true that

all persons in trespass who aid or counsel, direct or join are joint trespassers: *Petrie v. Lamont* (1).

but the wrong done by the Collectors here is that being lawfully in possession of the plaintiff's goods they wrongfully i. e. contrary to their duty refused to deliver possession to him and so their possession became unlawful. This is what is contemplated by the concluding words of the first and third columns of Art. 49. But this cannot possibly be predicated of the defendant company who never had possession of the goods. I think, therefore, that the learned Judge was right in holding that this cause of action is time barred under Art. 36.

The defendant company filed two suits against the plaintiff one in this Court and one in the High Court of Bombay. The Calcutta suit was filed on 11th May 1922 and an interim injunction was on that day obtained ex parte from Mr. Justice Greaves restraining the plaintiff from removing from bond or dealing with 100 cases lying with the Customs. The defendant company gave an undertaking in damages. On the 8th June the motion for an interlocutory injunction was disposed of in the presence of both parties. The plaintiff undertook to deposit Rs. 20,000 (less certain charges) on fixed deposit in the Alliance Bank and the interim injunction was dissolved. There is no suggestion of any false statement or suppression made by the defendant company on this occasion. Indeed on asking to be referred to the affidavits I am informed that they were not even put in evidence in the present case. The suit

came on for hearing promptly. It was heard by the same learned Judge whose decree in this case is now under appeal and was dismissed by him on 18th July 1922. An appeal to this Court was dismissed on 10th April 1923: *Imperial Tobacco Co. v. Albert Bonnan* (2), and an appeal to His Majesty in Council shared the same fate on 15th May 1924 *Imperial Tobacco Co. v. Albert Bonnan* (3).

The suit in Bombay was filed on 22nd May 1922 and notice of motion for an injunction was given for 2nd June. It was heard on 19th June, that is, after the injunction given in Calcutta had been dissolved. On the 19th June the matter was settled by cross-undertakings. The plaintiff undertook pending the hearing not to sell any cigarettes then in Bombay or to arrive in Bombay and the defendant company undertook in damages. The plaintiff's undertaking not to sell was discontinued by order of the Court on 2nd August 1922 (soon after the Calcutta suit had been dismissed by the trial Judge) on his agreeing to keep an account, and this undertaking to keep an account came to an end by order of 20th September 1923 (by which time the appeal in Calcutta had been dismissed). The suit was abiding the result of the Calcutta case and the appeals therein, and was dismissed on 10th November 1924 after the decision of the Privy Council in that case.

The plaintiff says that these suits were brought maliciously and without probable cause and that he is entitled to damages accordingly; including, as I understand, damages for the harm done to his business by the litigation which discouraged dealers from buying goods which might land them in trouble. He says further that in this suit, and apart altogether from the defendant company's undertakings in damages, he can in these circumstances recover damages in respect of the Calcutta injunction and of his own undertaking not to sell given to the Bombay Court. It has further been maintained on his behalf more particularly on the authority of *Bhut Nath v. Chandra Binode* (4) that so far as the Calcutta injunction is concerned, the obtaining of it was an act in the nature of trespass to property and it is not necessary for the

(2) A. I. R. 1924 Cal. 216=50 Cal. 762.

(3) A. I. R. 1924 P. C. 187=51 Cal. 892=51 I. A. 269 (P. C.).

(4) [1912] 16 C. L. J. 34=16 I. C. 448.

(1) [1842] Car. & Marsh 96.

plaintiff to prove malice or any want of probable cause.

At least two of these contentions appear to me to be wrong. The plaintiff has (if he has not lost it by delay) the right to apply to the High Court of Bombay to give him damages pursuant to the cross-undertakings given to that Court on 19th June 1922. In no other way can he get damages for carrying out his own undertaking whether the suit was or was not malicious or an abuse of process. I agree entirely on this point with the learned Judge.

That, apart from malice or want of probable cause, a plaintiff can recover damages in an independent suit (and apart from any undertaking given by the defendant) upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights—this too is a proposition I dissent from. It is to be found in the case cited but it proceeds upon a misunderstanding of such cases as *Clissold v. Cratchley* (5) which are cases where trespass was committed and the defendant unsuccessfully set up as his justification an order of the Court which was disregarded because it was irregularly obtained by the defendant. To speak of an injunction as on a par with such a case as being an act

in the nature of trespass to property, is merely to obscure matters by a false analogy or else to beg the question. S. 95, Civil P. C., is rendered almost absurd by such a doctrine.

On the 11th May 1922 when the interim injunction was obtained in Calcutta restraining the plaintiff from removing from bond or selling or disposing of 100 cases of cigarettes then lying with the Customs, the defendant company gave an express undertaking in damages. This was an undertaking to the Court and the character of such an undertaking has been discussed in the case of *Smith v. Day* (6). It is not such an undertaking as amounts to contract with the other party, nor does it ground any action at common law. It is to be enforced by application to the Court to which it was given and in the suit or proceeding in which it was given. The right to ask for an enquiry as to damages

thereunder may be lost by delay but there is no rule that an enquiry must be asked for when the injunction is dissolved or when the suit is decided: *Ex parte Hall* (7). It is clear now that although the granting of an enquiry as to damages is a matter upon which the Court exercises its judicial discretion, it is not necessary that the party aggrieved by the interlocutory injunction should show that his opponent suppressed material facts or otherwise obtained the injunction by improper means: *Griffith v. Blake* (8). In the present case the plaintiff before taking action waited until the defendant company's appeal has been disposed of by the Privy Council but he commenced this suit promptly thereafter. This in substance satisfies the general rule that the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted: see *Ex parte Hall* (7).

No limitation is provided by Indian statute law for an application to enforce an undertaking given to the Court. It is, I think, clear that the plaintiff has brought an independent suit when for this purpose he should not have done so but this Court has jurisdiction to treat his suit as though it were an application made in the previous suit since it happens that both proceedings are in the same Court and have been dealt with by the same Judge. Where an independent suit is necessary a mere application may have to be dismissed; but where the plaintiff has adopted a more formal and elaborate procedure than he should have adopted in applying to the correct Court, no lack of jurisdiction is involved and the question becomes one of costs and of discretion. If the plaintiff had launched an application in the previous suit and asked that it should stand for hearing until the matter had been finally decided in appeal, he would have taken a very reasonable course. I consider also that in this case an enquiry as to damages could not have been refused as there is every reason to think that the interlocutory injunction would interfere with his chance to sell his cigarettes. [cf. *Graham v. Campbell* (9).]

For these reasons it hardly appears to be necessary for the decision of this case

(5) [1910] 2 K. B. 244=79 L. J. K. B. 685=102 L. T. 520=54 S. J. 442=26 T. L. R. 409.

(6) [1888] 21 Ch. D. 421=81 W. R. 187.

(7) [1888] 23 Ch. D. 644.

(8) [1884] 27 Ch. D. 474=53 L. J. Ch. 965=51 L. T. 274=32 W. R. 833.

(9) [1877] 7 Ch. D. 490=47 L. J. Ch. 229=26 W. R. 336=38 L. T. 195.

that we should discuss the proposition that if *A* maliciously and without probable cause brings a suit against *B* and without suppression of facts, misstatements or other improper means, obtains an interlocutory injunction, an action will lie at common law for the damage done to his business by the injunction. But I think it right to say that this proposition is one to which I refuse assent. I respectfully agree with the observations of Fletcher J. in *Mohini Mohan v. Surendra Narain* (10) and with the decision in that case. It is the duty of a Judge before granting an injunction to satisfy himself that the plaintiff is not without reasonable and probable cause—indeed to satisfy himself, that it will stand a "higher test. Unless the malice of the plaintiff results in some form of misstatement or leads the plaintiff to suppress some fact or facts—it was his duty to lay before the Court—I have much difficulty in seeing how the granting of the injunction is causally related to the plaintiff's act or state of mind. The present case is probably unique in that no attempt is made to prove what was laid before the Court or that it contained any element of falsity. The granting of an injunction is a judicial act in the fullest sense: it is not a ministerial order or an order of course or mesne process or a necessary incident of any particular jurisdiction. The *Quartz Hill* case (11) is not really directed to the present question but to the question whether a plaintiff has a cause of action from the mere bringing of a suit or other proceeding. I observe that in one well-known text book (*Clerk and Lindsell on Torts 7th edn. p. 654*) it is suggested that the observations in that case (at p. 684) made by Brett M. R. show that in no case can a person who has maliciously and unreasonably set the law in motion absolve himself from the consequences which he invited and brought to pass, by the suggestion that their immediate cause was a mistake on the part of the Judge. On this view doubt is thrown upon *Daniels v. Fielding* (12). A careful perusal of the learned Judge's argument in criticism of what Martin B. said

(10) [1914] 42 Cal. 550=21 C. L. J. 68=26 I. C. 296=18 C. W. N. 1189.

(11) [1888] 11 Q. B. D. 674=52 L. J. Q. B. 488=31 W. R. 668=49 L. T. 249.

(12) [1846] 16 M. & W. 200=16 L. J. Ex. 153=10 Jur. 1061=4 D. & L. 329.

in *Johnson v. Emerson* (13) leads me to think that this is a misunderstanding of what he said. His point is that damage to credit results from the mere present action of a bankruptcy petition and that Martin B. has failed to notice this special feature of that kind of petition. Of the proposition imputed to him I think it quite likely that he would have thought as of Martin B's doctrine—its fault is that it is too large.

There is nothing in the second subsection of S. 95 of the Code or in Art. 40, Sch. 1, Limitation Act 1908, which is inconsistent with what I have already said. These indeed are curious places in which to expect to find the law as to the conditions upon which a suit for damages caused by an injunction is sustainable, and it cannot be disputed that upon some conditions such a suit is competent as where an injunction has been procured by fraud.

For reasons already given I think, however, that it is within our power to make an order such as would have been more properly asked for by an application in a previous suit. But as a large body of evidence has been taken in this case and as the plaintiff has sought the judgment of the Court as to the amount of damages to which he is entitled, I propose that in ordering the inquiry this Court should give a decision upon one important matter for the guidance of the officer conducting the inquiry. I refer here to the question whether or not the plaintiff can, as part of the damages caused by the injunction, recover damages for loss caused to him by the cancellation of two contracts for the purchase of cigarettes from Messrs. Venis and Company. In para. 18 of the plaint the plaintiff says that the Army & Canteen Board cancelled 258 cases of cigarettes by reason of which he was put to a loss of Rs. 1,09,549. In para. 16 he says that 160 cases, portion of 220 cases which he had contracted to sell in Bombay have not been shipped to India, but in Ex. O. as the summary of his claim which the learned Judge has acted upon, he definitely states of these 160 cases also that they were cancelled by sellers in England. Now it appears that the cancellations relied upon are cancellations made by the plaintiff himself and not by his sellers. On the

(13) [1871] 6 Ex. 329=40 L. J. Ex. 201=25 L. T. 397.

17th May 1922, he wrote to Messrs. Venis and Company:

Regarding my order of the 21th December for five million cigarettes, I very much regret to inform you that owing to an injunction served upon me by Messrs. Imperial Tobacco Co. of India Ltd. here, which restrains me from importing these goods, I shall not be able to take delivery of the cigarettes and therefore please cancel same and oblige.

On the 6th June 1922 he wrote to Messrs. Venis and Co.

I am in receipt of your letter of the 16th May for which I thank you. I note that you can still make arrangements for the delivery of the goods. But I regret to inform you that owing to an injunction brought against me by the Imperial Tobacco Co. in India, I am restrained from importing these goods and they have commenced proceedings against me. Therefore I regret I cannot accept your kind proposition. Thanking you for the same.

This is said to refer to six million cigarettes. Now the Calcutta injunction was granted ex parte on the 11th May and referred only to 100 cases then lying with the Customs. The injunction was dissolved on the 8th June. As I understand the reasoning of Brett L. J. in *Smith v. Day* (7) damages to be paid by virtue of an undertaking are not necessarily confined to proximate and natural damages but may be enlarged either by reason that the opposite party had notice of all the circumstances or by reason that the case is one for the giving of exemplary damages in view of fraud or malice. But it is to my mind reasonably clear that in respect of neither cancellation was the plaintiff's conduct rendered reasonable by the ex parte injunction; as to the 100 cases in Calcutta, the plaintiff did not even wait to see what view the Court would take when he appeared to put his case before it. The Court in fact dissolved the injunction on the 8th June. The plaintiff's conduct may well have been reasonable in the sense that he now saw that he was involved in litigation about questions of "trade mark" law or by reason of the fact that he was not prepared to peril too much upon his chances of success. His claim that the contracts were cancelled against him is anything but candid, and I am of opinion that this matter ought not to be canvassed again at the enquiry which we direct. It is upon this condition only that I am prepared to direct such enquiry.

I turn now to consider whether the plaintiff is entitled to damages by reason of the mere bringing and prosecution of

the suits in Calcutta and Bombay. I do not doubt that the existence of this litigation came readily and quickly to the notice of the trade. I do not doubt that the agents of the defendant company informed their customers in the trade and the persons whom they employed to canvass for orders, of the facts that they had started these proceedings. I do not doubt either that some dealers refused to buy the plaintiff's goods because they did not wish to offend the defendant company; others because the defendant company would refuse to deal with them or to deal with them on the same favourable terms as before; others because they anticipated that they too might become involved in litigation if they dealt in plaintiff's goods; others again because they were definitely informed that the defendant company were prepared to assert their rights to prevent the plaintiff's cigarettes being sold in India by bringing whatever suits were necessary to establish and enforce their alleged right. The learned Judge has held

that the defendant company made full use of the litigation in Bombay and Calcutta with its attendant threat of trouble to others as an obstruction to the plaintiff and as a deterrent.

He has further held that the suits were throughout designed as a disparagement of the plaintiff's goods and an obstruction to the unfettered exercise of his rights as a trader, of which I have no doubt the company made the fullest use the whole time of the litigation lasted and whenever occasion so required.

These observations of the learned Judge are to be coupled with his finding that the defendant company were actuated by malice and that their case had no reasonable or probable cause.

These findings taken broadly make an impressive case of hardship and oppression. It is, however, necessary to remember that while the plaintiff might have been well entitled to seize the opportunity afforded by the existence of war stocks, to drive the defendant company out of the market, he was not in law entitled to rely upon the defendant's passivity in the face of his laudable endeavour; the defendant company were certainly entitled, if they chose, to protect themselves by refusing to deal at all with any person who sold the plaintiff's goods. This complaint may be put upon one side. The rest of this formidable indictment may, I think, be examined under two heads. The first head is the bringing of the suits; the second is the ques-

tion of threats. As regards the bringing of the suits I think the relevant authorities are *Savile v. Roberts* (14) and the *Quartz Hill* case (11) already cited to which I would add *Wren v. Weild* (15); *Pitt v. Donovan* (16). The recent case of *Sorrell v. Smith* (17), although the immediate subject-matter is illegal combination or conspiracy, is I think particularly valuable because it takes account of the right of a rival trader to forward or defend his trade and it examines the notion of malice in connexion therewith.

Where damages are sought for the mere bringing and prosecution of a civil suit two main questions emerge. The first question is the leading element in the *Quartz Hill* case (11). That question is a question of the remoteness of the damage. The mere institution of the proceedings may, having regard to their character, involve damage to credit or reputation, damage to property in the sense that the defendant is put to expense, or damage to the person in the sense that he is liable to arrest. In such cases that damage is not remote but in any ordinary case

the broad cannon is true, that in the present day and according to our present law, the bringing of an ordinary action, however maliciously and however great the want of reasonable and proper cause, will not support a subsequent action for malicious prosecution. The counsel for the plaintiff company have argued this case with great ability but they could not point to a single instance since. Westminster Hall began to be the seat of justice, in which an ordinary action similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause. *Quartz v. Hill* case (11).

Lord Bowen in saying this had clearly before his mind that incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; and Brett, M. R., in deciding that a petition to wind up a company was within the exception mentioned in *Savile v. Roberts* (14), stated:

the present case is reduced to this question namely: Is a petition to wind up a company more like an action charging fraud or more like a bankruptcy petition.

If injury to the fair fame of a person is not for this purpose a consequence of

(14) [1697] 1 Ld. Raym. 374.

(15) [1869] 4 Q. B. 730 (731)=10 B. & S. 51=

83 L. J. Q. B. 327=20 L. T. 1007.

(16) [1813] 1 M. & S. 639=14 R.R. 535.

(17) [1925] A. C. 700.

an action charging fraud, it is impossible to contend that injury to his business is, in such a case as the present, a consequence of the mere bringing of the suit.

The second question which arises in cases of this sort is as to what is meant by malice. When we turn from criminal prosecutions to civil cases special consideration is here necessary. A prosecutor has no right to employ the process of the criminal Court save for the purpose of vindicating public order and justice. If there is no reasonableness in his charge that of itself raises at least a suggestion that he is acting from some other motive and that he is serving some private end in an oblique and improper manner. This may be mere spite or it may be something quite different, such as the desire, by abuse of the criminal process, to obtain money or other properties or to induce the person prosecuted to come to a compromise. Now in a civil suit the obtaining of money or property or the assertion of valuable rights is the declared object of the plaintiff. He is entitled, if he thinks that he has chances of success, to put the matter to the test and in this way it is daily experience that Courts of law are invited to do things which it would be most unreasonable for them to do. When two people are competing for the same market success on the part of the one necessarily involves injury to the other except indeed the market be capable of expansion so as to admit them both. Holt, C. J., in *Savile v. Roberts* (14), in dealing with the second "objection," gives this answer:

There is a great difference between the suing of an action maliciously and the indicting of a man maliciously. When a man sues an action he claims a right to himself, or complains of an injury done to him; and if a man fancies he has a right, he may sue an action If the law will permit a man to make a false claim out of a Court of justice (i. e. outside a Court of justice) a fortiori when he proceeds to assert his right in a legal course.

In *Wren v. Weild* (15) Blackburn, J., stated

that an action may be brought under such circumstances as to render it morally wrong and injurious in fact is certain, though the authorities leave it in doubt whether, under any circumstances, the person so sued can recover damages for the vexation and annoyance caused to him by the false suit.

He refers to the case reported in Maynard's Long Quinto

that for bringing a suit manifestly wrongful, to the defendant's own knowledge, an action might be maintained.

He refers to a case of *Sir G. Gerard v. Dickenson* (18) where the defendant had brought a suit alleging against her own knowledge that a certain lease, which was a forgery and which she knew was a forgery gave her title to the land. It is clear from his judgment that the furthest limit to which Blackburn, J., was prepared to go was that if a man sue me in a proper Court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice.

The case before him was one in which the defendant had warned persons who had purchased or were intending to purchase machines from the plaintiff, that the machines sold by the plaintiff were infringements of the defendant's patents and that if they used the machines he would claim royalties and should take legal proceedings. The actual decision was as follows :

If, therefore, the plaintiffs had given evidence, on which the jury might properly find that the defendant made the communication to the intended purchasers mala fide, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiff; or on which the jury might have properly found that the defendant did not (to use Lord Holt's phrase) so much as fancy he had a right, but as Lord Hobart says, knew certainly that his claim was utterly without ground of truth, we are inclined to think that it would have been proper to leave that evidence to the jury in support of the plaintiff's allegation that the defendant's letter was false and malicious.

In the judgment of Lord Cave, L. C., in *Sorrell v. Smith* (17), it is stated in effect that there is some authority for the view that it is actionable for one person wilfully to injure a man in his trade if damage results to him. This, however, is guarded by a proviso to the effect that if the real purpose is not to injure another, but to forward or defend one's own trade, then no wrong is committed and no action will lie, although damage to another ensues. Of malice the Lord Chancellor stated this :

In some cases malice is postulated as an element in the tort which I am considering. If the word means only that the act complained of is wilfully and knowingly done, or that it is done for the purpose of injuring another, then it is rightly used in this connexion. But there is a tendency to interpret malice as connoting personal enmity or spite or some other evil

motive, and as such a motive is neither an essential element in the offence nor conclusive of the offence having been committed, it seems better to forgo the use of the word.

I propose, in view of these authorities to consider in the light of the judgment of the learned Judge whether the defendants' suit was brought with the knowledge that it had no chance of success and for purposes other than the purpose of endeavouring to establish in Courts of law that the defendant company had the right to object to the plaintiff's importations and whether the defendant company's desire was to injure the trade of the plaintiff as distinct from the desire to forward or defend its own trade. It is suggested that the defendant company's case was essentially absurd because the plaintiff company's cigarettes had been made in America by the successors of W. D. and H. O. Wills of Bristol. Two cases have been cited to us which I think dispose of this contention : *Imperial Tobacco Company (Newfoundland) Ltd. v. Duffy* (19) and *Dunlop Rubber Co. v. Booth* (20). It is necessary, therefore, to see whether it can be imputed to the defendant company that their superior officers were well aware that they had no case for claiming that their assignment of all the Indian rights in the Will's trade-mark should carry a similar consequence. It cannot I think be contended on a perusal of the proceedings at the trial or in appeal that the defendant company were treated by the Courts as persons advancing an idle claim. The case offered no little scope for dispute upon the principles of law applicable. Nor was it one in which the careful sifting of somewhat numerous and complicated considerations was unnecessary. The learned Judge who tried the case gave a very clear analysis of the whole matter, but I do not find in his judgment dismissing the suit an indication that he found the decision of it to be noticeably free from difficulty. In matters of trade-mark law the directors of a company are necessarily in the hands of their legal advisers. In this case they had received from the solicitors in India advice to the effect that the law was against them. Their legal experts in London took another view for the reason, as I think that they failed fully to appreciate the con-

(19) [1918] A. C. 181=87 L. J. P. C. 50=35 R. P. C. 12=118 L. T. 259.

(20) 43 Patent Cases 139.

sequences in India of the lack of statutory title to a trade-mark. These consequences have in the course of the case worked out with reference to S. 22, Trade-marks Act, 1905 which authorizes the "splitting up" of a trade-mark territorially. In any view the burden of proof lies heavily upon the plaintiff to show that the defendant company were persuaded that Mr Macnaghten was wrong and the Indian solicitors were right.

In deciding appeal to the Courts of law they must have known not merely that they were committing themselves to some expense, but that they were taking the risk of an adverse decision which might affect them seriously in future. If the learned Judge has meant to find that the defendant company throughout the whole history of the litigation was intentionally riding for a fall, that they were not really endeavouring or hoping to establish by a judicial decision the right which they claim, but well knowing that they would ultimately lose, brought the actions for the sole purpose of obstructing plaintiff in the exercising of rights which they know to be his, I respectfully differ from his conclusion. It certainly was, not merely the object, but the declared purpose of the defendant company to prevent the plaintiff from selling these cigarettes in India. The plaintiff had at least several opportunities for considering whether the case made against him was transparently hollow. One was when he gave his undertaking to the Bombay High Court: another was when he decided to cancel the two contracts with Venis & Co already mentioned. I do not know what transpired on the 8th June 1922 before Mr. Justice Greaves, but his order puts the plaintiff upon terms as to making a deposit with the Alliance Bank as a condition of dissolving the ex-parte injunction. I will assume for the present purpose that in applying to the Collector of Customs the directors acted mala fide in the sense that they claimed a relief to which they knew that they had no right. Even so it is a different question whether, in taking steps to approach a Court of law for the decision of their claim, they knew that they had no right whatever or were merely suing to serve an oblique and improper purpose. The plaintiff has in my opinion wholly failed to show that either suit was brought

mala fide, without belief that the defendant company had any reasonable cause or from oblique motives other than a motive to make their case good in furtherance of their own trade interests. I do not see that their case, though it turned out to be bad and has been overruled for reasons which I do not presume to challenge, was in any way such as to make it wrong or unreasonable for them to lay it before the Court.

With regard to the allegation that the defendant company maliciously threatened to harass the plaintiffs' customers with vexatious litigation, I do not know what threats in particular, if any, the learned Judge has considered to be proved, and I fail to find this allegation in the plaint. It appears to me that what I have already said is sufficient to dispose of any question as to threats, whether threats to litigate or threats to boycott, as such threats are unlawful only where the purpose of the threat is wilful and ultraneously to injure the trade of another

as distinct from the purpose to forward one's trade: *Sorrell v. Smith* (17).

The plaintiff further claims damages for what is sometimes shortly called "slander of goods," i. e. for statements false, made maliciously or without lawful occasion, and causing him special damage.

Paragraph 11 of the plaint pleads this cause of action as follows:

The defendant company through its officers, servants and agents throughout India rumoured and caused to be rumoured and circulated statements to the effect that the Gold Flake cigarettes imported by the plaintiff were inferior in quality and otherwise than they represented to be, and they were otherwise than in a sound and good merchantable condition and that they were inferior to those sold by the defendant company, that they were not genuine Gold Flake cigarettes, and that the plaintiff had no right to import and sell them as such.

The allegation of special damage refers to all the other grievances as well as to this, viz. the injunction, the detention by the customs, and two suits etc. Para 12 states:

By reason of the aforesaid conduct and acts of the defendant company, its servants, agents etc., the plaintiff failed to find a market for the cigarettes imported and arranged by him to be imported into India, and agents and dealers refused to purchase and sell or advertise or expose for sale the said cigarettes imported by the plaintiff as aforesaid with the result that by reason of the said wrongful and malicious acts and conduct of the defendant company, the

plaintiff was put to considerable loss and expenses particulars whereof are hereinafter set out.

Speaking roughly the special damage for which he claims is his whole loss by reason of the failure of his venture.

The pleadings disclose no particulars of the time when, person to whom, or by whom the alleged "rumours" were set on foot; in fact no particulars of publication whatsoever nor any specific statement what on any occasion was actually said. No particulars were applied for.

The trial took place in November and December 1925. In July 1925 the plaintiff examined one witness on commission in Bombay, and in August 1925 another before this Court *de bene esse*. From the evidence of the former, Merwan Hornfusi Irani, the defendant company got before trial notice of two occasions on which slander of goods was said to have been uttered. In the evidence of the latter (a dismissed servant of the defendant company called Carr) I cannot see that there is any indication of or reference to any slander now relied upon or anything else that looks like slander of goods. The defendant company, in August, examined *de bene esse* Mr. Abbott, their Chairman, and I see in his cross-examination no reference to any other slanders uttered by him or in his presence save a reference to one of the two occasions already mentioned. The witnesses examined by the defendant company in July on commission in Bombay are asked nothing about slanders.

• At the hearing in December 1925 the plaintiff called nine witnesses including himself. The plaintiff's evidence-in-chief upon this part of the case forms questions 258 to 266 and contains only the most harmless hearsay. The only witnesses called to speak to any question of slander of goods are Ardeshir Khodadad, Kali Pada Roy, N. N. Chakrabarti and M. N. Jarvar. The learned Judge deals specifically with two only of the alleged slanders: one said to have been uttered by Carr to Khodadad in March or April 1922, and another said to have been uttered by Mr. Ryan and Akhil Pal in July 1922 to Kali Pada Roy and his partner's father, N. N. Chakrabarti.

On the hearing of this appeal it appeared to us that this part of the case, as presented by the pleadings, was not at the time of the trial in a fit condition to be tried and that it would be as well to re-

quire a statement from the plaintiff of particulars of those slanders which he claimed to have proved. Accordingly particulars were filed alleging 13 several publications, five of which were in our opinion afterthoughts in no way within para. 11 of the plaint and dealt with neither by cross-examination nor by the learned Judge as substantive counts in the case. The attempt made was intelligible in view of the plaintiff's difficulties as to limitation. These five new counts are based upon letters and the charge is that the defendant company published them to their typists and staff, to the Collector of Customs and the Imperial Bank. It seems reasonably clear that neither counsel nor the learned Judge at the trial was aware that they were assisting at the investigation of any such case. In my opinion these counts must be disallowed altogether. They appear to amount to be a contention that for the defendant company even to claim that the plaintiff's goods infringed their trade-mark rights was an actionable wrong.

There remain eight allegations of slander of goods and it is our duty to examine each in the light of the findings of fact come to by the learned Judge. As I read his judgment the only finding of untrue statements made by anyone for whom the defendant company can be responsible is that while it is true that the plaintiff's goods were old and true, that his packing was inferior to the defendants' the defendant company's servants, when warning dealers that these were not the goods of the defendant company, impressed on dealers a non-existent difference in the quality of the goods.

This seems to be a slender foundation for an action of this character brought against a rival trader and I am not surprised that learned counsel for the plaintiff is not quite content with it. (The judgment then narrated and discussed the several occasions and proceeded.) It will be observed that all the occasions on which slander of goods is specified, except the twelfth and thirteenth (which refer to letters dated 1st and 14th January 1924 sent to the Imperial Bank), are occasions in 1922. The learned Judge has held that they are covered by Art. 36, Limitation Act, and are time barred. But he says that it is a fair inference to draw from the evidence that the statements alleged and complained of

continued to the extent already mentioned to be repeated within two years before suit.

Accordingly, as I understand, part of the damages which he awards is awarded for false and malicious statements made by persons unknown to persons unknown upon occasions and at times as to which the only information is that they were subsequent to January 1923. All that is known as to the contents of these statements is that they affirmed a non-existent difference in the quality of the goods.

What is supposed to be known as to the special damage caused is still more difficult to understand. Because, though the learned Judge has disallowed the claims in respect of detention of goods by the Collectors of Customs at Bombay and Calcutta, in respect of the undertaking given by the plaintiff to the High Court of Bombay, and in respect of all alleged slanders of goods prior to January 1923, he has in the end awarded damages on the basis of compensation to the plaintiff for the whole of his loss of profit on all the cases destined for the Indian market which he had contracted to buy, i. e., 666 cases. I am not quite sure what the figure of Rs. 23-8-0 represents, but I think it is intended as the average price which the plaintiff could have obtained if the defendant company had never in any way claimed that he was infringing their trademark rights or that their own goods were superior in quality to his.

With all respect to the learned Judge I cannot assent to this way of dealing with the case so far as it is a case of slander of goods. The defendant company is doubtless responsible for the statements of agent or servant acting "within the scope of his authority" (in the wide sense given to that phrase by modern law) provided that they were false statements made maliciously or without lawful occasion. In the present case malice is on any view an essential and I do not understand how malice or falsity or special damage can be attributed in the vogue.

As the question of special damage enters into questions of limitation I desire to observe that no single one of the slanders referred to in the plaintiff's particulars filed in this Court is within the doctrine of *Ratcliffe v. Evans* (21). Proper particulars would have shown; in each case the

loss of the particular customer or dealer to whom they were spoken or some other really specific damage flowing from the publication to him: *Leetham v. Rank* (22).

The statements here founded on are not statements printed in a newspaper or made at an auction or to the public or to a fluctuating and transitory class of persons unknown to the plaintiff. Neither the nature nor the circumstances in any case require the admission of evidence of general loss of business as the natural and direct result produced. It is in order to get out of the requirement of alleging and proving actual temporal loss with certainty and precision in each case that the plaintiff here claims to multiply by an imaginary number whatever he has proved. In my opinion he has proved no specific instance. But let it be assumed that he has proved three or six instances, all within limitation. One dealer refuses to buy, another cancels his purchase, another goes on buying as before:

If the words are uttered to an individual and repetition is not intended except to a limited extent general loss of custom cannot ordinarily be a direct and natural result of the limited slander. [cf. *Ratcliffe v. Evans* (21).]

Proof of a conspiracy to slander the plaintiff's goods, proof of twenty slanders, part of a course of conduct, proof of orders to a group of servants to go out uttering slanders throughout a market—this might bring a case to the same level as a case of publication in a newspaper and require the Court as a matter of common-sense to let in evidence of general loss of business. But where is the necessary proof? The case is not a case of conspiracy or illegal combination as learned counsel for the plaintiff expressly concedes. If the number of specific instances proved does not show slander broadcast, what is the evidence to contradict the evidence of Abbott and of Selfe? Is it the evidence of the dismissed servant Carr? or Javar's evidence—not put to Carr of what Carr said to him? Carr's evidence in cross-examination is that practically it was left to them to do what they liked so long as they did nothing wrong. He does also say that he was told to tell the dealers that the plaintiff's goods were old stock from the army and were inferior in quality. This last element does not appear in his statement as to what he actually said to the dealers. It seems, however, highly reasonable to

(21) [1892] 2 Q. B. 524=61 L. J. Q. B. 556=66 L. T. 194=40 W. R. 578=56 J. P.

suppose that if the defendant company were selling fresh stock from England with a superior form of protection from the weather and were asking Rs. 36 per thousand they would represent to dealers that these goods were better than the plaintiff's, who charged a bare three-quarters of their price. Otherwise they could hardly hope to sell their cigarettes at all.

I pass over the statements of the plaintiff to the customs on the question of duty. That the question is one of opinion is clear enough. Sheriar says he gave some of plaintiff's cigarettes to two or three customers to test them and that he relied on their opinion and his own also. He does not smoke himself, but he did not think there was any difference between plaintiff's and defendant's cigarettes. He would not pay the same price for goods two years old as for fresh goods. Carr says the plaintiff's cigarettes were absolutely sound and marketable when they first came to Bombay. Khodadad says the quality was equal. Das says he had no complaints. Bonnan Sheriar says they were fresh goods and saleable and he had no complaints. Kali Pada did not compare them with the defendant's, but says they were of good quality and condition and sold easily. Chakrabarti says some customers would choose the one and some the other. The assistant from Samuel Fitze & Company says they thought the plaintiff's goods to be sound in condition and quality and when they sold they had no complaints. Jawar who says he is an expert, asked how the plaintiff's goods compared with the defendant's, replied "Not much difference" and "practically the same." It was put to Mr. Abbott in cross-examination that at the previous trial an experienced dealer gave evidence that the plaintiff's cigarettes were the better. He says it is a question of opinion and that ordinarily dealers and smokers would not detect the difference at once. His letters to London on 10th May 1921 said the plaintiff's goods were in surprising good condition, but "they smoke rather nastily in our opinion." On this evidence I fail to see why a claim that the fresher and dearer goods were better should not come within the principle that trade competition is no wrong or why malice should be imputed to the defendant company's servants for their efforts to persuade dealers that their

article was superior: *White v. Mellen* (23) *Hubbock v. Wilkinson* (24). In "slander of goods" the burden of proof of falsity is on the plaintiff and in my opinion he fails to prove this statement to be false.

In these circumstances I do not propose to discuss the question of limitation as to this head of claim, but in my opinion S. 24 and Art. 36 give the plaintiff two years from the accrual of special damage.

In my judgment this appeal should be allowed. Treating this suit as an application in Suit No. 1610 of 1922 for an inquiry as to the sum to which the plaintiff is entitled as damages for loss caused to him by the injunction granted therein on 11th May 1922, we should order that such inquiry be held in the said suit by the Official Referee and direct that in ascertaining the said sum the Official Referee do not include any loss accruing to the plaintiff by reason of the cancellation of the contracts referred to in the plaintiff's letters of 17th May 1922 and 6th June 1922 to Messrs. Venis & Co. Quoad ultra the suit should be dismissed. The plaintiff must pay to the defendant company (1) their costs of this appeal and also (2) their costs of the suit before the learned Judge less a sum of Rs. 300 which we assess as the reasonable costs of an application for an inquiry as to damages.

It is desirable to make clear that except for the direction just mentioned as to the cancelled contracts the question of the amount of damage caused by the injunction is at large. The figure of Rs. 23-8-0 mentioned by the learned Judge was arrived at on a footing which is not consistent with our decision and the Official Referee will be in no way bound by it. The inquiry should be treated as an urgent reference.

C. C. Ghose, J.—This is an appeal against a judgment delivered by my learned brother Mr Justice Pearson on the 25th January 1926, by which he held that the plaintiff was entitled to recover damages from the defendant company on account of certain wrongful and malicious acts alleged to have been done by the latter.

The facts giving rise to the litigation, out of which the present appeal has arisen, are to be found, among other

(23) [1895] A. C. 154 (163)=64 L. J. Ch. 308=11 R. 141=48 W. R. 353=59 J. P. 628.

(24) [1899] 1 Q. B. 86=63 L. J. Q. B. 34=15 T.L.R. 29=79 I. T. 429.

things, in Ex. D.D. being the judgments delivered in a previous litigation between the parties by Mr. Justice Pearson on the 18th July 1922, by the late Chief Justice and Mr. Justice Richardson on the 10th April 1923, *Imperial Tobacco Co. v. Albert Bonnan* (2) and by their Lordships of the Judicial Committee of the Privy Council on the 13th May 1924: *Imperial Tobacco Co. v. Albert Bonnan* (3). It will, therefore, and also in view of the judgment just delivered by my Lord, not be necessary for me to state in detail herein the facts involved in the present appeal, except in so far as may be necessary.

In the action in which the said judgments were pronounced, the present appellants sought to restrain the plaintiff from selling in India a well-known brand of cigarettes, namely Wills Gold Flakes which, for many years, they alone, as assignees of the trade-mark and goodwill for India, had been importing into and selling in India. It appeared that the present plaintiff having bought as surplus war stock, over 21 millions of the said cigarettes cheaply in England from purchasers from the manufacturers (who had granted to the present appellants the sale rights for India) was able to undersell in India the present appellants. It was held in that litigation that the sale by the present plaintiff in India of the said cigarettes involved no breach of contract, misrepresentation, or infringement of the rights of the present appellants, and that it had not been shown that the latter had acquired any independent reputation as importers of the said cigarettes. Their Lordships of the Judicial Committee held confirming the judgments delivered in this Court that the present appellants' suit was not maintainable see *Imperial Tobacco Co. v. Albert Bonnan* (3).

On the 28th February 1922 and on the 8th March 1922 the first lot of the plaintiff's goods arrived in Bombay and Calcutta respectively and he sold also certain cases to dealers. Thereupon the present appellants who had, up to then, exclusive rights of selling the said cigarettes in India, applied to the Collectors of Customs in Bombay and Calcutta for orders for detention of the plaintiff's goods, on the ground, among others, that having regard to the trade history of the appellants' cigarettes and the acquisition by them, as purchasers of the goodwill in

India of the business with which the trade-mark "Wills' Gold Flakes" was associated, the importation of the said cigarettes by the plaintiff (who was not one of the appellants' customers) infringed their trade-mark. The plaintiff's goods were accordingly detained by the Collectors of Customs in Bombay and Calcutta. This was done in order to allow the appellants an opportunity of having the matter adjudicated upon in the civil Courts.

Thereafter, two suits, one in this Court and another in the Bombay High Court, were filed on the 11th and 22nd days of May 1922 respectively. On the first mentioned date, application having been made by the appellants an interim injunction was issued by this Court restraining the plaintiff, his servants and agents, from disposing of certain cases of cigarettes then lying with the Customs authorities in Calcutta. The application for injunction was disposed of by this Court in the presence of both sides on the 8th June 1922, when, it appearing that the present plaintiff had placed a sum in fixed deposit of Rs. 20,000 into the Alliance Bank of Simla, it was ordered that the interim injunction referred to above should stand dissolved. It was stated in the order of the 8th June that the present plaintiff's claim for damages, if any, owing to the interim injunction having been granted was reserved. In the Bombay suit the present appellants gave notice of motion on the 23rd May 1922 for a similar injunction against the present plaintiff. The application in the Bombay Court was disposed of on the 19th June 1922 when the present plaintiff, who was the defendant, having given an undertaking not to dispose of or in any way deal with the cigarettes then in Bombay or to arrive in Bombay, the application stood over by consent of parties till the hearing of the suit. Subsequently, by an order of the 2nd August 1922 the then defendant's undertaking of the 19th June 1922 was vacated, as he agreed to keep an account of the sale of the contents of the cases of cigarettes mentioned in the plaint in the Bombay suit, without prejudice to the rights of the defendant, if any, to claim damages consequential on the order of the 19th June 1922.

On the 21st January 1925 the plaint in the present suit was put on the file

and in it the present respondent complained that certain acts which had been done by the present appellants were malicious and wrongful and he accordingly claimed damages for seven and half lacs of rupees. The acts complained of are referred to in paras. 6 to 11 of the plaint, and they may be classified as follows.:

(a) Wrongfully and maliciously applying to the Collectors of Customs in Bombay and Calcutta and obtaining from them orders for detention of the plaintiff's goods.

(b) Wrongfully and maliciously instituting and prosecuting suits against the plaintiff in the High Courts in Bombay and Calcutta.

(c) Wrongfully and maliciously obtaining an injunction against the plaintiff from this Court as referred to above.

(d) Wrongfully and maliciously giving notice of motion for an injunction against the plaintiff in the Bombay High Court in which proceeding the plaintiff was made to give an undertaking on the 19th June 1922.

(e) Wrongfully and maliciously publishing various statements slandering the plaintiff's goods.

Mr. Justice Pearson held that the conduct of the appellants in regard to the proceedings before the Collectors of Customs in Bombay and Calcutta was malicious and without reasonable and probable cause. He also held that in filing the two suits in Bombay and Calcutta and in proceeding with them as they did, the appellants acted maliciously and without reasonable and probable cause. He found that the appellants did make and circulate statements slandering the plaintiff's goods, and he finally came to the conclusion that the plaintiff had suffered damages by reason of the said acts on the part of the appellants. According to Mr. Justice Pearson, the plaintiff started off very well in Bombay in the matter of the sale of his cigarettes, but instead of finding a fair field for his goods, he found himself faced with obstruction after obstruction, maliciously raised by the appellant's courses of delay, disparagement of his goods, assertion of unfounded rights—all of which interfered with the plaintiff's right to trade in his goods in the ordinary way. In short, Mr. Justice Pearson came to the conclusion that in this case the appellants had acted mala fide and with ulterior motive from

beginning to end. He therefore directed an enquiry for ascertainment of damages sustained by the plaintiff under heads 1 to 5, both inclusive, in Sch. A to the plaint on the basis of a uniform rate of Rs. 23-8-0 per thousand cigarettes [vide *A. I. R. 1926 Cal. 757—Ed.*]

The appellants' case has been elaborately argued and I propose to examine whether the plaintiff's said claim for damages are sustainable in law or on facts. To start with it appears that in respect of claim (a), the orders for detention of the plaintiff's goods in Bombay and Calcutta by the Collectors of Customs were made under the provisions of the Sea Customs Act (Act 8 of 1878) under the usual indemnity from the appellants on the ground that the goods which the plaintiff had imported into India bore a counterfeit trade-mark. Whether they bore a counterfeit trade-mark or not, it is quite clear that the provisions under the Sea Customs Act are in some cases to be read with the provisions of the Indian Merchandise Marks Act (Act 4 of 1889) relating to false trade description and that they are intended not only for the protection of manufacturers...and merchants against the piracy of their marks, but also for the protection of the public against the supply of goods of an inferior or unknown quality under cover of a well-known brand. As I read the provisions of the Sea Customs Act, as amended by the Merchandise Marks Act, it is clear that although ordinarily action thereunder is taken upon information received from the manufacturer or merchant aggrieved, there is nothing to prevent the customs officers from acting upon their own initiative. The sections of the Sea Customs Act which were referred to at the hearing before us are Ss. 18 and 19A. The appellants might have taken an exaggerated view of their rights, but it appears that the customs officers really proceeded in this matter to act in accordance with the instructions for the observance of customs officers appearing on p. 11 of the Merchandise Marks Manual (1925) issued by the Government of India. (The judgment then discussed facts and evidence and proceeded) Now the first question which arises for consideration is whether the present plaintiff has, on the evidence before us, substantiated his contention that the statements made to the two Collectors of Customs were un-

true in fact, that the said statements were made maliciously, and without reasonable and probable cause and that he has suffered special damage thereby: see the case of *Nemi Chand v. Wallace* (25). From what has been stated above in my opinion there cannot be any doubt that the appellants did really believe in what they had stated to the customs authorities and that there was no misstatement of fact on their part. On the evidence on record, both oral and documentary, I am not prepared to say that the appellants had made statements to the Collectors of Customs which were untrue in fact and untrue to their knowledge, or had acted maliciously in the proceedings before the said Collectors. The plaintiff has, in my opinion, entirely failed to bring his case within the rule laid down by the Court of appeal in the case of *Nemi Chand v. Wallace* (25). So much on the evidence; but the plaintiff's claim on this head is bound to fail for another reason, namely, that it is, having regard to the dates set out above, barred by limitation under Art. 36, Sch. 1, Limitation Act, as was indeed held by the learned Judge at the bottom of p. 528 of the paper-book, Part I. It was urged that Art. 49 applied to this part of the plaintiff's case. In my opinion Art. 49 does not apply at all; the detention of the plaintiff's goods was not by the appellants.

I will now deal with claim (e), which is referred to in para. 11 of the plaint, which runs as follows:

The defendant company through its officers, servants and agents throughout India rumoured and caused to be rumoured and circulated (statements) to the effect that the Gold Flake cigarettes imported by the plaintiff were inferior in quality and otherwise than they were represented to be, and that they were otherwise than in a sound and good and merchantable condition and that they were inferior to those sold by the defendant company, that they were not genuine Gold Flake cigarettes and that the plaintiff had no right to import and sell them as such.

The learned Judge's finding on this point is summed up in the following words:

Undoubtedly the company's servants were going round warning dealers that they would not be responsible for the plaintiff's goods. There is no harm in that and they could properly employ the whole of their organization in broadcasting it to the dealers. There seems to be no doubt, however, that they went further and wrongly impressed on dealers a non-existent difference in the quality of the goods, and also made full use of the litigation in Bombay and

Calcutta with its attendant threat of trouble to others as an obstruction to the plaintiff and as a deterrent. That is a clear impression which I retain after hearing the evidence.

The learned Judge further added, in dealing with the question of limitation raised on behalf of the defendant company as an answer to this part of the plaintiff's claim, the following:

In so far as the cause of action may be slander of title or slander of goods the limitation would be either one year under Art. 25 or two years under Art. 36. The latter is in my opinion applicable in the circumstances for I think the action would be on the case. Nevertheless I think it is a fair inference to draw from the evidence that the statements alleged and complained of continued, to the extent already mentioned, to be repeated within two years before suit, particularly having regard to the continuance of the previous suits which throughout were designed as a disparagement of the plaintiff's goods and an obstruction to the unfettered exercise of his rights as a trader, of which I have no doubt the company made the fullest use the whole time the litigation lasted and whenever occasion so required. I am not prepared to say that in any view of the matter the company is excused by the principle that a trader is entitled to protect his own property and his own interests because I think in this case there was *mala fides* and ulterior motive from the beginning until the end.

It will be seen from the above that the learned Judge laid particular stress on the pendency of the previous suits for founding his conclusion that slander of the plaintiff's goods had been going on.

Now, in an action for damages for slander of goods the precise words complained of must be set out in the statement of claim: there are many authorities that it is not sufficient to allege that the slanderer used such and such words or to that effect. Has this rule been complied with in the present instance by the plaintiff? In my opinion para. 11 of the plaint offends in every way against this cardinal rule; and it is surprising that the defendant company should not have insisted in the Court of first instance on full and sufficient particulars being furnished to them before the pleadings were closed, in respect of the matters alleged or suggested in para. 11 of the plaint. However, at the hearing before us, learned counsel on behalf of the plaintiff has furnished us with a number of particulars of the statements complained of and we have been taken through them. (The judgment then discussed the evidence and proceeded.) Now, to succeed in an action for slander of goods, the plaintiff must allege and prove (1) that

the statement complained of was made of and concerning his goods; (2) that it was false, (3) that it was published maliciously i. e. with the intention of injuring him and (4) that he has suffered special damage thereby. A trader is entitled to commend his own goods and state that they are better than the goods of another and if he does so, no action will lie against him, whatever damage may ensue from such statement.: see *White v. Mellin* (23).

It is otherwise where a trader does not limit himself to a comparison of his goods with those manufactured by another trader and a mere statement that they are inferior in quality to his own, but goes further and makes an untrue statement of fact about his rival's goods, for example, where he states that they are rotten or unmerchable. In a case like this, an action on the case will lie, provided it can be proved that such statement was published maliciously and that special damage has ensued: see *Lyne v. Nicholls* (26). It is not malice if the object of the trader is to push his own business. To make the act malicious it must be done with the direct object of injuring the other person's business. Therefore, the mere fact that it would injure that other person's business is no evidence of malice: see *Dunlop Pneumatic Tyre Co. v. Maison Talbot* (27).

This being the state of the authorities, I have carefully scrutinized the evidence of Sheriar and Khodadad and of the other witnesses on the side of the plaintiff taken along with the evidence of the officers of the defendant company and I have come to the conclusion that no statements in slander of the plaintiffs goods were made by the officers of the defendant company which would give rise to a cause of action. I am not unmindful that it was alleged on the plaintiff's side that the plaintiff's goods were said to have been described by Mr. Selfe, an officer of the defendant company, on one occasion as being "kharab" or unmerchable; but I am unable to place any reliance on that piece of evidence. In what context was the word used, if used at all? I have grave doubts if it was at all used. The learned Judge says that the statements alleged and complained of continued to be repeated within two years before suit.

Where is the evidence in support of this statement? It is possible and indeed likely that the appellant gave instructions to their officers to see that their rights are protected so far as the market was concerned; but I do not find on the evidence that lying reports about the plaintiff's goods were made by the company's officers or were authorized by them, if ever made or that they were repeated from time to time within two years before suit. Therefore, on the facts I must hold that the plaintiff has failed to make out any case whatsoever in support of his claim (e), as set out in para. 11, of the plaint. His claim for damages must also be held to be barred under S. 24 and Art. 36, Limitation Act.

I now proceed to consider the case set up by the plaintiff under claim (b), as set out above, viz. wrongfully and maliciously instituting suits against the plaintiff in the High Court in Bombay and Calcutta. On behalf of the appellant it has been contended before us on the authority of the case of the *Quartz Hill Consolidated Gold Mining Co. v. Eyre* (11), that no action would lie against the defendant company for having brought the suits in the Bombay High Court and in this Court referred to above. Brett M. R., in that case observed as follows:

I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice.

Bowen, L. J. observed as follows:

I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action. To speak broadly, and without travelling into every corner of the law, whenever a man complains before a Court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious legal proceedings have been accompanied by damage express or implied. The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the doctrine laid down by Holt, C. J., in

(26) [1906] 23 T. L. R. 88.

(27) [1904] 20 T. L. R. 579.

Savile v. Roberts (14). He there said that there were three sorts of damages, any one of which would be sufficient to support an action for malicious prosecution. (1) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between *Sir Andrew Henley* and *Dr. Burstall*: Raym. 180.....(2) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action.....(3) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property; and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself.

It is clear that Holt, C. J., considered one of these three heads of damages necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action.

To apply the second head of damage, namely, those injuries which are done to the person; the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the existence of which will support such an action as this, is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognizes, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the Judge refuses to give him costs, it is because he does not deserve them. If he deserves them, he will get them in the original action; if he does not deserve them, he ought not to get them in a subsequent action. Therefore, the broad canon is true that in the present

day, and according to our present law, the bringing of an ordinary action, however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution.

I do not say that if one travels into the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to show that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution.

It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause. And although every Judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise Judge who sits to administer justice, must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

In this case it is contended on behalf of the appellants that when they instituted the suit in this Court and in Bombay in 1922, they had a perfectly genuine and reasonable case which they could present to the Courts: see in this connexion *Imperial Tobacco Co. (Newfoundland) v. Duffy* (19) and *Dunlop Rubber Co. v. Booth* (20); and it was never suggested at any time that the actions brought by the appellants in this Court and in the Bombay High Court were malicious. It is quite true that the actions did not succeed; but it is contended that mere dismissal of a suit is no evidence whatsoever of there being no reasonable and probable cause for the institution thereof. It is further urged that all that the appellants did was to take steps for the purpose of protecting their trade in which they had been engaged for a number of years and where their cigarettes had acquired an enduring reputation and that in circumstances like these malice will not be imputed: see *Sorrell v. Smith* (17). On behalf of the plaintiff it has been argued that the right of a

defendant to institute a regular suit for compensation after 'the termination of certain previous proceedings is clearly recognized in S. 95, sub-S. 2, Civil P. C., and that in India the matter is not concluded by the authority of the case, *Quartz Hill Mining Co. v. Eyre* (11). It is not disputed, however, that in such a suit for compensation one of the ingredients which the plaintiff must prove is malice, in addition to the facts required to be proved by S. 95, Civil P. C., see the case, *Nanjappa v. Ganapathi* (28). In this case, whether the matter is looked at from the point of view indicated in *Quartz Hill Mining Co. v. Eyre* (11) or from that referred to in S. 95, Civil P. C., the present plaintiff must in my opinion fail on the facts. On the evidence on record which I have read and re-read, I can find no trace of malice or of want of reasonable and probable cause on the part of the present appellants, in instituting the suits in this Court and in the Bombay High Court. They had received expert professional advice from London that they had a fair case to go to Court with, having regard to the authorities on the subject, and in these circumstances and without more it is difficult to see why the appellants' suits in Bombay and Calcutta should have been described as malicious. On this conclusion it is not necessary for me to refer to the question of limitation; but if I had to pronounce an opinion on the question of limitation, I should be prepared to hold that the plaintiff's claim for damages under this head is barred by Art. 6, Limitation Act.

I next come to the question whether the plaintiff has made out his case under claim (d). The facts in connexion with this branch of the case have already been set out by me in an earlier portion of this judgment and I need not, therefore, refer to the same here. It appears to me that having regard to the consent order of the 19th June 1922 in the Bombay suit, and having regard to the undertaking in the Bombay suit, the plaintiff cannot seek any relief in this Court in respect of any claim he may have for damages. Further, if he had any case under this head, it is barred by limitation.

There now remains for me to consider the question whether the plaintiff is entitled to any relief under claim (c). The plaintiff relies upon the case of *Bhut Nath v. Chandra* (4). In my opinion that case lays down the proposition that an injunction is in the nature of trespass to property in terms far too broad and I am unable to agree with it. Now the plaintiff is seeking to recover damages that had accrued to him by reason of the temporary injunction granted at the instance of the appellants in the suit in this Court. In the proceedings in which the temporary injunction was issued, an undertaking was taken from the appellants to compensate the plaintiff for any loss that might arise by reason of the injunction. Such an undertaking is on the authorities to be enforced by an application to the Court which granted the injunction: see *Smith v. Day* (6). In that case Jessel, M. R. observed as follows:

But the Court has a discretion, and before it will grant damages it must be satisfied that the injunction was improperly obtained, and that the defendant reasonably abstained from going on with his building, and that under all the circumstances damages ought to be given. It may happen that an interlocutory injunction is dissolved for delay or some cause which disentitles the plaintiff to an interlocutory injunction, though not to relief at the trial, and then at the trial a perpetual injunction is granted. The Court in such a case has a discretion whether, under all the circumstances, the defendant ought to have damages in respect of the interlocutory injunction having been improperly granted, though a perpetual injunction is granted at the trial. Then, again, the Court must have regard to the amount of damages; if it be trifling or remote the Court would not be justified in directing an enquiry as to damages, though the injury might not be so remote that an action would not lie. Then again the time at which the application is made is material. Having regard to the decisions, we are not entitled to say that the application for an inquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper time. The application may be made when the injunction is dissolved, but if made then it probably will be ordered to stand over till the trial. If made by motion subsequent to the trial, the party moving is subject to some disadvantage, for the application is one which should be made speedily and not after the Court has forgotten the circumstances; see also *Griff v. Blake* (8).

It would, therefore, appear that the enquiry into damages can be and is ordinarily had by means of an application to the Court which originally granted the

(28) [1911] 35 Mad. 598=21 M. L. J. 1052=12 I. C. 507=(1911) 2 M. W. N. 414.

A. I. R. 1928 Calcutta 21

PAGE, J.

Krishna Kishore Adhicary and another
*In re.*Insolvency Jurisdiction, Decided on
16th March 1927.*(a) Presidency Towns Insolvency Act (3 of 1909), S. 31—Re-adjudication is not independent of original insolvency, but revival of the latter.*

When a debtor is "adjudicated" or "re-adjudicated" or "freshly adjudicated" under S. 31, such adjudication is not independent of the original insolvency. [P 22 C 2]

*(b) Presidency Towns Insolvency Act (3 of 1909), S. 93—Composition scheme approved by Court—Debtor dying before its annulment—Any person interested in the scheme may continue proceedings.*After the acceptance and approval of the scheme the jurisdiction of the Court continues, and the scheme when accepted and approved operates only as a conditional discharge, and subject to S. 31 (2) upon annulment and re-adjudication the status quo ante is restored: *Ex parte Bacon* (1881) 17 Ch. D. 447 and *Re Hardy* (1896), 1 Ch. 904 *Rel. on.* [P 22 C 2]

When a scheme has been approved and subsequently annulled, and the debtor dies after the scheme has been approved and before it is annulled, S. 93, Insolvency Act, applies; and, notwithstanding the death of the debtor, any person interested has a locus standi to apply that the debtor be re-adjudged an insolvent. [P 22 C 2]

(c) Presidency Towns Insolvency Act (3 of 1909), S. 31—Re-adjudication order may be made if it is to creditors' benefit.

In considering whether it ought to re-adjudge the debtor under S. 31 the Court in the first instance should have regard to the position of the creditors, and if the Court is of opinion that the creditors will not be benefited by an order annulling the scheme and re-adjudicating the debtor, in ordinary circumstances the Court will not make an order of re-adjudication under S. 31. [P 22 C 2]

H. D. Bose and F. S. R. Surita—for Benares Bank.*S. N. Banerjee and S. C. Mitter*—for Official Assignee.*N. N. Sircar, S. C. Bose and B. C. Ghose*—for Insolvents.*Langford James, B. K. Ghosh, B. C. Mukherjee and S. M. Bose*—for Laik Guarantors.**Judgment.**—This is an application by the Benares Bank, a secured creditor,

temporary injunction. In this case, the proceedings, as will be seen from what has been stated above, did not finally terminate until the 13th May 1924. The present plaint was filed on 21st January 1925. It is contended, however, on behalf of the plaintiff that he is not limited to making an application in the suit in which the temporary injunction was granted for enquiry into damages; but that he has an independent right to bring a suit for compensation and that such right exists is clearly recognized by the terms of Art 42, Limitation Act. The procedure on the original side of this Court, being what it is, I think the proper course for the plaintiff should have been to make an application to the Court which granted the temporary injunction and ask for an enquiry into damages. The plaintiff, however, has not been guilty of unreasonable delay in coming to this Court with his present plaint and I think, in the circumstances of this case and for the reasons given by the learned Chief Justice, the plaint in this suit may be treated as an application for an enquiry into damages that might have been sustained by the defendant by reason of the temporary injunction issuing from this Court. The result, therefore, is that in my judgment on all the claims except claim (c) the plaintiff must fail and that as regards claim (c) there should be an enquiry into damages as indicated above. What the nature of those damages should be has been indicated by the learned Chief Justice and it is not necessary, therefore, for me to refer to it.

I, therefore, agree with the learned Chief Justice as regards the order which he proposes to make.

D.D

Appeal allowed.

and, as I understand, the only creditor of the estate remaining unpaid. The applicant asks that the provisions of the scheme may be enforced and sets out in prayer B particulars of the relief that it seeks. There is another application by the representative of Kalidas Laik for an order annulling the scheme, upon the ground that the administration of the scheme has been carried on with negligence and irregularity, and without regard to the terms of the scheme, and, therefore, that the Court ought to hold that the scheme

cannot proceed without injustice or undue delay,

and the scheme ought to be annulled and the debtor adjudicated insolvent under S. 31 (1), Presidency Towns Insolvency Act (3 of 1909). The Bank and the widow of Mukundalal Laik, one of the debtors, oppose the application for annulment of the scheme upon the following grounds :

(1) that the applicants have no locus standi to present the application ; and (2) assuming that they are persons entitled to ask the Court to re-adjudge the debtors insolvent and annul the scheme, that in the exercise of the discretion with which it is invested the Court in the circumstances ought to dismiss the application.

As regards the first ground of objection to the annulment of the scheme and the re-adjudication of the insolvent, in my opinion, there is no legal basis upon which the contention of the objectors can be sustained. The objectors urge that the effect of an order passed by the Court under S. 31 (1), Presidency Towns Insolvency Act, would be to adjudicate the debtors insolvents for a second time, the later adjudication being wholly independent of the original insolvency. Since the scheme was approved by the Court Mukundalal Laik has died, and the objectors, therefore, contend that in these circumstances the only person who is entitled to apply for the administration of the deceased debtor's estate is a creditor under S. 108, Insolvency Act. That that is not so in my opinion is clear from the wording of S. 31, which provides that the application may be made "by any person interested and it is not disputed that the Laiks are such persons. I am of opinion that when a debtor is "adjudicated" or "re-adjudicated"

such adjudication is not independent of the original insolvency, although, no doubt, between the date when the scheme was approved and the date when the debtor is re-adjudged an insolvent under S. 31 in respect of the law relating to insolvency he is a free man. In my opinion his legal position is analogous to that of an insolvent who has obtained his discharge but whose discharge ultimately is cancelled, during the period between the date when he obtained his discharge and the date when the discharge is cancelled. In either case, during that period the debtor is a person sui juris ; but, in my opinion, after the acceptance and approval of the scheme the jurisdiction of the Court continues, and the scheme, when accepted and approved, operates only as a conditional discharge, and subject to S. 31 (2) upon annulment and re-adjudication the status quo ante is restored : *Ex-parte Bacon* (1); *Re Hardy* (2). Williams on Bankruptcy (13th edn) at p. 99. It follows, therefore, where a scheme has been approved and is subsequently annulled, and the debtor dies after the scheme has been approved and before it is annulled, that S. 93, Insolvency Act, applies ; and, notwithstanding the death of the debtor, any person interested has a locus standi to apply that the debtor be re-adjudged an insolvent for the purpose of the further administration in insolvency of the deceased debtor's estate.

In my opinion, the second ground of objection also ought not to prevail. In considering whether it ought to re-adjudge the debtor under S. 31, the Court in the first instance should have regard to the position of the creditors, and if the Court is of opinion that the creditors will not be benefited by an order annulling the scheme and re-adjudicating the debtor, in ordinary circumstances the Court will not make an order of re-adjudication under S. 31.

Now, the only creditor who remains unpaid is the Benares Bank, and the bank strenuously urges that it would be against the interest of the bank that the scheme should be annulled and the debtors re-adjudicated. On the other hand, the Court must have regard to all the

(1) [1681] 17 Ch. D. 447=29 W. R. 574=44 L. T. 834.

(2) [1896] 1 Ch. 904=65 L. J. Ch. 461=44 W.

circumstances in considering whether an order ought to be made under S. 31, and Mr. B. K. Ghose, on behalf of the Luiks contended that so much delay and irregularity has taken place during the sixteen years in which this estate has been in the hands of the official assignee that it would work injustice to all the parties concerned if the scheme were allowed to proceed. I have considered the matter, and, in my opinion, the Court ought not to allow the scheme to be annulled in the present case. (The rest of the judgment is not material for this report.)

J.V. *Application dismissed.*

A. I. R. 1928 Calcutta 23

SUHWARWADY AND MALLIK, JJ.

Sabirer Ma and *others*—Plaintiffs—Appellants.

v.

Behari Mohan Pal and *others*—Defendants—Respondents.

Appeal No. 2281 of 1924. Decided on 21st June 1927, from the appellate decree of the 1st Sub-Judge, Sylhet, D/- 28th July 1924.

Civil P. C., O. 1, R. 9—Suit for declaration of right of pasturage—Cause of action arises only against persons obstructing the right—Ultimate owners of the land are not necessary parties.

The cause of action for a suit arises only against the persons who are responsible for the infringement of the right.

Plaintiffs sued for a declaration of their right of pasturage over the suit land under an implied grant from the Mirasidars on the ground that the defendants had obstructed them in the enjoyment of this right. Defendants alleged that the land in suit appertained to their taluk and they were in possession of it and pleaded that the suit was bad for non-joinder of the Mirasidars.

Held: there was no cause of action against the Mirasidars and therefore they were not necessary parties: *A. I. R. 1921 Cal. 622* and *A. I. R. 1924 Cal. 1050, Dist.* [P 24 C 1, 2]

Sarat Chandra Basak, Radhika Ranjan Guha and *Nikunja Behary Roy*—for Appellants.

Braja Lal Chakravarti and *Paresh Lal Shome*—for Respondents.

Judgment.—The plaintiffs appeal against the decree of the lower appellate

Court dismissing their suit on the ground of non-joinder. In the suit the plaintiffs claimed the right of pasturage on their own behalf as well as on behalf of the residents of the village of South Enathabad against the defendants on the ground that the defendants had wrongfully obstructed the right which they were in the enjoyment of, with the permission of and amounting to an implied grant by the mirasdar for over 100 years. Defendants 1, 2 and 3, who are now the respondents before us, contended that the portion of the land in suit with which we are now concerned appertained to their taluk and that they were in possession of it. They further denied the plaintiffs' right of pasturage over this land. As regards the objection on the ground of non-joinder of parties the written statement filed on behalf of these defendants refers to the objection in two paragraphs. In para. 3 the objection is taken that the suit is bad for non-joinder and mis-joinder of parties, no details, being given; and it is one of the typical objections that are taken almost in every statement filed in the mofussil along with the objection of limitation, want of cause of action, and the frame of the suit, which objections also have been taken in the present case. In para 14 of the written statement these defendants allege that they have no concern with the land from which the plaintiffs are said to have been dispossessed by defendant 5 and, therefore, there has been mis-joinder of parties. The Court of first instance gave a decree to the plaintiffs. The defendants appealed and the Subordinate Judge, without going into the case held, on a preliminary objection, that the suit was bad for non-joinder of parties, and dismissed it. Against that decree the plaintiffs have appealed before us and it is contended on their behalf that the view taken by the lower appellate Court in the circumstances of the case is erroneous.

The plaintiffs' case is that they are in the enjoyment of this right of pasturage over the land in suit under the implied grant of the mirasdars for over 100 years. They further allege that in such exercise of their right they were obstructed by the defendants in the suit. It appears that, in order to meet the objection upon this ground, the plaintiffs did make some of the landlords parties to the suit; but they did not appear or resist

the plaintiffs' claim. The defendants' case is that the lands exclusively belong to them. In such a state of the pleadings the Munsif, in our opinion, was right in holding that the question of misjoinder or non-joinder of parties did not arise. The Subordinate Judge, on the other hand, thinks that a suit of the present nature, namely, a suit for declaration of the right of pasturage over another's land, cannot be maintained in the absence of the owners of the land. We are unable to assent to such a broad proposition. On the plaintiffs' case the owners are unnecessary parties. The cause of action for a suit arises only against the persons who are responsible for the infringement of the right. It appears that in the deposition of one of the plaintiffs in a criminal case he mentioned three persons as the maliks of the lands in dispute. We do not know what lands the criminal case referred to. Nor do we think that the fact that they hold under the maliks the land in suit makes it incumbent upon the plaintiffs to make those parties inasmuch as the plaintiffs have come to Court on the allegation that they have been in the enjoyment of the right claimed with the consent of the maliks. Moreover, it does not lie in the mouth of the defendants to take this objection as, according to their case with which they have come to Court the lands in suit do not belong to any one except themselves. The learned Subordinate Judge seems to think that the right of pasturage is an encroachment upon the right of ownership of the land, that in such suits the landlords must be made parties and that the absence of the landlords is fatal to the suits. This, in our opinion, is not the correct view. In the special circumstances of the case this question hardly arises. The parties joined issues on the existence of the right of pasturage and the plaintiffs said that the property appertained to a certain taluk. But for their purpose it did not matter to which taluk it did appertain so long as the right of pasturage was declared. The defendants, on the other hand, claimed the land in dispute as appertaining to their homestead and not to the taluk over which the plaintiffs claim the right of pasturage. Now, if effect is given to the view taken by the lower appellate Court and the maliks are brought on the record as defendants, and if the maliks come and

say that they have no objection or that they never objected to the plaintiffs exercising or enjoying the right of pasturage over the land they must be relieved from the suit: and we do not know who would be responsible for their costs. A suit must be determined under O. 1, R. 9, Civil P. C., according to the relief claimed as between the parties to the suit. To suppose that the execution of the decree against any party to the suit may be obstructed by certain persons interested in the property is to indulge in speculations. If the plaintiffs get a decree against the contesting defendant in this suit and if at the time of enforcement of the decree they are obstructed by the maliks or anybody else, then there would be a fresh cause of action against such persons. But the suit, as at present constituted, does not disclose any cause of action against the owners or against any person interested in the land in suit. In this view the question for decision in the case of *Haran Sheikh v Ramesh Chandra Bhat-tacharjee* (1), or in the case of *Surja Narain Bera v Chandra Bera* (2), upon which the lower appellate Court relied does not arise. If it was necessary to consider those decisions we would not be inclined to hold that in the present suit any person other than those who objected to the plaintiffs' right of enjoyment was a necessary party.

As the result of the above considerations this appeal must succeed. The decree of the lower appellate Court is set aside and the case sent back to that Court for trial on the other issues. The appellants are entitled to their costs in this appeal. The costs of the lower Courts will abide the result.

N.D.

Case sent back.

(1) A. I. R. 1921 Cal. 622.

(2) A. I. R. 1924 Cal. 1050.

A. I. R. 1928 Calcutta 24

CHOTZNER AND DUVAL, JJ.

Isaf Nasya and *others*—Accused—
Petitioners.

v

Emperor—Opposite Party.

Cri. Revn. No. 860 of 1926, Decided on 8th September 1926, from the order of the Sessions Judge, Rungpore, D/- 9th August 1926.

Criminal P. C., Ss. 200 and 202—It is necessary for the Magistrate to pass order on the police report under S. 203 or S. 204 when he takes cognizance of a complaint and examines the complainant and orders a police enquiry under S. 202

When a Magistrate takes cognizance of a complaint under S. 190 (1) (a) and examines the complainant under S. 200 and orders a police inquiry under S. 202, it is for him to pass the necessary order on the police report either under S. 203 or S. 204. His order directing the police to submit charge-sheet to some other Magistrate is without jurisdiction. [P 25 C 2]

H. C. Guha, A. K. Fazlul Huq and Jnan Chandar Roy—for Petitioners.

Khundkar—for the Crown.

Duval, J.—In this matter a complaint was lodged before the District Magistrate of Rungpore on the 16th February 1926, against certain people of charges under S. 366, I. P. C., and other sections. The complainant was examined on oath, as provided for in S. 200, Criminal P. C., and the Magistrate then passed an order sending the case to the police for inquiry, but adding:

The police will see if there is any evidence for the submission of a charge-sheet, and after that they will send it to the Magistrate concerned.

As a matter of fact it appears that the alleged place of occurrence was within Nilphamari, a sub-division of the Rungpore District. An inquiry was made by the police, and on the 1st May, a charge-sheet was submitted to the Sub-divisional Officer of Nilphamari, who thereupon issued a warrant for the arrest of certain accused persons. Certain of the accused subsequently surrendered, and then an application was made to the Sessions Judge to refer the matter to this Court for quashing of the whole proceedings. The Sessions Judge, however, refused to refer the matter to this Court, and this rule was then obtained from this Court why the proceedings should not be quashed on the grounds (1) that the procedure adopted by the District Magistrate is wrong, inasmuch as he acted under Chap. 16, Criminal P. C., and then proceeded under Chap. 14, Criminal P. C., (2) that, after having taken cognizance of the case under S. 190, Cl. (a), and proceeded under S. 200, the learned Magistrate had no power to act under S. 156 (3); (3) that his action in directing the police to submit a charge-sheet is illegal and without jurisdiction; (4) that the Sub-divisional Magistrate of Nilphamari has no jurisdiction, unless the case is

transferred to him according to the provisions of law.

Now the facts seem to be clear; the Magistrate took cognizance of a complaint under S. 200, Criminal P. C., and it would appear that he referred the case to the police for inquiry under his power to do so under S. 202, Criminal P. C., but in giving that order he did not observe that it was for him to pass the necessary order on the police report either under S. 203 or S. 204. His order, therefore, directing the police, if they found the case to be established, to submit charge-sheet to the Magistrate concerned (in this case the Sub-divisional Officer of Nilphamari) appears to us to have been without jurisdiction. We do not think that S. 156 (3) can have any application to the case before us. The Magistrate had certainly taken cognizance of the case under S. 200, and it appears to us that this section only empowers the Magistrate to order a police inquiry in a case when the Magistrate does not himself issue process at once. It seems, therefore, that the whole of the proceedings of the Sub-divisional Officer, Nilphamari, accepting the charge-sheet and proceeding with the case, without any order by the District Magistrate under S. 204, Criminal P. C., or any order of transfer of the case to him under S. 192 are without jurisdiction and must be set aside. We, accordingly, set these orders aside, and send the proceeding back to the District Magistrate of Rangpore who will now under S. 203 or S. 204 pass the necessary orders on the police inquiry which has taken place; and if he so thinks he may issue processes and transfer the case to the Sub-divisional Officer for trial or inquiry.

The rule is made absolute to the extent only that the later orders are set aside. The order of the District Magistrate taking cognizance will remain, and he will now pass orders in the manner directed above.

Chotzner, J.—I agree.

N.D. *Rule partly made absolute.*

A I. R. 1928 Calcutta 25

PAGE AND GRAHAM, JJ.

Basanta Kumar Adak—Appellant.

v.

Khirode Chandra Ghose—Respondent.

Appeal No. 162 of 1927, Decided on 19th July 1927.

Civil P. C., O. 43, R. 1—Order dismissing application to set aside sale merely for non-appearance of the applicant is appealable—Civil P. C., O. 21, R. 90.

Where a person applies under O. 21, R. 90 but the application is dismissed for his non-appearance, and the opposite party is present and ready to contest, the order dismissing the application is an order under O. 43, R. 1 (j) and is, therefore, appealable: *A. I. R. 1926 Cal 773, Discussed.* [P 26 C 2]

Nasim Ali—for Appellant.

Santosh Kumar Pal and *Sukumari Hazra*—for Respondent.

Page, J.—This is an appeal against two orders passed by the learned Subordinate Judge of Howrah on the 18th December 1926, by one of which the learned Judge dismissed the judgment-debtor's application for an order setting aside an execution sale under O. 21, R. 90, and by the other he confirmed the sale. Now, the order dismissing the judgment-debtor's application to set aside the sale was passed upon the application of the opposite party who was present, and urged that the application should be dismissed because neither the applicant nor any pleader on his behalf was present to support it when called for hearing.

A preliminary objection was taken to the competency of this appeal upon the ground that the order dismissing the judgment-debtor's application to set aside a sale under O. 21, R. 90 was not an order under O. 21, R. 92, "refusing to set aside a sale," and, therefore, was not within O. 43, R. 1 (j). In my opinion, the preliminary objection fails. In *Basaratullah Mean v. Bezaruddin Mean* (1). I ventured to observe that :

I am disposed to think that an order dismissing an application to set aside a sale merely on default of appearance of the parties cannot be regarded as in any way confirming the sale. No doubt, if the Court not only dismisses the application but orders that the sale be confirmed, such an order is within R. 92, and is appealable under O. 43, R. 1 (j). On the other hand, in dismissing the application for default, when neither party appears on the case being called for hearing, the Court does not refuse to set aside the sale, but in the absence of the parties refuses to consider whether the sale should be set aside or not. Such an order, in my opinion, is not appealable under O. 43, R. 1 (j). Whether an appeal lies from an order or not in each case must depend upon the construction of the order. In my opinion, where an order is passed dismissing an application to set aside a sale merely on default of appearance by the parties and not on the merits the applicant is not debarred from making a

fresh application for the same purpose, if he prefers the application within the time allowed by the statute of limitation, and the application otherwise is duly made according to the requirements of the law.

The position is entirely different where the application under O. 21, R. 90, is dismissed either on the merits, or when the applicant does not appear but the opposite party appears and is ready to contest the application. In either of those circumstances in my opinion, the order dismissing the application to set aside a sale is an order refusing to set aside a sale within O. 43, R. 1 (j) and in either case the order confirming the sale under O. 21, R. 92 is ancillary to and follows as of course from the order dismissing the application to set the sale aside. In my opinion, the orders of the 18th December 1926, by which the application to set aside the sale was dismissed and the sale was confirmed were subject to appeal. Upon the merits, in our opinion, the appeal must succeed. It appears that the applicant was desirous of summoning four witnesses in support of his application under O. 21, R. 90, and deposited diet money sufficient for the purpose. One of the witnesses was duly summoned and accepted the diet money; another refused to accept the diet money, and the remaining two were not served. Subsequently, on the 13th November an order was passed that fresh summons should be issued to the witnesses for the applicant and the hearing of the execution case was adjourned till the 4th December. On the 4th December the applicant presented a petition praying that fresh summonses should be issued to the two witnesses whom hitherto he had been unable to serve, but the Court rejected his petition upon the ground that

no requisites had been filed and the parties were directed to be ready for the hearing on the 18th December.

On that day a petition was presented by a pleader on behalf of the applicant praying that the fresh summonses should be issued upon the two witnesses whose names were mentioned in the petition and that there should be an adjournment of the hearing. In his petition the applicant stated that the diet money for these witnesses was on deposit in this Court. That was the fact. Nevertheless, the learned Subordinate Judge passed the following order :

(1) *A. I. R. 1926 Cal. 773=53 Cal. 679.*

I do not find any sufficient reason to issue summons upon the applicant's witnesses at this late stage, particularly when diet money for the witnesses is not filed and the opposite party is ready with his many witnesses. The petition appears to be frivolous and no pleader appears to support it. Petition is rejected.

Now, it appears that on that morning, after the pleader had lodged his petition during the first hour of the sitting of the Court, he left the Court as the petition could not be heard forthwith, and did not return to the Court until after the mid-day adjournment, when it was discovered that one of the orders under appeal had been passed in the following terms :

The applicant does not appear though repeatedly called. His pleader is also absent. Case be dismissed with costs. Pleader's fees Rs. 4.

And this order was followed by the other order under review :

Thirty days having expired from the date of sale and the objection having been disallowed, ordered that the sale be confirmed and the execution case be dismissed on part satisfaction.

There can be no doubt, having regard to the course of the proceedings, that the learned Judge refused the petition for an adjournment and fresh service because he came to the conclusion that as no diet money had been duly deposited the applicant was not bona fide prosecuting application. But it now transpires that the diet money had all along been on deposit in Court, and in the circumstances obtaining in this case I do not think that the application ought to have been rejected. At the same time if the applicant or his pleader had remained in Court on the 18th December, and had explained what the real position was, in all probability these proceedings would not have been necessary.

The order of the Court is that the appellant must deposit in the executing Court the respondent's costs incidental to both this appeal and the Miscellaneous Case No. 45 of 1926 within one week from the date of the order assessing the costs in the lower Court. The costs in the lower Court are to be assessed within one week after the arrival of the records and this order in the lower Court. We assess the hearing-fee in this Court at two gold mohurs.

If the costs as aforesaid are deposited in the Court below as directed above the appeal will be allowed and the orders under appeal set aside, and the application of the appellant under O. 21, R. 90 heard according to law. If the said costs

are not deposited as aforesaid the appeal will stand dismissed with costs, the hearing-fee being assessed at two gold mohurs.

Graham, J.—I agree.

N.D.

Order accordingly.

* A. I. R. 1928 Calcutta 27

BUCKLAND, SUHRAWARDY AND
CAMMIADE, JJ.

Hari Narayan Chandra and others—
Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 89 to 91 and 99 of 1926, Decided on 18th January 1927, from the decision of the Commissioners, D/- 9th January 1926.

* (a) *Criminal P. C., S. 360 (3)—Witness deposing in vernacular—Deposition recorded in English—It need not be read over to him in English before interpreting in vernacular.*

Sub-Section 360 does not require that the deposition recorded in English should be translated into the vernacular to a witness who has deposed in the vernacular, after having first been read over to him in English. If such had been the intention of the Legislature, one would have expected the word "also" to stand between the words "shall" and "be interpreted" in sub-S. (3). [P 31 C 2]

(b) *Criminal P. C., S. 360—Pleader engaged—Deposition may be read in pleader's presence*

When accused is absent, the reading over of a deposition in the presence of a pleader during the temporary absence of the prisoner represented by such pleader, is a sufficient compliance with the provisions of S. 360 : *A. I. R. 1926 Cal. 528, Expl.* [P 32 C 1]

(c) *Criminal P. C., S. 205—Pleader is to be engaged to safeguard interests of accused.*

All that S. 205 provides is that, when the Magistrate sees fit, a person against whom a summons has issued may be exempted from personal appearance, provided he engages a pleader to attend and see that the proceedings are properly and legally conducted. [P 32 C 1]

* (d) *Criminal P. C., S. 103 (3)—Absence of accused is not material.*

It is not necessary that the person whose premises are searched must be present at the search : *View of Beachcroft, J., in 41 Cal 310. Diss. from.* [P 35 C 2]

* (e) *Criminal P. C., S. 103 (2)—All search witnesses need not be called.*

It is not the duty of the prosecution to put every search witness into the witness-box. The discretion is left to the Court to require or not, the attendance of such witnesses : *9 C. W. N. 438, Diss. from.* [P 35 C 2]

(f) *Penal Code, S. 120-B — Incriminating articles found in a house—Other facts also suggesting implication of all inmates in conspiracy—Innocence of person present there must be proved.*

Where there are no means of discriminating between the cases of the various persons found in a house where incriminating articles are discovered and the circumstances point to the conclusion that every person found in the house was a member of the conspiracy, absence of proof that a particular person was there innocently leads to the conclusion that no one's presence was innocent. [P 33 C 1]

(g) *Criminal Trial — Prosecution proving prima facie case—Accused should not merely criticize but should adduce evidence in rebuttal (Suhrawardy, J.)*

When appearances are against the accused in a case, and the prosecution has established prima facie the existence of incriminating circumstances, it is the duty of the defence to rebut the presumption arising from them by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated statements from the dock. [P 40 C 2]

(h) *Explosive Substances Act (1908), S. 5—House containing explosives — Temporarily residing in the house is no offence under S. 5 (Suhrawardy, J.)*

Temporary residence in a house containing explosive articles, even with the knowledge of their existence there, is not possession within the meaning of S. 5, Explosives Act. Conspiracy to possess connotes some act of possession or attempted possession. [P 41 C 2]

Mrityunjoy Chattopadhyaya—for Appellants

B. L. Mitter—for the Crown

Cammiade, J.—These four appeals are against a judgment of commissioners appointed under sub-Ss (1) and (2) S. 4, Bengal Criminal Law Amendment Act, 1925. Nine persons were convicted by this judgment; and out of these one has undergone sentence of death passed on him in connexion with the Alipore Jail murder. There remain eight persons. Five of them, namely Hari Narayan Chandra, Rajendra Lal Lahiri, Birendra Kumar Banerjee, Dhrubesh Chandra Chatterjee and Rakhal Chandra De are the appellants in appeal No. 89; Nikhil Bandhu Banerjee is the appellant in appeal No. 90; Debi Prasad Chatterjee is the appellant in appeal No. 91; and Shibaram Chatterjee is the appellant in appeal No. 99. Two of the appellants in the first of these appeals, namely Dhrubesh Chandra Chatterjee and Rakhal Chandra De, have been sentenced to transportation for life in connexion with the Alipore Jail murder; and the learned vakil who appears

for them has moved us to exercise the powers vested in us by S. 397, Criminal P. C., and make the sentence passed in the case before us run concurrently with the other sentence, in the event of our finding these appellants guilty in the present case also. The learned Advocate-General has supported this request. This appeal in other respects, as far as these appellants are concerned, may be treated as sentimental.

All the appellants have been found guilty of the following offences, namely conspiracy, under S. 120B, I. P. C., to commit the offences specified in S. 4(b), Explosive Substances Act, and S. 19(f) Arms Act, and also substantive offences under both the last-mentioned sections. Hari Narayan Chandra and Rajendra Lal Lahiri have been sentenced to transportation for ten years under S. 4(b), Explosive Substances Act, and to rigorous imprisonment for two years under S. 19(f), Arms Act. Birendra Kumar Banerjee, Nikhil Bandhu Banerjee, Dhrubesh Chandra Chatterjee and Rakhal Chandra De have been sentenced to rigorous imprisonment for five years under the former section and rigorous imprisonment for two years under the latter. Shibaram Chatterjee and Debi Prasad Chatterjee have been sentenced to rigorous imprisonment for three years and 18 months respectively under the above two sections. The separate sentences passed on each of the appellants are to run concurrently.

The story of the case is to the following effect :

The police had been keeping watch over the house, No. 4 Sovabazar Street; and instructions had been given to shadow Ananta Hari Mitra. On the 6th November 1925, a watcher named Nalini Kanta Roy, who was standing at the junction of Sovabazar Street and Chitpore Road, saw Ananta Hari Mitra engage a taxi at about 1.45 p. m. and drive into Sovabazar Street. After a few minutes he saw the same taxi returning with Ananta Hari Mitra, Dhrubesh Chandra Chatterjee and another man inside. The taxi turned into Chitpore Road and went northwards. The watcher took down the number of the taxi.

That evening, at about 6 o'clock, the watcher came across the taxi and asked the driver where he had taken the three young men. The driver, whose name was

Hiru, replied that he had driven them as far as Baranagore Bazar where they had alighted and engaged a ticca gharri. On being asked if he could point out the ticca gharri, he said he might, and also that his friend, Shamser Ali, who had been with him, might also help in the matter. The watcher went with Hiru to Shamser Ali's house. They took Shamser with them in the taxi to Baranagore Bazar. There Hiru and Shamser made enquiries among the ticca gharri drivers and returned and said that the man who had driven the young men was one Mona, who was not there at the moment. Next morning, the watcher went to Baranagore and found Mona, from whom he learnt that he had driven the three young men to Bachaspatipara in Dakhineswar. The watcher made Mona drive him to the place where the young men had alighted. There Mona pointed out the house to which one of the young men had gone to get change for a rupee, while the other two had remained in the carriage. That house is the one referred to in the evidence as Dwaraka's house.

Early on the morning of the 10th November, Mr. Duckfield, Additional Superintendent of Police, 24-Parganas, went with a posse of police to make a search. He was taken by Nalini Kanta Roy, the watcher, to Dwaraka's house. That house is in two parts. The house was surrounded; and at each of the parts of the house one of the inmates was questioned. It was ascertained from them that the next house, separated from this one by a tank, was occupied by strangers, who kept very much to themselves. Mr. Duckfield inferred that that was the house he wanted; and he had it surrounded. One search witness was taken on the way to the place, at a distance of about half a mile from the house that was searched; and three neighbours were also summoned and made to attend as witnesses to the search. All the nine persons who have been convicted were found at the house that was searched. The police found the door closed, and they knocked for admittance. Rakhai Chandra De opened the door and stood in the doorway and Mr. Duckfield asked him his name: and he gave the name of Nimai Chandra Deb. Rakhai was put under arrest. As the rooms on the ground floor were unoccupied, Mr. Duckfield went up the stairs, followed by some of

the members of his force. He found the door at the head of the stair closed and fastened. As no one complied with the request that that door should be opened, a pick-axe was procured, and the door was broken open.

On the first floor of the house there are three rooms and an enclosed verandah. The house faces south; and the enclosed verandah is on the south side. As one goes up the stairs, one finds to the left a door leading off the enclosed verandah into the room that is referred to as the eastern room. On the right-hand side as one goes up, there is the enclosed verandah, out of which two doors open northwards into the rooms which are referred to as the middle room and the western room. When Mr. Duckfield entered the enclosed verandah he found Rajendra Lal Lahiri at the foot of the flight of stairs leading to the roof, which lie between the stairs that lead to the ground floor and the eastern room. Mr. Duckfield arrested Rajendra Lal Lahiri, and sent him downstairs. Mr. Duckfield then went into the middle room. There he found Dhrubesh Chatterjee and Shibaram Chatterjee lying ill, with Ananta Hari Mitra attending to them. The last named was put under arrest.

Mr. Duckfield then went to the eastern room. On the way there, he found Debi Prosad Chatterjee under arrest in the enclosed verandah. The latter had been in attendance on the three persons who were lying ill in the eastern room. Those three persons were Birendra Kumar Banerjee, Hari Narayan Chandra and Nikhil Bandhu Banerjee. None of the persons found upstairs gave his name, with the exception of Debi Prosad who also gave his father's name, and address. The eastern room was searched first. The articles found there were items 1 to 46 of search list Ex. B. The search of that room lasted till about 9-30 a.m. At about 9 o'clock, the five persons who were ill were sent in an ambulance and in a taxi to Alipore, to be produced before the District Magistrate.

The search of the middle room was taken up after that of the eastern room was concluded. In the middle room, amongst other things, there was an almirah which was padlocked. Those of the arrested persons who had been brought up and were present were called upon to produce the key. As the key was not

produced, the padlock was forced open. In that almirah were found most of the remaining articles specified in search list Ex. B. including, among other things, a live bomb. The Chief Inspector of Explosives was sent for; and he placed the bomb in a bucket of water, and took it away. The search of the premises was continued till 7-30 p. m. on that day and was continued on the next two days. Nothing of any importance was found in the western room upstairs, in the room on the roof, in the ground floor rooms or in the out-houses. The four accused persons in good health were present throughout the search of the middle and western room and were there for the rest of the day. They were produced before the Magistrate next morning.

Before proceeding to discuss the case on the merits, it is necessary to dispose of a preliminary objection to the validity of the trial, taken on behalf of all the appellants. It is contended that the provisions of S. 360, Criminal P. C. have not been complied with. Our attention is drawn to the fact that the certificates given by the commissioners at the foot of the depositions are in four different forms:

(1) "Read over to witness in the presence of the accused or their lawyers, and admitted to be correct.

(2) Read over in the presence of the accused and admitted to be correct.

(3) Explained to the witness in the presence of the accused or their lawyers and admitted to be correct.

(4) Explained to the witness in the presence of the accused and admitted to be correct.

It is contended that only the second of these forms of certificates shows compliance with provisions of S. 360. As regards the reading over of the depositions in the presence of the lawyers representing accused persons, who were temporarily absent from the Court-room for necessary purposes at the time the depositions were read over (certificate form No. 1 above) it is urged that such reading over is not a compliance with the provisions of the section, the object of which is to enable both the witness and the accused to see whether or not the depositions have been correctly recorded.

As regards the certificates in forms Nos. (3) and (4) set forth above, it is contended that, in order to comply with the provisions of S. 360, it is the duty of the Court first to read over the recorded de-

position in English, as provided in sub-S. (1) and then to have it interpreted to the witness as provided in sub-S. (3), and that as the certificate does not show that the deposition, where certificate in form No. 3 or No. 4 has been given, was read over in English, there was no compliance with the requirements of the section.

Before proceeding to discuss this matter it should be stated that all the accused persons under trial were represented by lawyers. Throughout the trial, all the accused persons were represented by a Solicitor named Delip Kumar Chakrabarti, witness 74 for the prosecution. Besides this, for the first five days of the trial, the appellant Nikhil was represented by a Mr. Mukherji and certain other legal gentlemen who appeared also for other accused persons. On the sixth day of the trial Mr. Mukherji and these other legal gentlemen made known to the Court that from that day forward they ceased to appear for Nikhil. All the accused persons admittedly knew English.

Two affidavits have been filed on behalf of the appellants, one by one Krishna Charan Chandra, brother of the appellant Hari Narayan Chandra, and the other by one Akhil Bandhu Banerjee, brother of the appellant Nikhil Bandhu Banerjee. On the side of the Crown, a statement signed by one of the commissioners, contradicting the allegations made in these affidavits, has been filed. In the first of these affidavits the commissioners are charged with having merely told some of the witnesses what purported to be the substance of the depositions that had been recorded; and it is further stated that all the accused persons were not present in the Court-room at the time that some of the depositions were read over. The other affidavit states that Nikhil was not present in the Court-room when some of the depositions were either read over or explained to the witnesses. The deponent states that he particularly remembers that Nikhil was absent from the Court-room when the deposition given by Jugal Kishore was explained to that witness. He further repeats the charge that in the case of some of the witnesses only the substance of their depositions was given to them in Bengali.

The commissioners' statement is to the effect that, whenever a witness deposed in English the deposition was read

over to him in English, that whenever a witness deposed in the vernacular, the deposition was read over sentence by sentence and then explained to the witness in the vernacular, and that if any accused person not represented by a lawyer was absent from the Court-room, the Court invariably waited for his return before proceeding to read out the deposition to the witness.

The learned vakil appearing for the appellants were none of them present at the trial, and are not in a position to support the allegations made in the affidavits. None of the legal gentlemen who did appear for the appellants at the trial has sworn an affidavit to support the allegations that have been made. The persons who have sworn the affidavits are the brothers of two of the appellants who have nothing to lose by swearing falsely. The allegations made by them are amply refuted by the statement signed by one of the commissioners. The very record shows with what care and scruple the commissioners did their work. The commissioners have been at pains to record in each instance whether or not all the accused persons were themselves present in the Court-room at the time a deposition was read over, showing that they made a point of ascertaining each time whether or not all the accused persons were present in the room when depositions were read over. There can, therefore, be no doubt that whenever Nikhil, who was considered unrepresented, was out of the room, the Court did, as the commissioner has stated, await his return before reading over a deposition.

We are not prepared to accept the contention that sub-S. (3), S. 360 is an additional provision, requiring that the deposition recorded in English should be translated into the vernacular to a witness who has deposed in the vernacular, after having first been read over to him in English. It would be a grave insult to the Court to question its integrity in giving a true rendering in the vernacular of the deposition it has recorded. There is nothing in the wording of the section to indicate that it requires that the deposition shall first be read over as recorded in English and shall then be translated into the language in which the witness has deposed. If such had been the intention of the legislature, we should have

expected the word "also" to stand between the words "shall" and "be interpreted" in sub-S. (3). It is, however, not necessary for us on this occasion to decide whether or not the interpretation sought to be put upon the section is correct, as the commissioner who has made a statement has placed on record that whenever a witness deposed in the vernacular, the deposition recorded in English was first read out sentence by sentence and then interpreted to the witness.

As regards the objection that the reading over of a deposition in the presence of a pleader, during the temporary absence of the prisoner represented by such pleader, is not a compliance with the provisions of S. 360, we have been referred to the case of *Kasim Ali v. Sarada Kripa Laha* (1) and also to the wording of Ss 360 and 361 of the Code. It is true that in the case referred to we find that a Bench of this Court laid down as follows :

It is clear from the wording of the section that if the accused is in attendance the evidence must be read over in his presence, and it is only when the accused appears by pleader that the reading over of the evidence in the presence of the accused's pleader is sufficient.

But the facts of the case do not appear from the report. It may be inferred that in that case the deposition had been read over before a pleader and that is all. There may have been more than one accused person in the case ; and possibly the person in whose absence the deposition in that case was read over had no pleader appearing for him. We, therefore, cannot consider the case as an authority for the proposition set up by the appellants.

As regards the argument based on the wording of the sections, we are unable to accept the contentions of the appellants. The contentions are as follows :

Firstly, that the words in sub-S. (1), S. 360,

or of his pleader, if he appears by pleader relate to cases where the personal attendance of an accused person is dispensed with under the provisions of S. 205 of the Code in which the words

permit him to appear by pleader are to be found, and secondly that such interpretation is borne out by the provisions of S. 361, of which the first two sub-sections read :

Sub-S. (1) : Whenever any evidence is given in a language not understood by the accused,

(1) A. I. R. 1926 Cal. 523.

and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

Sub-S (2): If he appears by pleader and the evidence is given in a language other than that of the Court and not understood by the pleader, it shall be interpreted to the pleader in that language.

Now, the words "appear by pleader" are nowhere defined. In ordinary acceptance, these words mean "represented by pleader," that is to say, having a pleader to act and plead. In S. 205 the word "appear" seems to convey a double meaning, seemingly connoting not merely authority to act and plead, but also authority to personate the accused; but there is nothing to show that double meaning was intended by the legislature. It is necessary that someone should be present at the trial to look after the interests of the accused; and all that S. 205 provides is that, when the Magistrate sees fit, a person against whom a summons has issued may be exempted from personal appearance, provided he engages a pleader to attend and see that the proceedings are properly and legally conducted. The law considers that the interests of the accused will be completely safeguarded if his pleader is in attendance. This is all that can be gathered from the provisions of that section. A similar intention is to be gathered from the provisions of S. 361.

But even if the double meaning of the word "appear" in S. 205 were intentional, there is nothing in the provisions of sub-S. (1), S. 360 to indicate that the legislature intended that the reading over in the presence of the pleader should be a compliance with the provisions of that section only in cases where the personal appearance of the accused is dispensed with by the Court. The words used are:

It shall be read over to him (the witness) in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader.

The natural meaning of these words is that if an accused person has engaged a pleader, who is in attendance, the reading over of the deposition in the presence of the pleader will be a full compliance with the provisions of the section, if the accused himself does not happen to be present at the time the deposition is read over. We, therefore, hold that the provisions of S. 360 have been complied with.

Turning to the facts of the case: we

find a number of young men, not all of one caste, hailing from different places, none of them with any ostensible means of livelihood, and only one of them apparently possessing some money, living together in what is practically a village on the outskirts of Calcutta, a place which is admittedly malarious. These young men keep very much to themselves. They hardly go abroad and even will not make use of the privy standing within the compound of the house, using instead a rain-water pipe leading from the roof of the house. They have no intercourse with neighbours. They keep their door closed all the time. When one of them visits the grocer's shop to buy groceries, he does so late in the evening and tells the grocer to make haste and hand over the goods. They live under assumed names. Even when some of them are ill, rather than call local medical men, they go to the expense of bringing one from a distance, paying him a high fee and the expenses of conveying him to Dakhineswar and back. At the search of the house they occupy, the police found a stolen revolver, a muzzle-loading pistol, cartridges for revolvers, for an automatic pistol and for a shotgun, a live bomb, a large quantity of chemicals used in the preparation of explosives, hand-written and type-written instructions for the preparation of explosives of various kinds, cloth masks, written instructions about disguises, inflammatory literature and have hand-drawn maps of the neighbourhood.

All these young men profess to have no connexion with the incriminating articles found at the search. Every one of them, except Nikhil, who made no statement, gives some excuse for being in that house. Hari Narayan says that he is an ex-internee, and that as the police were always on his tracks he decided to live in a quiet place outside Calcutta. He came to hear of the house at Dakhineswar through his friend Dhrubesh, and took it at the beginning of August, and went to live there with Birendra and Shibaram. Birendra says that the people of the house where he had worked as a private tutor in Howrah had calumniated him and that he had to leave Howrah on that account. His friend, Hari Narayan, suggested living at Dakhineswar; and he went there to live with his friend, who also promised to

take him into partnership in a business he was going to start. Birendra, however, was ill most of the time.

Shibaram says he had quarrelled with a professor of Ashutosh College and had gone to St. Xavier's College, against his father's wishes. He failed in his annual examination; and his father expressed annoyance at this. He, therefore, left home. His friend, Hari Narayan, took him to live at Dakshineswar to save him expense and also promised to have him instructed in short hand. Dhrubesh says he had a quarrel with his uncle over money matters and left home and lived at one or two places and then went to the Dakshineswar house, where his friends had started a cheap mess. Rakhal De had a quarrel with the manager of a business called the Chittagong Chemical Industries, for which he had been working. He was on the look-out for other employment and wrote to his friend, Ananta Hari Mitra, who invited him from Chittagong to Krishnagar and then took him to live at Dakshineswar early in November.

Rajendra Lahiri, Debi Prosad and Ananta Hari say they went to the house on the 8th November, two days before their arrest, and found several people lying ill. They were asked to stay and help; and that is how they happened to be present at the time of the search. Rajendra claims to have come to know of the place through his friend Dhrubesh, whom he had met near the Dakshineswar temple, and had been invited to go and visit the mess whenever he could. Debi Prosad also had quarrels. He had formerly lived at the house in Dakshineswar in which he has a share. As he had quarrelled with his co-sharers he had gone to live at Bally, on the other side of the river. The letting of the house to Hari Narayan and his friends was arranged through him, but his relatives tried to deprive him of his share of the rent. He, therefore, went to the house on the 8th November to collect his share of the rent direct.

That the incriminating articles were found in the house and that all the appellants were arrested there on the 10th November 1925 are not questioned. The case sought to be set up for all the appellants is that they had no connexion with the incriminating articles, and that these articles must have been introduced into the house by the police; and if that

theory is not accepted, it has not been proved which of the appellants was in possession of the incriminating articles.

As regards individual appellants, it is urged that, in the absence of evidence to the contrary, it should be believed that Rajendra and Debi did not go to the house till the 8th November, and that their purpose in staying there was merely to help in nursing people who were ill. For Shibaram it is said that he was too ill to know what was taking place in the house.

Touching the first part of the general defence set up in argument before us, it has been urged that firstly the search was not conducted in accordance with law; and secondly that, as Mr. Duckfield has said that the appellants who were in good health were brought up from downstairs when the middle room was searched, that is to say at 9-30, and the men who were ill were removed at 9 o'clock, the police had had half-an hour in which to "plant" the incriminating articles in the middle room. At the time of the trial, the suggestion that was thrown out was that the things had been carried into the house before the arrival of the local search witnesses. This suggestion will appear only from the following passage in the deposition of the friendly search witness Makhan Lal Chatterji, P. W. 5, who is related to the appellant Debi Prosad. The question put to this witness was:

Had you any conversation with the accused there.

('There' refers to the door of the house, where according to the witness he found Rajendra and Debi under arrest).

I shall recall it to you. Did the accused say this. "Mahashay, why have you come so late? They have done what they wanted to do."

And the answer was "yes."

From this it is argued that the suggestion then was that the incriminating articles were carried into the house by the police before Makhan's arrival. Yet neither Rajendra nor Debi said anything about this in his statement on examination before the commissioners. The learned vakil appearing for the appellants naively states that these persons could not make such statements in their answers to the commissioners, because they were downstairs and could not see the things being put into the almirah upstairs. They may or may not have been in a position to say that they saw things put

into the almirah; but they must have been in a position to see things being taken upstairs. Considering the enormous number of articles taken at the search and the bulk of several of these articles, it certainly would have been impossible for the police to have taken these things upstairs without being seen. This matter will have to be referred to further in connexion with the comments that have been made about the searching of the persons of the police and of the search witnesses before they entered the house. The failure of the appellants to state that they saw articles in the hands of the police or indications that they were carrying articles concealed in their uniforms is a complete refutation of the suggestion that anything was carried into the house by the police at any time.

The enclosed verandah upstairs is only about five feet wide. According to the search witness Makhan the contents of a tin-box found in the eastern room were examined on that verandah. The officers conducting the search, some constables and the search witnesses were present. In such circumstances it is difficult to understand how it could have been possible for the police to carry to the middle room the large number of articles that were found there. If aspersions are made on the police, it should be shown that such aspersions are justifiable. It is not sufficient to say that on certain occasions the police have been known to fabricate circumstances. It must be shown that in the present case there are at least indications that the police put the incriminating articles into the house. The indications point the other way. When the key of the padlock to the almirah in the middle room was asked for, had those of the appellants who were present been innocent, one would have expected them to say ;

How should we know where the key is? You have yourselves put the padlock on the almirah.

They would have made similar remarks when the incriminating articles were taken out of the almirah. Instead of which we find that when the bomb was found, the appellant Rajendra Lahiri offered to remove the fuse and make the bomb harmless.

Further, the nature of at least two of the articles makes it extremely improbable that the police had any connexion with them. The first is the bomb, which, as

Dr. Robson has deposed, was in a sensitive condition. He describes the mixture of chemicals contained in the bomb as a dangerous mixture and says that there is considerable probability of ammonium chlorate being formed from such a mixture, which might lead to a premature explosion. It is not reasonably probable that, in order to gain promotion or reward, the police would carry about on their persons such an extremely dangerous article as this bomb. The other item is the revolver. This weapon was unlicensed. Whenever that weapon might have been discovered by the police, the person with whom it was found would have been prosecuted. The weapon, moreover, is an expensive one; and it is unreasonable to suggest that subordinate members of the police establishment keep expensive weapons of this description by them for the purpose of "planting" them on persons whom they intend charging with possession of unlicensed arms. The suggestion that the police smuggled the incriminating articles into the house does not bear investigation.

In the same connexion the learned vakils for the appellants have drawn attention to certain discrepancies in the evidence on the subject of the searching of the persons of the police and of the search witnesses; they have characterized the search of the eastern room as illegal, because, according to Mr. Duckfield's evidence, the four men who were not ill were not present at that search; and they have asked us to disbelieve the evidence of the search on the ground that two of the search witnesses were not examined.

The witnesses agree in saying that the police were searched, although there are discrepancies concerning the manner in which they were searched. Some say hands were not laid on their persons; others say that the clothes were felt; and one police officer says that his pockets were searched. Mr. Duckfield offered himself for search and asked the search witnesses to search his force before he entered the house. As regards the search witnesses, they were four in number. Makhan was well disposed towards the appellants; and there is no suggestion that he took anything into the house. The other two witnesses to the search must also have been free from suspicion, since complaint is made that those persons were not placed in the witness-box. The

suggestion, therefore, is that the remaining search witness, Jugal, must have smuggled things into the house. This is nothing but a suggestion. Suspicion is sought to be cast on Jugal because he was brought by the police from a distance of about half a mile from the place. This circumstance is not calculated to create any suspicion unless it can be shown that Jugal was in any way connected with the police. There is absolutely nothing to show this. The place where the house stands is more or less a village, well away from the Barrackpur Trunk Road. The house at which the police went to make the search was one near which it must be more or less difficult to secure persons to attend a search. It is not every one who is willing to be dragged into a police case. Therefore the mere fact that Jugal was found nearly half a mile away from the house that was searched is no ground for suspicion. There is also nothing reasonable about the suggestion. As already stated, the articles found were bulky. There were a great many bottles of acid, glycerine and other chemicals; there was glass apparatus of various kinds and a large number of small phials, packets containing different substances and papers, besides the bomb, the revolver, the pistol and the cartridges. It cannot be seriously suggested that Jugal Kishore could have smuggled any appreciable portion of this bulk. We are not told what clothes the man was wearing; and there is nothing to show that he wore any more clothing than Makan, who says he had on nothing more than a dhoti and a chadar. There is no force whatever in the suggestion that anything was smuggled into the house.

Nothing turns on the other two objections made concerning the search. With regard to the absence of Ananta Hari, Rajendra, Debi Prosad and Rakhal, the four persons who were in good health, at the time of the search of the eastern room, Mr. Duckfield may or may not be mistaken; but assuming that he is right in saying that all the four persons were downstairs when that room was searched, their absence can make no difference to the case. Our attention has been drawn to the remarks of Mr. Justice Beachcroft in the case of *Ramesh Chandra Banerjee v. Emperor* (2), where the learned Judge

observes that in his opinion the spirit of S. 103, Criminal P. C. requires that the persons whose premises are searched shall be present and that he must be given the option of being present. This view of the meaning of the word "permitted" in sub-S. (3), S. 103 was not accepted by Mr. Justice Woodroffe, the other learned Judge who decided that case. We are not prepared to agree with the interpretation put on the word "permitted" by Mr. Justice Beachcroft.

As regards the failure of the prosecution to put the other two search witnesses into the witness-box, our attention has been drawn to the case of *Munui Sonar v. Emperor* (3), where it was laid down that every search witness should be put into the witness-box, unless the prosecution are of opinion that such persons would misrepresent facts and would mistake what had happened. With all the respect to the opinion of the learned Judges who decided that case, we must hold that no such duty is cast on the prosecution. Sub-section (2), S. 103 expressly lays down that

no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

The reason of this provision is obvious. Many persons would be unwilling to attend searches if, as a matter of course they had to attend Court at the trial of the case, possibly two Courts, if the case is committed to the Sessions. The discretion is, therefore, left to the Court to require or not the attendance of such witnesses. It does not even appear that the appellants moved the commissioner to have those witnesses produced; and they certainly did not call them as witnesses for the defence, which it was open to them to do, and which they should have done, since they profess to have a high regard for the truthfulness of these persons. There is no substance in the grievance sought to be made out. Be those things as they may, the important question is whether or not the incriminating articles were in the house when the police went to search it. If this is so, as we must find it to be so, it would not matter in the least, whatever irregularities might have been committed in the conduct of the search.

The other important question in the case is the question of possession of the

(2) [1913] 41 Cal. 350=23 I. C. 985=18 C. W. N. 493.

(3) [1901] 9 C. W. N. 438.

incriminating articles. At the trial, an attempt was made in cross-examination to suggest that the chemicals and the chemical apparatus were the property of a medical practitioner who had previously lived in the house. This suggestion has not been seriously pressed before us; and it is entirely negatived by the evidence. It appears that the medical practitioner who had occupied the house was one Govinda Gopal Mukherjee, Debi's maternal uncle. He had lived in the house for about twelve months and had been in the service of a neighbouring mill. He was away at his work the greater part of the day and had no private practice. He kept no chemicals in his house and had no laboratory. These facts are deposed to by Debi's relations, who are witnesses in the case. One of them, Nabin Kali, Debi's aunt, states that after the house had been let to the young men she had cleaned out the almirah in the middle room and left it open.

As far as concerns the bomb, there can be no question about its manufacture within a few days of the date of the search. There is unimpeachable proof that it was manufactured after the 23rd October 1925, because the circular slips of paper found within it, serving as a covering to the explosive powder, have been proved conclusively to have been cut out of the Amrita Bazar Patrika of that date.

A cash memo was also found among the papers in the house, showing purchase of extra pure nitric acid of the gravity of 1.42 on the 3rd November 1925, and among the bottles of acid found in the almirah was one such acid. The cash memo has been proved by the chemist who sold the acid. The purchaser had given the name of Asok Chandra Roy, being one of the names that one of the appellants had assumed. The address given to the chemist by the purchaser was 70 Balaram Ghose Street, a totally fictitious address. There is no room for the suggestion that the incriminating articles had belonged to the medical practitioner who had occupied the house. Possession of these articles can only be attributed to the occupants of the house at the time of the search. The only question is whether any of the persons found in the house can claim the benefit of the doubt in regard to this matter.

All the circumstances of the case leave no room for doubt that the occupants of the house were members of a conspiracy with anarchical designs. The persons found in the house belonged to different places. Hari Narayan belonged to Chinsurah; Biren to Salkia; Dhrubesh to Nandigram in the district of Hooghly; Nikhil to Joypur in the district of Jessore; Rakhal to Chittagong; Rajendra to Pabna; Ananta Hari to Krishnagar in the district of Nadia; Debi Prosad to Bally in the district of Howrah; and Shibaram to Bhowanipore, Calcutta. Some explanation is necessary for the presence of such persons in the same house several of them admittedly living together. The absence of explanation, which would be forthcoming if the appellants were innocent, undoubtedly corroborates the case for the prosecution. These young men, moreover, were doing nothing; and, according to their own account of themselves, the majority of them had quarrelled with their relations. They have none of them even stated that they had been making efforts to find employment. Only Birendra has said that he had had it in his mind to rejoin his appointment in the office of the E. I. Railway.

The fact that these young men were living in a place which is admittedly a hotbed of malaria does not suggest that they chose the place for the sake of their health. If they had been living honestly, there was no occasion for the extreme secrecy observed by them—secrecy carried to the point of making their lives disgusting. As already stated, these young men actually used a rain water pipe leading from the roof of the house as a latrine, when they had a privy outside. It is idle to say that people who do such a thing as this can have any but nefarious ways. Their only object in doing anything as disgusting could be to escape observation from neighbours. The inmates of the house went under false names. We have nothing but the statements of the majority of them that for one reason or another they had fallen out with their relatives and guardians and that they did not wish to be traced by them. This story is not consistent with the story that Rajendra who is supposed to have become stranger to the bulk of the occupants of the house, was invited to visit the house as often as he could go, or that Ananta Hari, a person who is said to

have had no sort of connexion with the establishment, took Rakhal to live there as a matter of course. We have nothing but the word of the appellants about the reasons for their being where they were found, with all the incriminating articles. People living in the house were collecting materials for the manufacture of explosives, had in their possession directions for the preparation of explosives of various kinds and at least one live bomb and also unlicensed arms. That persons who were engaged in doing such things would have as their mess mates any but fellow conspirators is utterly inconceivable. It cannot be believed that any person could have been admitted within the house unless he was a safe person. Since the occupiers of the house would not even associate with neighbours in the street and were so careful about avoiding even being seen by their neighbours, it is utterly unlikely that they would admit people within the house, least of all have people to stay with them, unless such people were co-conspirators.

Of the co-owners of the house, Hari Sadhan Chatterjee, Satish Chandra Chatterjee and Nabin Kali, each was admitted upstairs once. On the occasion of their visits, they found the door of the house closed and had to knock for admittance. Satish visited the house in the first part of August, and Hari Sadhan visited it in the first week of September. They went there to collect the rent. Nabin Kali went to the house on four or five occasions. She used to go to the garden to collect *bel* leaves for worship. She used to find even the door of the outer wall of the house fastened and had to shout for admittance. She went upstairs once. That was at the time of the Ananta Chaturdashi in the month of Bhadra (end of August). That was the occasion on which she cleaned out the almirah in the middle room. It does not appear that any of the co-owners of the house went there after the first week in September; and we find that Debi paid the rent to Hari Sadhan at the beginning of November.

Whether or not chemicals for the manufacture of explosives had been introduced into the house before the end of the first week of September, it is impossible to say. There is one circumstance that seems to indicate that they had not, namely that apparently the

house was not occupied during the Durga Puja festivities, which occurred in that year between the 24th and the 27th September. Nabin Kali states that the boys told her they were going home for the puja and would lock up the house. During the Puja festivities she noticed that the door of the house was padlocked. Three days after the puja she noticed that the door was still padlocked, and it seemed to her that there was no one in the house. The real activities of the conspirators seem to have started after the Puja. There is no definite evidence of this. The only circumstances that seem to indicate this are the one stated above, the manufacture of the bomb subsequent to the 23rd October, the apparent purchase of nitric acid on 3rd November, as evidenced by the voucher found in the house, and the increase in the number in the house.

Over and above the grave improbability that any persons other than fellow conspirators would have been admitted into the house when the conspirators had become active, there is the want of plausible explanation of the presence of the persons who were admitted there after the Puja, and there is the further fact that the prosecution has established a connexion between the house at Dakshineswar and 4 Sova Bazar Street, the house that Ananta Hari Mitra used to frequent. That house also was searched on the 10th November, and amongst the things found there were a five chambered revolver with cartridges, six large bottles of nitric acid and inflammatory literature. A bicycle was found at that house; and the bill for repairs done to that bicycle was found in the almirah in the middle room of the Dakshineswar house, and has been proved by the owner of the shop where the repairs were done. The established connexion with 4 Sova Bazar Street and the repeated appearance in the accounts found in the almirah of mysterious names, including the assumed names of some of the persons found in the Dakshineswar house, prove that the establishment at Dakshineswar was a branch of a larger organization; and this fact makes it all the more impossible to believe that the conspirators at work at Dakshineswar would admit within their house any but persons who were members of the conspiracy.

As we have no means of discriminating between the *gues* of the various persons

found in the house, and as the circumstances point to the conclusion that every person found in the house was a member of the conspiracy, absence of proof that a particular person was there innocently leads to the conclusion that no one's presence was innocent. The explanation offered on behalf of Rajendra is palpably false. The improbability of persons who kept themselves so very much concealed as the inmates of the house inviting people to go and visit them has already been noticed. But, apart from this, we have clear indications that Rajendra had been in the house for some time and had not, as he says, only gone there on the 8th November. He stated that, because he knew he could have to stay with the sick persons for a day or two, he went away and fetched a cloth, a chadar and Bryce's Democracy. At the search of the house at Dakshineswar, various articles were found which he claimed as his own—shaving materials, a blanket, a panjabi and other things. His admitted belongings were found in various parts of the house. Over and above this, we find that his panjabi bore the arrow mark, which the dhobi who had washed the clothing of the inmates of that house had been putting on those clothes. The dhobi has also identified Rajendra as one of the persons whom he saw at the house when he went there in connexion with the washing of clothes. The dhobi says he was not allowed to enter the house, and that the clothes used to be thrown to him from upstairs.

The only appellants besides Rajendra who claim to have been recent arrivals are Rakhal and Debi Prosad. The former, as already stated, had come from Chittagong. The fact that according to his own case he was introduced to the establishment by Ananta Hari Mitra, who was connected both with this establishment and the one at 4 Sova Bazar Street makes it all the more necessary that he should prove his statements. There is nothing but his own uncorroborated statement to show that he was a recent arrival. But, even if he was a recent arrival, the inferences arising from the facts of the case have to be rebutted; and there is absolutely nothing to rebut them.

As regards Debi Prosad, it may be said that he was co-owner of the house and had occasion to go to there to collect rent. There really appears to have been no reason

why he should have collected his share of the rent for himself as his uncle Hari Sadhan, and his cousin, Satish, who lived close by could have collected it. Both these men have said that there was no quarrel between them and Debi Prosad. They admit that they wished to have the family properties partitioned, and that Hari Sadhan had caused notice to be served on Debi to that effect through a pleader. Nabin Kali states that Hari Sadhan had wished to apply the rent of the house towards repairs. It is possible that if there was a difference of opinion between Debi and his uncle on that matter, Debi might have decided to realize his share of the rent for himself. If Debi had merely gone to the house to collect the rent once a month, some sort of doubt might have arisen in his favour; but it appears from the evidence of the neighbours that he was seen going to and from the house fairly frequently. The excuse for his staying in the house from the 8th November onwards is anything but satisfactory.

According to his own story there were already three persons in the house to look after five persons who were ill. The story that he was asked to stay and help would have been an improbable one even if the inmates of the house were not involved in a criminal conspiracy. As matters stand, his story is incredible. There is no excuse whatever for Debi's failing to produce witnesses to prove that he had come from his house at Bally, on the other side of the river, only two days before the search of the house. The fact that he is a co-owner of the house is not sufficient to rebut the conclusions to be drawn against him from the circumstances of the case. On the contrary, the fact that he was a co-owner tells against him. He could not help being aware of the filthy use to which the rain pipe was put; and, had he been innocent, he would have strongly objected to such misuse of the premises. As part-owner of the house he would have sought an explanation of the extreme secrecy observed by the persons who were his tenants. He offers no explanation in regard to these matters; and his silence clearly indicates guilty knowledge. Having such knowledge it is incredible that he should have consented to stay in the house when asked to do so, unless he was himself a member of the conspiracy.

The appellants were all of them in possession of the explosive, and the unlicensed arms and were members of the conspiracy to possess them. They have been rightly convicted.

As regards the sentence: the commissioners have not stated why they classed Rajendra Lahiri with Hari Narayan and not with Birendra and the other three who were sentenced to rigorous imprisonment for five years. We have nothing before us to show who were the leaders of the conspiracy except the statements of the appellants themselves. Hari Narayan admits that he was the prime mover in the starting of the establishment at Dakshineswar; and he fully deserves the sentence passed upon him.

As regards Rajendra there is no evidence to prove that he was a leader; and we do not find anything on the record to justify his being punished more severely than Birendra, Dhruvesh or Nikhil. The only thing that suggests itself is that the commissioners have punished him more severely because he offered to take the fuse out of the bomb, but this in itself does not make his case more serious than that of Birendra and the others. His sentence is, therefore, reduced to that imposed upon those three persons, namely rigorous imprisonment for five years under S. 4 (b), Explosive Substances Act, and rigorous imprisonment for two years under S. 19 (f), Arms Act, the sentences to run concurrently. Considering the nature of the conspiracy, the sentence passed on the other appellants do not seem to be severe. The sentences passed in the present case on Dhruvesh and Rakhal shall run concurrently with the sentences passed on them in the Alipore Jail murder case. In other respects, except the above the appeals are dismissed.

Suhrawardy, J.—I fully agree with my learned brother in his decision on questions of law and in the observations on the evidence made by him in his lucid judgment. There is one matter on which I should like to lay some stress. When appearances are against the accused in a case, and the prosecution has established prima facie the existence of incriminating circumstances, it is the duty of the defence to rebut the presumption arising from them by some tangible evidence other than by mere criticism and suggestions or untested and uncorroborated

statements from the dock. The idea that the defence is not bound to adduce any evidence is dangerous. In jury trials the last word may have some value, but in a trial before three experienced Judges the prosecution and the defence stand on the same footing. In this case there are matters that are within the special knowledge of the prisoners which, if they want the Court to accept, they must substantiate them by evidence. For instance, the prisoner alleged that some of them were students, gone to the house at Dakshineswar to prosecute their studies and that some others were either looking for work or making arrangements to start a business. These are matters which only the defence could prove and the absence of such proof lends strength to the case for the prosecution.

While I concur generally with my learned brother, I am unable to persuade myself that the evidence against the accused Debi Prosad Chatterjee is sufficient for conviction for possessing and conspiring to possess explosive articles which offences, my learned brother holds, have been proved against him. I am not sure that the facts proved against him are not at all consistent with his innocence though they also make it probable that he was one of the conspirators. To my mind, the most the evidence against him proves is that he was friendly with the inmates of the house and possibly was aware of their nefarious designs and practice. He may even have attempted to shield his friends from suspicion. But to convict him of possessing, manufacturing or conspiring to possess explosive articles within S. 5, Explosives Act, something more need be proved than his occasional visits to the house or his statement about the inmates of the house to Satis, P. W. 22, which is not true. There is another fact which apparently tells against him, but it is not enough to prove his possession of the articles, found in the house. It is proved that he made a certain statement to Mr Duckfield, Superintendent of Police, which he subsequently tore up. We do not know how far that statement incriminated him, and though it was of such a nature that it could not be legally proved, we cannot presume that it contained confession of the guilt of possessing the articles found. If such presumption can be made, it will frustrate the very object

of the law which keeps out statements made to a police officer. Such a presumption may be more damaging than the statement itself. This incident, therefore, cannot be used as evidence against him.

The very fact of his occasionally visiting the house proves that he was not in possession of the things inside the house. It is probable that his statement that he was in the house for two days previous to the raid to help nursing the people who were admittedly very ill is true, for no article belonging to him was found in the house at the search. I am not convinced that temporary residence in a house containing explosive articles, even with the knowledge of their existence there, is possession, within the meaning of S. 5, Explosives Act. Conspiracy to possess, I take it, connotes some act of possession or attempted possession. On all these grounds I hold that the evidence for the prosecution falls short of bringing home to the accused Debi Prosad Chatterjee the charges under which he has been convicted, and in my opinion he should be given the benefit of doubt and acquitted. As my learned brother has taken a different view let the case of the accused Debi Prosad Chatterjee be placed before the Chief Justice for proper orders under S. 429, Criminal P. C. Let copies of our judgments be given to Babu Mrityunjoy Chatterjee, the vakil for the accused Debi Prosad Chatterjee.

[Appeal No. 91 was then placed before Buckland, J., for hearing, whose judgment was as follows.]

Buckland, J.—The appellant Debi Prosad Chatterjee has been convicted by the commissioners appointed under sub-Ss. 1 and 2, S. 4, Bengal Criminal Law Amendment Act, 1925, of offences, under Ss. 120-B, I. P. C., 4 (b), Explosive Substances Act, and 19 (f), Indian Arms Act and sentenced to three years rigorous imprisonment under S. 4 (b), Explosive Substances Act, and to eighteen months' rigorous imprisonment under S. 19 (f), Indian Arms Act, the sentences to run concurrently. Nine persons in all of whom the present appellant was one were convicted. They all appealed. One of them was executed upon conviction in another case and the appeals of the others have been dismissed and the convictions and sentences have been affirmed except as regards Rajendra Nath

Ishiri whose sentence has been reduced. But as regards Debi Prosad Chatterjee, owing to a difference of opinion between the learned Judges who heard the appeal the matter has been referred to me under S. 429, Criminal P. C. In these circumstances, it is unnecessary that I should state all the facts at length. They are to be found fully stated in the judgment of the commissioners and again in the judgment of my learned brother Mr. Justice Cammiade.

The question is whether the evidence supports the conviction of the particular appellant. The test is, I think, as the learned vakil who appears for him has put it, whether there is evidence upon the record of the commissioners upon which the conviction and the sentence can be supported. The point depends upon whether the evidence as to the appellant's association with the other persons convicted shows that he was at Dakshineswar at the times stated for a legitimate purpose or that he was there for the purposes which the prosecution alleges. There is evidence referring to instances more or less isolated when he was seen at Dakshineswar. But, without going into all the evidence in detail, there is in addition a considerable body of evidence of some five or six witnesses which, if believed, in my opinion, establishes the case for the prosecution. We first of all have the evidence of Nabin Kali Debi who describes how the house was taken for these persons and how it was arranged by the present appellant. The matter is narrated at some length and Debi Prosad answered various questions by her as to whether the women-folk would come and so forth. The story is not, in my opinion, one which one would expect to hear, if it was a simple matter of Debi letting the house in which he had an interest to his friends for a legitimate purpose. The evidence is not very strong, but there is indication that in letting the house there was something that he wished to conceal. This is carried further by the evidence of Satish Chunder Chatterjee, a cousin of this appellant. To him the appellant made disingenuous statements, for, he said that he had got tenants for the house and that they were boys who messed together, that they were cousins and two of them had business and the others were students. He said that they were five—

three brothers and two cousins—and they were acquaintances of his.

On that evidence, I should say, he was endeavouring to keep Satish Chunder Chatterjee in the dark and to make it appear that there was nothing which would give rise to any suspicion on the part of his relatives as to the persons to whom he was letting the house and at the same time endeavouring to conceal their identity; for his case is that he did not know all these persons and that they were not all his acquaintances before he let the house in August. Then, when we come to the time when the house was occupied by these persons, we find that there is evidence by the witness Norendra Nath Chatterjee who lived at Dakshineswar that he saw young men washing their faces in the tank and among them was the appellant whom he saw entering and leaving the house, but never going to the houses of the neighbours. Then we have the evidence of Sumira Mahato Koiri who says that he saw Debi Prosad taking his bath in the tank in front of the house which was afterwards searched. These facts show that Debi Prosad must have been on terms of some degree of intimacy with the occupants of the house; and the frequency with which he went there appears from the evidence of Suresh Chunder Chatterjee who said that he had seen Debi Prosad passing his house with other boys, that Debi Prosad had been seen there about two or three times a month and that the occupants of the house did not associate with the neighbours. If this evidence is believed, it is quite clear that the appellant was not frequenting the house at Dakshineswar for any of the purposes for which it is contended his object was in going there. It is suggested that he visited a sister living at Dakshineswar. There is no evidence that he went to her house and, even if he did so, it is quite consistent with the evidence to which I have referred.

A stronger argument has been based upon the fact that he was a co-sharer in the premises and went there to collect rent. But it is obvious that the evidence, if it is believed, proves that he went there in excess of what would be expected of a co-sharer landlord who simply went to collect rent. As regards the collection of rent, the evidence is that until the month of November various other parties

who were interested—and not only the appellant—went to collect rent. The point, in my opinion, does not bear close investigation having regard to the rest of the evidence. It is further suggested that he simply went to see his former acquaintance; but there is also evidence showing that he was seen about with persons other than the one with whom, he says, he was formerly acquainted.

He endeavours to account for his presence on the day of the search—10th of November and two days earlier by stating that some of the inmates of the home were ill and he was asked to stay and help to watch them. That statement might possibly have been accepted had there been no such evidence against him; for, it appears that some of the inmates of the house were actually ill and it is conceivably possible that the appellant having gone there on the 8th November to collect rent was asked to stay and watch the sick and in his kindness of purpose did so. But it is difficult to believe that that wholly explains his staying there in the face of the other evidence as regards his association with these persons. If the evidence to which I have referred be believed, there can be no question as to the guilt of the appellant. In my judgment, no sufficient reasons have been advanced for showing that the view taken by the commissioners who tried the case was wrong or that I should take a different view of the evidence on appeal. In my judgment, the appeal must be dismissed and the conviction and sentence must be affirmed.

D.D.

Appeals dismissed.

A. I. R 1928 Calcutta 41

PAGE AND GRAHAM, JJ.

Mt. Matangini Ghose and others—
Principal Defendants 1 and 2—Appellants.

v

Mt. Monmohini Ghose and others—
Plaintiffs 1—4 and pro forma Defendants—Respondents.

Appeal No. 225 of 1926, Decided on 5th July 1927, from the appellate order of the Sub-Judge, Dacca, D/- 15th March 1926.

Bengal Estates Partition Act (8 B. C. of 1876), S. 149—Estates Partition Act (5 B. C. of 1897), S. 119—The revenue officer who carries out the partition should not concern himself with the disputed question of title to the land under partition; only a civil Court has a right to decide that question.

The revenue officer who carries out the partition should not concern himself with or affect to decide disputed questions of title to the land under partition. Though S. 149 prohibits attempts that may be made by way of litigation to re-agitate such vexed questions as whether the partition as made or the proportionate revenue imposed upon any separate estate is fair or correct, it does not provide that a person who claims an interest in the land which is the subject of a partition should be deprived of the right to have the validity of his claim decided by a Court of law, although no doubt in certain circumstances the final decree in the title suit may be subject to the partition that was or will be made and must be framed in such manner as to give effect to the partition: 36 Cal. 726; 37 Cal. 662; 16 C. W. N. 639 and A. I. R. 1924 Cal. 245, *Inf.*

[P 42, C 2, P 43, C 1]

Tarakeswar Pal Chaudhury and Prakash Chandra Pakrashi—for Appellants.

Rajendra Chandra Guha and Kiran Mohan Sircar—for Respondents

Piraj Mokan Majumdar—for Deputy Registrar

Page, J.—This appeal depends upon the true construction of S 149, Estates Partition Act (8 of 1876), now S 119 of Act 5, 1897. S 149 runs as follows :

No order of a revenue officer (d) made under Part IV, Part V, Part VI, Part VII, Part VIII, (except as provided in the next succeeding section) or Part IX

shall be liable to be contested or set aside by a suit in any Court, or in any manner other than as is expressly provided in the Act.

The material facts for the purposes of this appeal are few and simple. An application for partition of a parent estate No. 397 in the Dacca Collectorate was preferred under the Act of 1876 by the registered proprietors. The partition was duly effected on 25th August 1912, and the appellants as recorded proprietors were put into possession of Sahams No. 15356 and No. 15340 which had been carved out of the parent estate, and had been allotted to them respectively. Many years after the partition proceedings had been completed the respondents filed the present suit No. 260 of 1924, in which they claimed a declaration that they were entitled to an 8 gandas share in kharija taluki right in Mauza Jhougara, part of the parent estate No. 397, and

that after partition they were entitled in kharija taluki right to a 3-annas 15-gandas share in Saham No 15356 and to a 3-annas 17-gandas share in Saham No 15340. They also claimed a decree for possession of their said shares and incidental relief.

The trial Court dismissed the suit upon the ground that it was not maintainable under S. 149, Estates Partition Act, 1876. The lower appellate Court reversed the decree of the trial Court, holding that the suit was maintainable and remitted the case to the trial Court to be heard and determined on the merits. The question that falls for determination is whether or not in the suit as framed an order of a revenue officer within S 149 (d) is liable to be contested or set aside.

Now, the scheme of the Estates Partition Act, as I apprehend that enactment is to enable the co-sharers of an estate, each of whom jointly and severally are liable for the revenue to which it is assessed, to obtain a partition of the parent estate into two or more separate estates in such a form that on the one hand, the payment of the revenue secured upon the property should not be jeopardised, and, on the other hand, that the several co-sharers should be liable to pay only that portion of the revenue imposed upon the parent estate as had been charged upon the separate estates which respectively are allotted to them. But, as I read the Act, it was neither intended nor enacted that the revenue officer who carried out the partition, should concern himself with, or affect to decide disputed question of title to the land under partition. That is a function more fittingly performed by a Court of Law; the principal duty of the revenue officer in effecting the partition being to provide that the security for the payment of revenue should be safe-guarded. A perusal of the Act discloses that the revenue officer is to have regard to the claims of the recorded proprietors of the estate. It is only a recorded proprietor who is entitled to claim a partition under the Act, and it is the recorded proprietors whose names are to appear in "the paper of partition (S. 77.)."

In my opinion the object of the Legislature in enacting S. 149 was to prohibit any attempt that otherwise might have been made by way of litigation to

re-agitate such vexed questions as whether the partition as made, or the proportionate revenue imposed upon any separate estate, was correct or fair; see in this connexion *Ananda Kishore v. Daiji Thakurani* (1), *Janaki Nath v. Kali Narain* (2); *Lakhi Chowdhuri v. Akloo Jha* (3), *Anil Kumar Biswas v. Rash Mohan Saha* (4). Having regard to the elaborate machinery that had been set up for carrying out the partition it is, I think, clear that the Legislature intended that such matters should not be re-opened except as provided in the Act. But, in my opinion, the Legislature by enacting S. 149 did not intend or provide that a person who claimed an interest in the land which was the subject of a partition should be deprived by a Court of Law; although no doubt, in certain circumstances the final decree in the title suit would be subject to the partition that was or would be made, and must be framed in such manner as to give effect to the partition.

See for example Ss. 24 to 28 (to which S. 149 is not applicable), Ss. 116 and 150. In the present suit the respondents do not seek either to contest or disturb the partition as made, nor do they question in any way the quota of the revenue payable by any of the separate estates into which the parent estate has been divided. Indeed, if the respondents succeed in establishing their claim to a share in the sahams, the result will be that the ultimate liability of the recorded proprietors to pay revenue will pro tanto be diminished, while the payment of revenue will be further secured by reason of the added liability of the respondents to pay the revenue due.

For these reasons, in my opinion, the claim in the present suit is not barred by S. 149 of the Act of 1876 and the appeal must be dismissed with costs; the hearing fee being two gold mohurs.

Graham, J.—I agree.

N.D.

Appeal dismissed.

A. I. R. 1928 Calcutta 43

MUKERJI AND GRAHAM, JJ.

Priya Nath Manna and others—Defendants—Appellants

v.

Official Trustee of Bengal and others—Plaintiffs—Respondents.

Appeals Nos. 275 to 280 of 1926, Decided on 24th May 1927.

(a) *Landlord and Tenant—Relationship may be governed by status.*

The relationship of landlord and tenant under Bengal Tenancy Act may be governed not only by contract but also by status.

[P 45 C 1]

(b) *Bengal Tenancy Act, S. 158 (d)—Revenue officer is competent to ascertain the rate of rent and if there is none, to determine a fair and equitable rent.*

* The revenue officer is, on a local enquiry, competent to ascertain the contract rent or rate of rent, but if he finds that there is none such, he is equally competent to determine a fair and equitable rent for each of the holdings; 3 C. W. N. 15, 6 C. W. N. 592 and 15 Cal. 182, (F. B.) Expl.

[P 45 C 2]

(c) *Bengal Tenancy Act, S. 158, Cl. (d)—Landlord can ask for a decree for back rents at a fair and equitable rate which is found for the years in suit.*

The determination of the rent under the section when it is fair and equitable rent for the holding must be such as is payable at the time of the application and on its basis only rent for future years may be realized and not for the years in arrears in the suit; while there is nothing to prevent the landlord from asking for a decree for back rents at such rate as the Court may find to be fair and equitable for the years in suit; 22 C. W. N. 685, and A. I. R. 1925 Pat. 559, Expl.

[P 46 C 1]

(d) *Civil P. C., O. 41, R. 23—Court need not remand a case if the only object is to have enquiry under Bengal Tenancy Act, S. 158.*

There is no point in sending the case down to the trial Court if the only object of adopting that course is to have an enquiry under S. 158, Bengal Tenancy Act by a revenue officer. The result of such enquiry may be taken into consideration by the appellate Court itself and then the appeal may be finally disposed of. [P 44 C 2]

Nabadvip Chandra Saha—for Appellants

Gunada Charan Sen, Santosh Kumar Bose, and Sisir Kumar Banerjee for *Haridas Majumdar*—for Respondents.

Mukerji, J.—The two main contentions of the appellants in these appeals being, first that the remand is bad, and second that S. 158, Bengal Tenancy Act, has been misappreciated by the Court below, it is necessary to examine the precise character of the suits which have given rise to the appeals and the nature of the reliefs asked for therein.

(1) [1909] 36 Cal. 726=1 I. C. 549=10 C. L. J. 189.

(2) [1910] 37 Cal. 662=7 I. C. 881=15 C. W. N. 45.

(3) [1912] 16 C. W. N. 639=13 I. C. 123.

(4) A. I. R. 1924 Cal. 245.

These six appeals arise out of as many suits for recovery of arrears of rent. The plaintiffs alleged that the defendants paid rent at a certain rate for the holdings, and that in the record of rights no rent was entered, but it was only stated the holdings were liable to assessment of rent. The plaintiffs prayed ; (1) for rent at the said rates, and (2) that if the defendants denied those rates and the plaintiffs failed to prove them, they might be given decrees for fair and equitable rents, and they said that the rents they claimed represented such fair and equitable rents for the holding and that those rents should accordingly be settled as such. The defence, which is material at this stage, was that the rents of the holdings were really much less and were what were stated on their behalf.

There was a further prayer by the plaintiffs for enhancement under S. 30, Cl. (b), Bengal Tenancy Act, but this prayer was eventually withdrawn. There was a defence on the ground of remission on account of 'haja' but it was left open with the consent of both the parties as it was not pressed so far as these suits were concerned. During the pendency of the suits on the 4th July 1925, the plaintiff filed a petition for a local enquiry under S. 158, Bengal Tenancy Act. The Munsif rejected the petition holding that there was an existing rate of rent, which was the rate alleged on behalf of the defendants and when the existing rate could be determined an enquiry under that section for the determination of fair and equitable rent was not permissible. Being of that opinion he decreed the suit for the rents admitted by the defendants.

The Subordinate Judge on appeal by the plaintiffs has passed a judgment the terms of which are somewhat difficult of comprehension, and there has accordingly been a good deal of controversy at the Bar as to what he has exactly found. He has in the result, set aside the decrees of the trial Court and remanded the suits to that Court with directions to grant the plaintiffs' petition under S. 158, Bengal Tenancy Act. The defendants are the appellants to this Court from this order.

In our opinion, the two findings which the Subordinate Judge has recorded and which cannot be now challenged are : first that the plaintiffs could not prove a fixed jama as there was no such fixed jama, and second

that the defendants could not prove fixed jama as there were none.

These two findings have been repeated in another part of the judgment in these words :

Regard being had to the evidence discussed above as adduced by the plaintiffs and the defendants, I find no hesitation to say that there were no fixed jama in existence.

Then he proceeded to observe thus :

It must be held that there was no subsisting contract and there must be an enquiry for ascertainment of fair and equitable rent.

In that view the learned Judge remanded the suits as indicated above.

The appellants' first ground, in our opinion, ought to succeed. There is no point in sending the cases down to the trial Court if the only object of adopting that course is to have an enquiry under S. 158, Bengal Tenancy Act, by a revenue officer. The result of such enquiry may be taken into consideration by the appellate Court itself and then the appeal may be finally disposed of. The last-mentioned course will have, if nothing else, this advantage that it will do away with the necessity of at least one appeal.

The next contention of the appellant is that S. 158 has no application as "the rent payable" within the meaning of Cl. (d) of the section is only the existing rent and not the fair and equitable rent. In support of this view reliance is placed upon the marginal note to the section which speaks of "application to determine incidents of tenancy" and certain decisions of this Court to which we shall presently refer. It is also contended that the plaintiff, having failed to prove the rate at which he claimed, is not entitled to decrees for fair and equitable rents even if they may be determined under S. 158.

In one of the earliest decisions of this Court, *Nityanund Ghose v. Kishen Kishore* (1), which was a suit instituted under S. 5, Act 10 of 1859 for the purpose of settling what the defendant's rents should be at the purgannah rate and to obtain from him a kabuliyat at those rates, this Court pointed out that where A avowedly holds and cultivates B's land, he is by the universal custom of this country B's tenant (even without express permission to cultivate on B's part, or express condition to pay rent on A's part and while so holding and cultivating, is bound to pay B a fair rent and to give him a kabuliyat. The learned Judges pointed out the distinction between the

(1) [1864] W. R. 1864 Act. 22. Ruling 82.

English law and the law of this country in this respect. Suits for pottahs and kabuliyats under the provisions of Act 10 of 1859 were somewhat rare and S. 158 was introduced to provide for a means of obtaining an authoritative statement of the essential incidents of a tenancy. Where there is an arrangement as to the rent that arrangement is the incident as to rental as contemplated by Cl. (d) of the section. Where there is the relationship of landlord and tenant without an arrangement as to the payment of rent properly so called the law recognizes an implied promise on the part of the tenant to pay a rent that is fair and equitable and that fair and equitable rent is the rent that is payable within the meaning of that clause. This is the view that was taken of the clause in the case of *Barhamdutt Misser v. Krishna Sahay* (2) where it was said that the relationship of landlord and tenant under the Bengal Tenancy Act may be governed not only by contract but also by status and that Cl (d), S. 158, admits of the determination of fair and equitable rent when the fair and equitable rent is the rent that is payable by the tenant at the time of the application. This also is the view of the Patna High Court as expressed in the case of *Ramgobind Singh v. Shashi Sekhar Prasad Singh* (3). In some of the reported cases it has been said somewhat loosely, as I presume to think though with the utmost respect for the learned Judges who decided them, that "the rent payable" within the meaning of the clause is the "existing rent" in the sense of the rent that was being paid or had previously been paid, but when the decisions of these cases are examined in the light of the facts of the cases themselves it is doubtful whether any such proposition was ever meant to be laid down. Of these cases the more worthy of notice are the cases of *Purna Rai v. Bunshidhur Singh* (4), *Sri Narain Thakur v. Luchmeshwar Singh* (5) and *Debendro Kumar Bundopadhyaya v. Bhupendro Narain Dutt* (6). In the first of these cases there are some observations which support the appellants' contention but the show facts that the revenue officer there was given certain direction which went

beyond what the revenue officer has to do under the section and also that the enquiry that was held by him was outside the range of the enquiry that was necessary for assessing fair and equitable rent for the tenants' holding. In the second case in a proceeding under S. 158 the Court proceeded to assess additional rent for excess lands found to be in the occupation of a tenant and it was held that it had no jurisdiction to do as its function was limited to record the existing rent payable at the time of the application and did not extend to assess additional rent for excess area. The last case mentioned above is more important as being a Full Bench decision of the Court. In that case it was observed that

the object of this section is to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and the tenant, and not to enable the Court in effect to make a new contract for parties between whom no contract was in existence at any time before the date of the application

The facts of that case in connexion with which these observations were made were that under colour of an application under S. 158 asking for the determination of the incidents of a tenancy a lease was sought to be set aside under which the tenant came into possession. In our opinion the appellant's contention is not well-founded. The revenue officer will, on the local enquiry he will hold, be competent to ascertain the contract rate or rate of rent; if he finds that there is none such, he will be equally competent to determine a fair and equitable rent for each of the holdings. In the latter case the fair and equitable rent is the rent payable in respect of the holding on the basis of the implied promise which the status will give rise to.

Here a further question arises, as it seems to be the view of the learned Subordinate Judge that if the revenue officer finds fair and equitable rents the plaintiff will be entitled to decrees on the basis thereof. This follows from his omission to give any further directions on the point and is likely to mislead any Court that may have occasion to deal with the suits hereafter. The question, therefore requires consideration.

As has been pointed out by Richardson, J., in his well-considered judgment in the case of *Dhananjoy Manjhi v. Unendranath Deb* (7) a suit to assess

(2) [1914] 18 C. W. N. 466=20 I. C. 910.

(3) A. I. R. 1925 Patna 517.

(4) [1899] 3 C. W. N. 15.

(5) [1902] 6 C. W. N. 592.

(6) [1892] 19 Cal. 182 (F. B.).

(7) [1918] 22 C. W. N. 685=46 I. C. 428.

rent is consistent with and arises out of the general law and the land revenue system of the country, and is irrespective of anything in the Bengal Tenancy Act. The learned Judge in that judgment referred to certain cases in which a claim for assessment of rent and for recovery of such rent for a certain period has been either expressly held as maintainable or has passed unquestioned. On the other hand in *Partab Mohton v. Wazir-un-Nisa* (8), the learned Judges of the Patna High Court, following an earlier decision of the same Court laid down that in a suit for assessment of a fair and equitable rent it is understood that rent had not been settled or paid hitherto and the Court is asked to determine the rent to be paid in future and, therefore, the plaintiff is not entitled to claim rent in arrears at the rate to be assessed as fair and equitable in the suit. The two views are not necessarily conflicting. The determination of the rent payable under Cl (d), S 158, when it is the fair and equitable rent for the holding must be such as is payable at the time of the application and on its basis only rent for future years may be realized and not for the year in arrears in the suit; while there is nothing to prevent the landlord from asking for a decree for the back rents at such rate as the Court may find to be fair and equitable for the years in suit. If the revenue officer is able to determine the contract rents the plaintiff will undoubtedly be entitled to decrees on the footing thereof. If he finds only fair and equitable rents those can only be such rents as are payable at the time of the application. In the latter case the plaintiffs having failed to prove the contract rents as alleged by them, and there being nothing to show what the fair and equitable rents for the period in suit was the plaintiffs' claim will be allowed only to the extent it is admitted by the defendants, and they will be entitled to a declaration as to the fair and equitable rents that are found for the holdings.

With these directions we allow the appeal and set aside the order of the learned Subordinate Judge and send the cases back to his Court so that the Court may now direct an enquiry under Cl 2 of S. 158, Bengal Tenancy Act, and on receipt of the report of the revenue officer as regards the result of that enquiry proceed

(8) A. I. R. 1925 Pat. 559=4 Pat. 604.

to dispose of the appeals in the manner indicated above.

The appeals succeed to the extent above mentioned, but in view of the nature of the success there will be no order for costs.

Graham, J.—I agree.

N.D.

Appeals allowed.

A I R. 1928 Calcutta 46

PAGE, J.

Bonomali Gope—Petitioner.

v.

Fakir Chand Pal and others—Opposite Party.

Civ. Rev. Application No 363 of 1927, Decided on 7th July 1927, from the decision of the 4th Munsif, Munshiganj, D/- 22nd December 1926

(a) *Limitation Act, S. 14*—Time spent in a Court not declining to entertain the suit cannot be deducted.

Where a suit to recover money lent upon interest payable on demand was filed before a Union Court and that Court finding that it was desirable that the suit should be tried by persons versed in law, ordered that it should be conducted in proper Court, and by the time the suit was filed in the Small Cause Court, the cause of action was time barred :

Held : that the plaintiff is not entitled to deduct the period during which he was prosecuting the suit in the Union Court. [P 47, C 2]

(b) *Limitation Act, S. 12*—Copy unnecessary—Time cannot be excluded.

Time spent in obtaining copy of an order which is not necessary for filing is not excluded. [P 47, C 2]

Panchanan Ghose, Radhika Ranjan Guha and Jatis Chandra Guha—for Petitioner.

Jatindara Mohan Chowdhury for Jitendra Nath Sen Gupta—for Opposite Party.

Judgment.—This is an application under S. 25, Provincial Small Causes Courts Act, to revise a decree passed by the learned Munsif of the Small Cause Court at Munshigunge. The suit was brought to recover money lent upon interest which was repayable on demand. The money was lent on the 2nd, 3rd, 4th, 5th and 6th May 1923. On the 14th June 1926 the plaintiff filed the present suit. Prima facie his cause of action is time-barred. The learned Munsif, however, held that the claim was not time-barred, and decreed the suit in part.

Two points are taken by the learned vakil for the opposite party. The first is that the period between the 2nd May 1926 and 6th June 1926 should be deducted from the period of limitation upon the ground that during that period the petitioner was prosecuting in good faith a suit to recover the subject-matter of the present suit in the Union Court in Bihar which Court from defect of jurisdiction or through causes of a like nature was unable to entertain it. It was the common case of the petitioner and the opposite party that in law and in fact the Union Court of Bihar had jurisdiction to entertain the suit. But the learned vakil for the opposite party contended, having regard to orders passed by the Union Court, that the opposite party should be given the benefit of S. 14, Limitation Act, upon the ground that his failure to prosecute the suit in the Small Cause Court was due not to lack of diligence on his part but to the act of the Union Court. When the suit came on for the hearing before Union Court that Court passed the following order :

It being desirable that there should be a proper trial conducted by persons versed in law of the question regarding the document filed by the plaintiffs and regarding the question of the rate of interest, this Court orders that the suit be conducted in the proper Court.

I am unable to accede to this contention. The opposite party was guilty of considerable and unreasonable delay in taking steps to recover the debt due to him. He waited until the 2nd May 1926 (within two or three days of the expiration of the three years' period of limitation) before he filed his suit in the Union Court. If he had filed his suit with due diligence in the Union Court there would be ample time after the Union Court had considered the matter for him to have presented his suit in the Court of Small Causes, within time. Further, I am not prepared to hold, having regard to what fell from the Union Court on the 6th June that the Court intended thereby to decline to entertain the suit or to decide that it had no jurisdiction or that through want of jurisdiction or any other cause of a like nature it was unable to entertain the suit.

The second contention upon which the learned vakil for the opposite party sought to uphold the decision under review was that, assuming that he was entitled to the benefit of S. 14 for the period between the 2nd May and 6th June, he

was also entitled upon the same ground to the benefit of S. 14 in respect of the period from the 6th June to 14th June because on the 6th June he had applied for a copy of the order of the Union Court that had been passed on that date, but the copy was not supplied to him until the 12th June, which was a Saturday, and he filed his suit in the Small Cause Court on the following Monday the 14th. In support of this contention he relied upon the case of *Lakshiram Mandal v. Sonatan Basar*(1) decided by Mookerjee and Teunon, JJ. in which their Lordships gave a very wide and liberal interpretation to the provisions of S. 14.

It is, unnecessary to express any opinion as to the correctness of that decision because, in my opinion, it was unnecessary for the opposite party to wait from the 6th to the 14th June before he filed his suit in the Small Cause Court. The suit could have been filed without a copy of the order of the Union Court, although no doubt it would have been right and proper to draw the attention of the Small Cause Court to what had taken place in the Union Court in due course. In my opinion, neither of the two grounds upon which the learned vakil on behalf of the opposite party has based his contention that the order under review should be supported is sound. The result is that the suit in the Small Cause Court was barred by limitation, and the decree passed by the Munsif on the 22nd December 1926 cannot stand. The decree is set aside, and the suit dismissed.

In the circumstances of this case I make no order as to costs in either Court. and I desire to express no opinion as to whether it is still open to the opposite party to prosecute the proceedings which he initiated on the 2nd May before the Union Court.

N.D.

Suit dismissed.

(1) [1912] 15 C. L. J. 160=7 I. C. 775.

A I. R. 1928 Calcutta 47

CUMING AND CAMMIADÉ, JJ.

Jamiruddee Naskar and another—Defendants—Appellants

v

Basanta Kumar Roy and others—Plaintiff & Pro forma Defendants—Respondents.

Appeal No. 278 of 1925, Decided on 14th July 1927.

Adverse Possession—Landlord and tenant—Knowledge or want of knowledge on the part of the landlord is immaterial in regard to the acquisition of a tenant's interest in property by adverse possession.

The knowledge or want of knowledge on the part of the landlord is perfectly immaterial in regard to the question of acquisition of a tenant's interest in property by adverse possession, and a landlord as against whom a person has been asserting tenant-right cannot repudiate the other man's interest unless he can prove that he was fraudulently kept out of knowledge of the assertion of the title by the other man: 17 C. W. N. 1088 and 19 C. W. N. 136, *Foll.*

[P 48, C 2]

Syed Nasim Ali—for Appellants.

Manmatha Nath Roy and Urukramdas Chakravarty—for Respondents.

Cammiade, J.—This is an appeal by the defendants in a suit for recovery of possession of six bighas and 15 cottas of land comprised in a tenancy the exact nature of which has not been ascertained by either of the learned Courts below. The plaintiff sued on the allegation that this tenancy was an under-raiyati tenancy, and that the defendants were trespassers who had purchased the interests of the late tenants and had acquired no right by their purchase. The Court of first instance dismissed the suit but the Court of appeal below decreed it. The facts are as follows:

The tenancy had originally been held by one Asmatulla who had several sons and daughters. After Asmatulla's death the tenancy seems to have been held, according to the case of both parties, by two of Asmatulla's sons, Samiruddi and Robbani. The first defendant is another son of Asmatulla and the second defendant is a grandson by another son; and these two defendants purchased the tenancy from Samiruddi and Robbani by two decrees, one of the year 1310 and the other of the year 1312 B. S. The plaintiff had granted rent receipts to the defendants from so far back as 1312 showing them as marfatdars. The suit for ejectment was instituted in 1920 corresponding to 1327 B. S. so that the defendants had been paying rents to the plaintiff for 15 years at least before the institution of the suit. The learned Subordinate Judge in decreeing the suit held that, although the plaintiff had been receiving the rent from these defendants from so far back as the year 1312, because these defendants were members of the family of Asmatulla, the plaintiff was not aware till quite recently, that is to

say, within 12 years from the date of the suit, that the defendants were claiming to hold the land by virtue of their own title. The Court of first instance found in so many words that the defendants had been in possession from the time of their purchase. Although that finding is not reproduced in express terms in the judgment of the appellate Court still the wording of that judgment shows that that finding was accepted and that the Subordinate Judge was of opinion that the mere fact of possession and assertion of title for a period of more than 12 years did not confer title on the defendants because the plaintiff was not aware of the assertion of such title.

This matter has been discussed in the case of *Prohabati Dasi v. Tarabaturinessa Chaudhurani* (1) and in *Panchkari Chattapadhyaya v. Maharaj Bahadur Singh* (2). In both these cases it has been said that the knowledge or want of knowledge on the part of the landlord was perfectly immaterial in regard to the question of acquisition of a limited interest in property by adverse possession, and that a landlord as against whom a person has been asserting tenant-right cannot repudiate the other man's interest unless he can prove that he was fraudulently kept out of knowledge of the assertion of the title by the other man. It is only by invoking the aid of S. 18, Limitation Act, that the landlord can avoid the effect of possession and assertion of title by a third person claiming the interest of a tenant on the land. It is obvious that if a person occupies the land for a period of 12 years he may acquire, if he so chooses, an absolute interest in the land, and it is only because he chooses to assert only a limited interest that he acquires only such limited interest. Therefore, whether the landlord chooses to make himself acquainted with the facts that the man in possession asserts his own title to the land or not limitation will run against the landlord. In these circumstances the decision of the first Court must be upheld. The decision of the Subordinate Judge is reversed and that of the Munsif is restored with costs in all the Courts.

Cuming, J.—I agree.

N.D.

Appeal allowed

(1) [1913] 17 C. W. N. 1088=20 I. C. 664=19 C. L. J. 62.

(2) [1915] 19 C. W. N. 136=28 I. C. 708.

A. I. R. 1928 Calcutta 49

CUMING AND CAMMIADE JJ.

Raichuddin and others—Defendants—Appellants.

v.

Mt. Waiz Bibi and others—Plaintiff and Defendants—Respondents.

Appeal No 216 of 1925, Decided on 13th July 1927 from the appellate decree of the Second Sub-Judge, Chittagong, D/- 8th September 1924.

Civil P. C., S. 100—Mushaa.

The question as to whether a gift is bad as offending against the doctrine of mushaa is a mixed question of law and fact and it cannot for the first time be raised in second appeal: 35 Cal. 1 (P. C.), *Rel. on.* [P 49 C 2]

Narendra Kumar Das—for Appellants
Chandra Sekhar Sen — for Respondents.

Cuming, J.—This appeal arises out of a suit for a declaration of the plaintiff's raiyati title and for recovery of possession of the lands described in the schedules to the plaint. The case of the plaintiff was that the lands had been gifted to her by her mother Hadya Bibi by means of a hebanama. The case of the defendant was a denial of the plaintiff's title.

The first Court decreed the plaintiff's suit in a modified form. The plaintiff's title in kayami mukarrari right to plot (ka) measuring 12½ gundas and to the disputed land described in Sch. 2 was declared and she was to get ejmali possession of these lands with the defendants. Defendants 1 (ka), 1 (kha) and 1 (gha) appealed to the District Court and there was also an appeal by the plaintiff. The District Court ordered the decree of the first Court to be modified to this extent: that the decree should be for exclusive possession of the lands of Sch. 2 of the plaint; and in the other lands the decree made by the first Court to the extent of the plaintiff's share for ejmali possession with the defendants was to stand. Neither of the lower Courts determined the question of the plaintiff's share in 12½ gundas land in which she was to get ejmali possession with the other defendants. Defendants 1 (ka), 1 (kha), 1 (ga) and 1 (gha) have appealed to this Court.

The appellants have raised three points: first of all, that the gift of an undivided share is bad as it offends against the

Mahomedan doctrine of mushaa; secondly, that it is neither alleged nor proved that the gift was accompanied by delivery of possession; and lastly, that the decree of the lower appellate Court is in vague terms and that the lower appellate Court should have determined the question of share.

With regard to the first point: the respondent contends that the question of mushaa is a mixed question of law and fact and it cannot be raised for the first time in second appeal. He draws our attention to the case of *Ibrahim Goolam Arif v. Saiboi* (1), a decision of the Privy Council in which it has been pointed out that the doctrine of mushaa is entirely unadapted to a progressive state of society and that it should be confined within the strictest rules. The respondent, I think, is quite correct in her contention. The question as to whether the gift was bad as it offended against the doctrine of mushaa is a mixed question of law and fact. It is possible in certain circumstances, for instance where the gift is made to a co-heir, it does not offend against the doctrine of mushaa. That being so, it is not open to the appellants to raise what is clearly a mixed question of law and fact for the first time in second appeal.

The next point argued by the learned vakil for the appellants is that it is neither alleged nor proved that the gift was accompanied by delivery of possession. On this point there is a definite finding of the first Court that the necessary formalities had been complied with. That Court described those formalities as being a declaration of the gift by the donor and acceptance of the gift by the donee and delivery of such possession as the subject of gift is susceptible. This finding has not been set aside by the lower appellate Court. Both these points are, therefore, decided against the appellants.

There remains now the last remaining point: that the lower appellate Court should have determined the share of the plaintiff. The respondent is equally of opinion that the lower appellate Court should have determined the share of the plaintiff. The case will, therefore, be remanded to the lower appellate Court and the lower appellate Court will pass

(1) [1908] 35 Cal. 1—34 I. A. 137—21 C. W. N. 973=6 C. L. J. 693 (P. C.).

its decree after it has determined the share of the plaintiff in the 12½ gundas plot.

The plaintiff-respondent is entitled to her costs in this Court.

Cammiade, J.—I agree.

R.K.

Case remanded.

A. I. R. 1928 Calcutta 50

PAGE, J.

J. M. Gregory—In re.

Insolvency Case No 48 of 1925, Decided on 7th April 1927.

(a) *Presidency Towns Insolvency Act, S. 6 (2)*—*Registrar can order discharge on an unopposed application.*

The Registrar in insolvency has no jurisdiction to entertain an opposed application for the discharge of an insolvent, but he has jurisdiction to pass an order of discharge upon an unopposed application. [P 51 C 1]

(b) *Presidency Towns Insolvency Act, S. 8 (1)*—*Registrar can rescind the order of discharge made by him whether application is opposed or not.*

The Registrar in Insolvency has jurisdiction to pass an order rescinding the order of discharge that he himself has made whether the application is opposed or unopposed. [P 51 C 1]

(c) *Presidency Towns Insolvency Act, (3 of 1908), Ss. 52 and 91*—*Discharge in first insolvency—Insolvent adjudicated a second time—Discharge in first insolvency rescinded—Assets acquired after first discharge and second adjudication are divisible in second insolvency and Official Assignee can represent creditors in first insolvency at such distribution.*

An insolvent obtained an unconditional discharge, no assets being recovered. He was again adjudicated insolvent, and his property acquired after the discharge thereupon became vested in the official assignee for distribution among his creditors. Meanwhile, the order of discharge in the first insolvency was rescinded, and it was ordered that the adjudication should be revived, and an order was made that the proceedings in the two insolvencies should be consolidated.

Held. that subject to any bona fide and valid disposition of the property of the insolvent that had been effected between the date of discharge and its rescission, the property acquired after the discharge, and any other assets recovered by the Official Assignee in the second insolvency would become assets distributable in the second insolvency, and that the Official Assignee as the representative of the creditors in the first insolvency would be entitled to prove in the second insolvency, and to receive dividends *pari passu* with the creditors in the second insolvency. [P 51 C 2]

A. A. Avetoom—for Creditors in the 1st Insolvency.

B. K. Ghosh—for Creditors in the 2nd Insolvency.

Judgment.—On the 4th February 1915, John Marchmont Gregory was adjudicated insolvent, on his own petition. No assets were recovered by the Official Assignee in that insolvency, and on the 3rd August 1920 the insolvent obtained an unconditional discharge.

On the 18th February 1925 John Marchmont Gregory on his own petition was again adjudicated insolvent, and his property thereupon became vested in the Official Assignee for distribution among his creditors under Ss. 17 and 52, Presidency Towns Insolvency Act (Act 3 of 1909).

On the 13th July 1926, as a result of the transaction into which the insolvent had entered after he had obtained his discharge from the first insolvency, and before the second adjudication, a sum of Rs. 97,670-12-0 was acquired by the insolvent, and passed into the hands of the Official Assignee as assets distributable in the second insolvency. Meanwhile, on the 30th April 1925 the order of discharge of the 3rd August 1920 was rescinded, on the ground that when applying for discharge the insolvent had misled the Court as to the state of his affairs. Accordingly, it was ordered that the adjudication of the 4th February 1915 should be revived. On the 10th February 1927 pursuant to S. 91, Insolvency Act, an order was made that the proceedings in the two insolvencies should be consolidated. All the above orders were passed by the Registrar in Insolvency.

The question that arises on this petition is whether the creditors in the first insolvency are entitled to participate in the said sum of Rs. 97,670-12-0 and any other assets distributable in the second insolvency. The creditors in the second insolvency contend (1), that the order of the 30th April 1925 rescinding the order of discharge was *ultra vires* the Registrar in Insolvency, and is null and void; (2) that in any event, having regard to the order of discharge, the rights of the creditors in the first insolvency ought to be postponed to those of the creditors in the second insolvency.

In support of the first contention learned counsel for the petitioner urged that, inasmuch as the application for an order rescinding the order of discharge was a substantive and opposed application, the Registrar in Insolvency had no

jurisdiction in the matter. Now, the Registrar in Insolvency has no jurisdiction to entertain an opposed application for the discharge of an insolvent, and it was argued with plausibility that the Registrar in Insolvency ought not to be entitled to hear an opposed application for the rescission of an order of discharge, because the application, if granted, might react upon the rights of persons who in good faith had transacted business with the insolvent after the order of discharge and prior to its rescission in a manner gravely prejudicial to their interests. There is much force in this contention: but I am concerned to ascertain, not whether the Registrar in Insolvency ought to have jurisdiction, but whether he has it, and under the law as it obtains at present I am of opinion that the Registrar in Insolvency was entitled to make the order of the 30th April 1925.

The order of discharge of the 3rd August 1920 was passed by the Registrar in Insolvency upon the unopposed application of the insolvent. That order the Registrar had jurisdiction to make under S. 6 (2), Insolvency Act, and the direction of Jenkins, C. J., dated 23th May 1915.

It appears to me that under S. 8 (1), Insolvency Act, the Registrar in Insolvency had jurisdiction to pass the order of the 30th April 1925 rescinding the order of discharge that he himself had made, whether the application for rescission was opposed or unopposed: see *Ex parte Summers* (1). Further, under S. 6 (2) (c), Insolvency Act, and General R. 5, Calcutta Insolvency Rules of 1910, in my opinion, the Registrar in Insolvency had jurisdiction also to hear the application for rescission of the order of discharge as being an application "that may be heard and determined in chambers."

No appeal has been preferred against the order of the 30th April 1925, and upon both these grounds I am of opinion that the order of the 30th April 1925 rescinding the order of discharge of the 3rd August 1920 is a valid and effective order.

In these circumstances, as I apprehend the matter, the respective rights of the creditors in the two insolvencies would be the same whether or not the order consolidating the insolvencies had been made. It appears to me that, subject to

any bona fide and valid disposition of the property of the insolvent that had been effected between the date of his discharge and its rescission, the said sum of Rs 97,670-12-0 and any other assets recovered by the Official Assignee in the second insolvency would become assets distributable in the second insolvency, and that the Official Assignee as the representative of the creditors in the first insolvency is entitled to prove in the second insolvency, and to receive dividends *pari passu* with the creditors in the second insolvency.

A solution of the problem in this sense, I think, is in consonance with the ratio underlying the provisions of S. 39 (1), English Bankruptcy Act, 1915, and the decision of the Court of appeal in *Ex parte Pitt* (2). I can understand that the creditors in the second insolvency may feel aggrieved that the creditors in the first insolvency should receive a share of the assets recovered in the second insolvency as a result of a transaction into which the insolvent entered when he was *sui juris* and discharged from liability under the first insolvency; but the hardship is more apparent than real, for if persons choose to have business relations with a debtor who has obtained his discharge, but who in certain events may again revert to a state of insolvency, such persons take the risks that are incidental to all transactions with persons under actual or potential disability (such as a minor or a woman possessing a Hindu widow's estate), and have only themselves to blame if they have miscalculated the chances of the transaction to which they have chosen to become parties.

An order will be passed giving effect to the view that I have expressed. The costs of both sets of creditors as of a hearing will be paid out of the assets available for distribution in the second insolvency.

N.D.

Order accordingly.

(1) [1907] 2 K. B. 163.

(2) [1882] 20 Ch. D. 308.

A. I. R. 1928 Calcutta 52

B. B. GHOSE AND ROY, JJ.

Rash Behari Mandal and others—Defendants—Appellants
v.

Hemanta Kumar Ghose and others—Plaintiffs—Respondents.

Appeal No. 286 of 1924, Decided on 9th February 1927, from the original decree of the Sub-Judge, Khulna, D/-27th September 1924

(a) *Bengal Patni Regulation* (8 of 1819), S. 11 (3)—*Occupancy raiyats cannot be ejected.*

Clause 3, S. 11, only provides certain restrictions on the right of an auction purchaser to eject certain persons, which right has been given by the previous clauses of that section. If the right of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejectment by some other law, there is no reason to suppose that S. 11 of the Regulation gives authority to the auction-purchaser to eject that occupier of the land by virtue of his purchase: 3 C. W. N. 13, *Doubted* [P 53 C 2]

The proviso in the third clause does not mean that persons in occupation not coming within the definition of khudkasht raiyats, are liable to be ejected, even if they have acquired occupancy rights under the tenancy law. [P 54 C 1]

(b) *Landlord and Tenant—Khudkasht means resident hereditary cultivator—land waste and infested with wild animals—Tenants living in adjacent villages are khudkasht*

A khudkasht raiyat is a resident, hereditary cultivator in contradistinction to Paikast raiyat, that is a migratory tenant. Where the tenants were resident within the patni mahal, but outside the jungle tract, which did not form part of any village, and where no man could live, and the land was at that time infested with tigers and other wild animals, it would not be reasonable to say that these tenants were not khudkasht tenants although they were residents of contiguous villages within the patni, especially when they belong to a class whose only mode of life is by cultivation: 20 W. R. 426, *Rel. on* [P 55 C 1]

S. C. Bose, Soroj Kumar Chatterjee and Jatis Chandra Guha—for Appellants.

Sarat Chandra Basak, Bepin Chandra Bose and Urukram Das Chakravarti—for Respondents.

Prafulla Chandra Chakravarti and Surjia Kumar Aich—for Deputy Registrar.

B. B. Ghose, J.—This appeal arises out of an action in ejectment, and is on behalf of some of the defendants in suit No. 55 tried by the Subordinate Judge of Khulna. The facts are these: There is a Sayedpur Trust Estate, which has got the zemindari interest. A patni

was created consisting of certain mouzahs within that estate in 1821 in favour of two persons named Gopi Roy and Kali Roy. Within the patni there was a large tract of jungle and apparently it was not included within any of the mouzahs. In 1843 some of the persons, who held the property in darpatni interest executed a lease of about 600 bighas of jungle land under certain terms in favour of two persons, named Ramjiban Jotedar and Ram Sundar Mandal. Sometime after that the patni interest appears to have come into the possession of certain Boses. On the 9th October 1879 these Boses granted a lease of 600 bighas of *patni* and jungle lands excluding 400 bighas of *dhap* lands in favour of four persons, who may be called Jotedars and Mandals. There was also a stipulation that the 400 bighas excluded, which was described as *dhap* lands, might be taken possession of by the lessees after reclaiming those lands at a certain rate of rent. The provision with regard to rent was in the usual manner of progressive rent from time to time, and stipulating that the rent would be at a certain rate from the year 1304, that is 1897. This patni was put up to sale under Regulation 8 of 1819 on the 15th May 1914, and was purchased by the plaintiffs. After their purchase they served notice on all persons, who were the descendants of the original lessees under the lease of 1879, and all those who had derived title under these lessees or their representatives. A large number of persons was impleaded as defendants.

Most of them came to an agreement with the plaintiffs and compromised the suit. The appellants before us fought out the suit in the Court below, and a decree for ejectment has been made as against them.

The case of the plaintiffs was that under the provisions of S. 11, Regulation 8 of 1819, they were entitled to eject the defendants and to recover khas possession of the lands in question. Various pleas were taken in defence but the main defence was that the lessees under the lease of 1879 were khudkasht raiyats and therefore protected under the third clause of S. 11 of the regulation. Secondly, even if it be considered that they were not khudkasht raiyats, they acquired right of occupancy as raiyats by holding the lands for more than 12 years and consequently they are protected from

ejection under the provisions of the Bengal Tenancy Act, notwithstanding the provisions of S. 11, Regulation 8 of 1819. Another plea was sought to be raised that the plaintiff had acquired no right by virtue of the regulation sale, as certain steps were not taken under the regulation.

Besides those pleas, other pleas were taken and a large number of issues was raised in the Court below. It is unnecessary to mention these as they are absolutely immaterial for the purposes of the appeal. The Subordinate Judge held that the defendants were not khudkhast raiyats. Secondly, he held that not being khudkhast raiyats, they are liable to ejection, as Cl. 3, S. 11 of the regulation does not protect them. He further held that the defendants were tenure-holders, and their interest was an incumbrance coming under Cl. 1, S. 11 of the regulation, and therefore they have no right to remain on the land after the patni sale. He also held that the defendants could not challenge the validity of the patni sale collaterally by way of defence in the present suit. On these findings he made his decree in ejection. Twelve of the defendants have appealed to this Court. One of them, defendant 18, is one of the representatives of the original lessees under the lease of 1879. Others claimed under various sub-leases from the lessees or from the sub-lessees under those lessees. It is unnecessary for our purpose to state the origin of the title of those subordinate holders.

Three main questions have been argued on behalf of the appellants before us. It is stated firstly, that the predecessors of defendant 18 were khudkhast raiyats and the lease being a bona fide lease in their favour the plaintiffs are not entitled to eject him, and consequently the plaintiffs are not entitled to eject the tenants holding under rights subordinate to the lessees under the lease of 1879. The second point was that the defendants have, by their cultivation of the lands, themselves acquired occupancy rights under Act 10 of 1859 as well as under the Bengal Tenancy Act, and are, therefore, not liable to be ejected. The third point taken was that the Collector had no jurisdiction to sell the putni under Regulation 8 of 1819 on account of certain circumstances, one of which was that he was the manager of the Sayedpur Trust Estate.

The third point may be taken up first and disposed of, on the ground that this plea was not taken in the lower Court, nor does it appear in the issues raised in that Court. The question not having been discussed in the lower Court, we are not inclined to allow that question to be raised for the first time in this Court. The other facts upon which they rely as to the invalidity of the sale are not such as would make the sale void, and therefore, in my judgment there is no substance in that point raised.

As regards the second point, the Subordinate Judge seems to have been of opinion that even if the defendants had acquired the right of occupancy under the Bengal Tenancy Act they were liable to be ejected under the provisions of S. 11, Regulation 8 of 1819. His view apparently was that under the third clause of that section, only khudkhast raiyats or resident and hereditary cultivators are protected, and whoever does not come within the description of that class of raiyats, is liable to be ejected at the instance of a purchaser at a patni sale. He apparently relies in support of that contention on the case of *Jogeshwar Mazumdar v. Abed Mahomed Sirkar* (1). In my judgment that view of the Subordinate Judge is erroneous. Apart from authority, if Cl. 3, S. 11 is examined, it will be apparent that it only provides certain restrictions on the right of an auction purchaser to eject certain persons, which right has been given by the previous clauses of that section. Under the first clause certain incumbrances, which had accrued upon the taluk, were liable to be cancelled. The second clause deals with leases creative of a middle interest between the resident-cultivator and the late proprietor, and the third clause mentions an exception to the right of the purchaser. If the right of the person in occupation does not come within the first or the second clause of that section, and if the occupier of the land is protected from ejection by some other law, there is no reason to suppose that S. 11 of the regulation gives authority to the auction-purchaser to eject that occupier of the land by virtue of his purchase. The case of *Jogeshwar Mazumdar* (1) can only be reasonably construed as an authority for the proposition that a lease is an incumbrance. If it be construed as

(1) [1896] 8 C. W. N. 13.

an authority for laying down the proposition that even an occupancy raiyat is liable to be ejected by an auction-purchaser because he does not come within Cl. 3, S. 11 of the regulation, with all respect I must say that I am unable to accept that proposition. That case has been interpreted and doubted in various other cases. See *Sradyote Kumar Tagore v. Gopi Krishna Mandal* (2), *Tamizuddin Khan v. Khoda Nawaz Khan* (3), and also the case of *Bama Charan v. Ramkanai* (4). In the last case, the learned Judges observed that the case of *Jageshwar Mazumdar* (1) did not lay down that an occupancy right is an incumbrance, and as a matter of fact it could not have been so laid down as an incumbrance, as contemplated in Cl. 1, S. 11 of the regulation. There is ample authority for the proposition that the proviso in the third clause does not mean that persons in occupation not coming within the definition of khudkhasht raiyats, are liable to be ejected, even if they have acquired occupancy rights under the tenancy law. I have not been able to find any authority with regard to patni sales, but the cases with reference to S 16, Act 8, 1865, where the proviso is in the same terms as the proviso in the third clause of S. 11, Regulation 8 of 1819, support the proposition. Those cases are *Pureeag Singh v. Purtab Narain Singh* (5); *Nal Madhub Karmokar v. Shiloo Paul* (6); *Emam Ali Mistry v. Ator Ali Khan* (7); *Bama Charan Gorai v. Ram Kanai Dubey* (4).

The second proposition, therefore, on behalf of the appellants ought to be accepted. But the question is whether the defendants had acquired a right of occupancy by remaining in possession of the disputed land for the requisite period under the Bengal Tenancy Act. It is not necessary for me to examine the evidence or the terms of the lease in detail having regard to the view I have taken with regard to the first question. The learned advocate for the respondents has argued with considerable stress, that the lease of 1879

was the grant of a tenure and if the lessees were tenure-holders they could not under the provisions of the law, acquire a right of occupancy as raiyats with regard to lands which they had themselves cultivated within their own tenure. That proposition seems to me to be unassailable. It is unnecessary for me to discuss the question whether the lease should be construed as the grant of a tenure or whether it should be considered as a mere raiyati lease, as is contended for equally strenuously on behalf of the appellants by their learned advocate. It is sufficient for my purpose to state that these lessees were illiterate people and actual cultivators themselves. They belong to the caste of Pote, one of that class of people who are considered to be untouchables. It can hardly be supposed that they were to act the part of landlords or tenure holders. The only point that can be urged against their being raiyats is that the area of the demised premises exceeds by far 100 highas of land.

I next come to the first point urged, and it is this, that the defendants are khudkhasht raiyats. The Subordinate Judge has found that the appellants have no dwelling house within the village in which the lands in question are situate. His finding is that some of them have got mere chalas where they stayed during the time of cultivation. He further relies upon the vakalatnamas filed by some of these defendants in which their residences have been described as in another village. He, therefore, does not believe the evidence given by the defendants' witnesses, that they are resident hereditary cultivators. I may mention that the descriptions in the vakalatnamas do not amount to anything. These people are illiterate. Their vakalatnamas must have been written by the clerks of their pleaders, and the clerks of their pleaders must have written their residence from the copy of the summons that was served upon the defendants, and their residence in the copy of the summons must have been taken from the plaint in which the plaintiff chose to describe the defendants as being residents of a different village.

That being so, the only evidence that remains is the evidence of those defendants as to their place of residence. But that also is not decisive of the question, because at the time when the lease was granted it was not known within which

(2) [1910] 37 Cal. 322=11 C. L. J. 209=5 I. C. 243=14 C. W. N. 487.

(3) [1910] 14 C. W. N. 229=5 I. C. 116=11 C. L. J. 16.

(4) [1914] 19 C. W. N. 858=28 I. C. 374.

(5) [1869] 11 W. R. 253=5 B. L. R. App. 20 Note

(6) [1870] 13 W. R. 410=5 B. L. R. App. 18.

(7) [1874] 22 W. R. 133.

village the jungle land was situate. In the description of the property in the lease of 1879, it was described as in Mouzah Sahapur Bil, where the details of the kistibundi as regards the payment of rent was given. In the schedule of boundaries it is described as in the Bil, south-west of Ramkrishnapur Ghona, within Taraf Sahapur. In para. 4 of the plaint the plaintiffs described it as situated on the south of the thak map that was prepared with respect to Ramkrishnapur and Ghona mouzahs jointly. From this it appears that the property was not actually situated within the village of Ramkrishnapur or Ghona. The lessees in 1879 were all residents of Ruprampur and Madhavkati, which villages, it appears, are within the patni mahal which has been purchased by the plaintiffs at the auction sale. What is the meaning of khudkhast raiyat? It is resident, hereditary cultivator in contradistinction to palkast raiyat, that is a migratory tenant. If the tenants were resident within the patni mahal but outside the jungle tract, which did not form part of any village, and where no man could live—and it is in evidence that the land in question was at that time infested with tigers and other wild animals would it be reasonable to say that these tenants were not khudkast tenants although they were residents of contiguous villages within the patni? I think not. There is ample evidence on the record to show that these jotedars and mandals were raiyats of the villages in which they lived, and as I have already stated, they belong to a class whose only mode of life is by cultivation. That these men may be considered to be khudkhast raiyats is supported by the observations of Mr. Justice Markby in the case of *Nubokishore Biswas v. Judub Chunder Sircar* (8)

I may state in passing that the Subordinate Judge is clearly wrong in observing that that case was not followed in the later cases mentioned by him. Now, if the tenants to whom the lease was given in 1879 were khudkhast raiyats, then their case falls within Cl. 3, S. 11 of the patni regulation; and that clause lays down that the purchaser is not entitled to eject the khudkhast raiyats, nor to cancel bona fide engagements made with such tenants by

the late incumbent, except it be proved in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rate would have been demandable at the time such engagements were contracted by his predecessor.

Now the only ground on which the plaintiffs might bring this action, as it seems to me, is that this was not a bona fide engagement. That has not been stated in the plaint, and having regard to the nature of the land, which was absolutely jungle, and the purpose for which the lease was granted, that is, for the purpose of reclaiming by these people, who were residents of villages close by, it can hardly be said that it was not a bona fide lease given to the lessees by the then patnidars. No attempt has been made to show that the rent then fixed was not the proper rent demandable. The representatives of the lessees under the lease of 1879 cannot therefore be ejected by the plaintiffs, and consequently the persons claiming under them or their representatives are also not liable to be ejected.

In this view as I have already stated, it is unnecessary for me to determine whether the lease created a tenure or a raiyati interest. Whether it is an incumbance falling within Cl. 1 of the section or not, need not also be determined having regard to my finding that the lessees were khudkhast raiyats and the lease was a bona fide lease for the purpose of reclaiming jungle lands. The result, therefore, is that this appeal must be allowed, and the suit for ejectment against these defendants-appellants must be dismissed with costs. The costs in this Court will be given to the appellants other than appellants 8, 9 and 12. The applications are not pressed and are dismissed without costs.

Roy, J.—I agree.

D.D.

Appeal allowed.

A. I. R. 1928 Calcutta 55

MUKERJI AND MALLIK, JJ.

Girish Chandra Sanyal and others—
Plaintiffs—Petitioners.

v.

Secretary of State and another—
Defendants—Opposite Parties

Civil Rule No. 671 of 1927, Decided on 2nd August 1927, from an order of the 1st Sub-Judge, Pabna, D/- 20th May 1927, in Declaratory Suit No. 109 of 1927.

(a) *Court-fees Act, S. 7, Cl. 4 (c) and (d)—Suit for declaration and injunction—The value of injunction for purposes of Court-fees is really the value at which the injury to the plaintiffs should be assessed.*

According to S. 7, Cl. 4, (c) and (d), the amount of the fee is to be computed according to the amount at which the relief sought is valued in the plaint, provided valuation is not arbitrary—not under-valued to evade payment of proper Court-fees—and it is for that purpose necessary to look to the substance of the allegations made and of the reliefs sought for. The value of the relief is its value to the plaintiff and not the value of the property involved and, therefore, the value of the injunction to the plaintiffs is really the value at which the injury to the plaintiffs should be assessed. [P 56 C 1, 2]

(b) *Court-fees—Admission as to computation is not binding,*

An admission by the plaintiff in respect of computation of Court-fees is not binding on him, the question being one of law and not of fact. [P 56, C 2]

Bojo Lal Chakravarti, Bijan Kumar Mukherjee and Surajit Ch. Lahiri—for Petitioners

Dwarka Nath Chakravarti Bahadur and Surendra Nath Guha—for Opposite Parties

Judgment.—The only question in this rule is whether the Court-fees paid on the plaint are adequate.

The plaint, in substance, challenges the validity of the imposition which purports to have been made under Ss. 15 and 15-A, General Police Act (5 of 1861) and the mode in which the amounts are about to be realized, namely in accordance with Ss. 386 and 387, Criminal P. C., which is one of the modes provided for in S. 16 of the said Act. The prayers are for certain declaration and a permanent injunction restraining the realization of the amounts by the said method.

The Subordinate Judge is of opinion that Rs. 1,682 and Rs. 18,301 are the amounts of tax and compensation that remain unrealized, and the suit, therefore, relates to the plaintiffs' liabilities which should be assessed at the sum total of these two amounts. He thinks that the reliefs sought for in the plaint involve declaration in respect of liabilities and an injunction restraining the realization of the said amount and that, therefore, the Court-fees should be paid ad valorem on the aggregate of the aforesaid two amounts.

The reliefs sought for in the plaint come within S. 7, Cl. 4 (c) and (d) of the Court-fees Act. Prima facie, in accord-

ance with the terms of that section, the amount of fee is to be computed according to the amount at which the relief sought is valued in the plaint. Of course the valuation should not be arbitrary and any device to evade the payment of proper Court-fees by casting the prayers in a way so as to admit of lesser Court-fees being paid should be guarded against and for that purpose it is necessary to look to the substance of the allegations made and of the reliefs sought for. On the other hand, the value of the relief is its value to the plaintiff and not necessarily the value of the property involved.

In the present case, leaving aside the declarations which by themselves do not affect the question of Court-fees, the consequential relief sought for is not recovery of the amounts which have been imposed, for they have not yet been realized—what has been realized is outside the scope of the suit—but a permanent injunction restraining the realization thereof by a particular process. There is no knowing whether by the said process the entire amounts yet unrealized will be realized. The value of the injunction to the plaintiffs is really the value at which the injury to the plaintiffs should be assessed. It is impossible to say that Rs. 5,100 is inadequate or arbitrarily low from that point of view, and so long as this cannot be said, the plaintiffs' valuation must necessarily be accepted under S. 7, Court-fees Act.

In fairness to the learned Subordinate Judge, however, it must be said that the view he has taken is founded upon statement which is contained in a petition filed on behalf of the plaintiffs who were on the record at one particular stage of the proceedings. The question however, is one of law and not of fact and it cannot be said that by that statement either they nor those who came in as plaintiffs afterwards are concluded.

We are accordingly of opinion that the rule should be made absolute. We set aside the order complained against and direct that the trial of the suit be proceeded with on the plaint as it stands. The costs of this rule—hearing fee being assessed at three gold mohurs—will be costs in the cause.

N.D.

Rule made absolute.

A. I. R. 1928 Calcutta 57

SUHRAWARDY AND MALLIK, JJ.

Mathura Nath Choudhury—Defendant
3—Appellant.

v.

Sreejukta Bageswari Rani and others
—Plaintiffs—Respondents.

Appeal No 1407 of 1926 and Rule No. 860 (S) of 1926, Decided on 26th May 1927, from the appellate decree of the Dist. Judge, Assam Valley Dist., D/- 13th February 1926.

(a) *Contract Act, S. 251*—A partner is liable for a bonafide contract entered into by other partners.

Defendants 1 to 3 carried the business of catching wild elephants. Defendants 1 and 2 hired from the plaintiff an elephant for the purpose of employing him in their business. There was an agreement between the plaintiff and defendants 1 and 2 of which the material portion was to the following effect: "I remain liable to pay to you Rs. 5,000 as the price of the elephant, Rs. 200 as the balance of the hire (money) if during the period the elephant remains in my possession, it be broken in health or become unfit for work or dies and I cannot return it to you at the stipulated time." The elephant subsequently died. Defendant 3, who was a partner in the business, denied all knowledge about the elephant.

Held: that under S. 251 read along with S. 231, defendant 3 was liable for the act of his co-partners: *A. I. R. 1924 Cal. 1036; A. I. R. 1925 Cal. 29 and Paterson v. Gandasequi (1812) 15 East 62, Foll.* [P 59 C 2]

(b) *Contract Act, S. 74*—Hire contract—Price to be paid if thing hired be not returned—S. 74 does not apply.

Where a contract is one of the nature of hire with the reservation that if the article is not returned, the value stipulated in the agreement should be paid to the owner, S. 74 does not apply. [P 59 C 2]

Joges Chunder Roy and Manmatha Nath Roy (Jr.)—for Appellant.

Bijan Kumar Mukharjee, Umashankar and Panchanan Ghosal—for Respondents.

Khutis Chandra Chakrabarty and Durga Charan Roy Choudhry—for Petitioner in Rule No. 860-S.

Judgment.—The facts which have given rise to the suit and this appeal are that the plaintiff was the owner of an elephant by the name of *Ial Bahadur*. Defendants 1 and 3 carried on the business of catching wild elephants and the plaintiff's case is that defendant 1 and his servant defendant 2 hired from her the elephant for the purpose of employing him in their business. There was an agreement between the plaintiff and

defendants 1 and 2 of which the material portion was to the following effect:

I remain liable to pay to you Rs. 5,000 as the price of the elephant and Rs. 200 as the balance of the hire (money); if during the period the elephant remains in my possession, it be broken in health or becomes unfit for work or dies and I cannot return it to you at the stipulated time.

Under this agreement defendant 1 took possession of the elephant and used it for shikar or catching wild elephants in the Garo Hills up till the 29th December 1923 when it was found that the animal was ill and it died soon after. The plaintiff thereupon on the basis of the agreement brought the present suit for recovery of Rs 5,000 from defendants 1 and 2. Defendant 1 in his written statement alleged that defendant 3 (the appellant before us) was a partner in the business and should have been made a party and that the suit should not proceed in his absence. Thereafter the plaintiff made an application in which she applied to make defendant 3 a party defendant and said that she was making the application on the objection taken by defendant 1 and as defendant 3 was an undisclosed partner in the business. The Sub-Judge before whom the application was made passed the following order:

The plaintiff makes an application to add Muthuranath Choudhury as a party. It occurs thus: He is a necessary party. Add him as a party. Issue summons."

On the body of the plaint the name of Mathuranath Choudhury, the appellant, was inserted at the heading under the names of the other defendants but no further alteration was made in the plaint either in the body of the plaint or in the prayers alleging facts against defendant 3 and seeking particular relief against him. The order adding defendant 3 as a party was passed after the settlement of issues in the case. The plaintiff, therefore, applied again to frame fresh issues with reference to defendant 3 and the following issues were added:

(a) Was defendant 2 an agent of defendant 3 Mathuranath Choudhury and was he authorized by defendant 3 to enter into the agreement with plaintiff? If not, is defendant 3 liable?

(b) Was defendant 3 partner of defendant 1 in the elephant catching business and as such liable to the plaintiff?

Defendant 3 in his written statement denied any knowledge of the agreement with the plaintiff and otherwise supported defendant 1 in his contention that no decree could be passed in the suit. The parties went to trial and evi-

dence was adduced on both sides and it appears that it was admitted by defendant 3 that he was a partner of defendant 1 in the business. The trial Court decreed the suit against all the defendants jointly. On appeal by defendant 3 the learned District Judge of the Assam Valley District maintained all the findings of the trial Court and dismissed the appeal. Defendant 3 appeals before us and it has been contended on his behalf, firstly, that the suit should not have been decreed as against him as the plaintiff was not properly amended and no relief was asked against him by the plaintiff in the plaint. The objection was not specifically raised in any of the Courts below nor in the grounds of appeal in this Court. Moreover we do not think that there is any substance in it. The objection is a highly technical one and is fully covered by S. 99, Civil P. C. There has been no failure of justice on account of the omission in asking for a particular relief against defendant 3. By the addition of defendant 3 as a defendant to the suit the plaintiff intended to claim a decree against him as well, being a partner in the business, for the conduct of which the defendant was let out. This objection must, therefore, be overruled.

It is next argued that defendant 1 exceeded his authority in entering into an agreement like the present. This objection should also be overruled on the ground that it was not taken in any of the Courts below; and it is an objection which must be decided on the evidence and on the facts of the case. The learned Subordinate Judge in dealing with the liability of the appellant under S. 251, Indian Contract Act, observed that not a word was said in the written statement to suggest that he was not liable for or was not bound by the act of defendant 1 and that the said act was not necessary for the business. The ground upon which this portion of the appellant's case has been placed before us is that the condition to pay the sum of Rs 5,000 in the event of the elephant being lost was an unusual condition into which defendant 1 entered without obtaining a valid authority from his partners; and he is, therefore, personally liable and not the other partners of the business. There is nothing on the record to support this contention except the fact that in some agreements by which elephants were

hired for the business defendant 1 made different stipulations. There does not seem to be anything unusual in the agreement before us. It has been found upon the evidence that the plaintiff was not willing to let out the elephant, but on the insistence of the defendants she agreed to do so on condition that she must be paid Rs. 5,000 if the elephant died or disappeared. It is also found that the elephant was a trained elephant for the purpose of catching wild elephants.

It has been strenuously argued that on the agreement defendant 3 cannot be made liable, firstly on the ground that the agreement was with defendant 1; and, secondly, because it has not been proved that it was in the course of the partnership business that this contract was entered into. It is said that the agreement was with defendant 1. (We may leave out of consideration defendant 2 as he was merely a servant of defendant 1, though an ex-parte decree was passed against him) and for this construction of the agreement reliance has been placed upon the case of *Kush Kanta v. Chandra Kanta* (1). In that case the law which is so well known was thus laid down :

The bailee is responsible to the bailor for loss, destruction, or deterioration of the bailed property upon his failure to return the same according to contract upon the expiry of the term of business ; an action of trover is maintainable against a bailee where he fails to re-deliver the bailed property or to deliver it over in accordance with the terms of the contract.

On the particular facts of that case it was held that a partner who was not a party to the agreement should not be made liable though the contracting defendant took the elephant and employed it for the purpose of the business of the company and which contract the company refused to execute to the knowledge of the plaintiff. On these circumstances it was held that no other partner of the business besides the contracting defendant might be made liable under the agreement though the hire was for the benefit of the partnership business. That case, therefore, does not support the defendant's contention and if it is carefully scrutinized it goes a great way to help the plaintiff's case. Reliance has also been placed upon the decision in the case of *Ram Chandra Sahu v. Kasim Khan* (2) the head-note of which is to the following effect :

(1) A. I. R. 1924 Cal 1056.

(2) A. I. R. 1925 Cal. 29.

The liability of the dormant partner extends only to sums borrowed by the active partner in his capacity as a member of the firm. The ultimate use by the firm of money borrowed by one of its members individually on his own credit does not render the firm liable for the loan.

In that case, it appears that the borrowing defendant was a partner of the firm and had also other business in which he was interested. He borrowed some money on his own account and in his own name. He found subsequently that the defendant firm was in need of pecuniary help and the money he had borrowed he employed for the business of the firm. In these circumstances the learned Judge held that the firm or all the members constituting the firm could not be made liable for the money thus borrowed, as it was not borrowed originally for the purposes of the firm by the borrowing defendant as a partner of it and was not also so borrowed with the knowledge of the plaintiff. The learned Judges also observed that where one member of a partnership borrowed money upon his own credit by giving his own promissory note for the sum so borrowed and subsequently used the proceeds of the notes in the partnership business, of his own free will, without being under any obligation to or to contract with the lender so to do, the partnership was not liable for the loan. The substance of the matter is whether the firm is liable for the money borrowed by one of its partners is pre-eminently a question of fact and depends upon the circumstances of each particular case.

With regard to the liability of defendant 3, if it be conceded that the money was borrowed and spent for the purpose of the business, there can be no question on the law as embodied in the Indian Contract Act and laid down by innumerable cases. Under S. 251, Contract Act, the appellant is liable if the act of defendant 1 was necessary for or usually done in carrying on the business of the partnership of which he was a member. It is not the appellant's case that defendant 1 did not act as a partner or his act was one which could be brought under the exemption to S. 251. As to undisclosed or dormant partner the law is clear. The leading case upon this point is the case of *Pater-son v. Gandasequi* (3), where the law is thus laid down :

If the principal be not known at the time of

(5) [1812] 15 East 62=13 R. R. 68.

the purchase made by the agent, it seems that, when discovered the principal or the agent may be sued at the election of the seller ;

and it was observed in that case that a dormant agent might be assimilated to a dormant partner where though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he might afterwards pursue his remedy against the dormant partner, when discovered. S. 251, Contract Act, which contains the law of partnership controls the relation between partners which is similar to the relation between principal and agent : and under S. 231, Contract Act, the principal is as much liable for the act of the agent himself. It cannot therefore be said that on the contract as it stands and on the findings of fact arrived at by the Court below defendant 3 is not liable under the agreement made between the plaintiff and defendant 1.

The last point taken by the appellant is that the sum of Rs. 5,000 stipulated to be payable to the plaintiff on the loss of the animal was in the nature of a penalty and the Court should have enquired as to the real value of the elephant and passed a decree accordingly. This point also was not raised in any of the Courts below and consequently there has been no enquiry as to the value of the animal. In the agreement the value of the elephant was given as Rs. 5,000 and it was stipulated that if the defendant failed to return the animal to the plaintiff he would pay Rs. 5,000 as the value of the animal. To the agreement as it stands S. 74, Contract Act, has no application. It is a simple agreement. The plaintiff said that she would part with her thing if the defendant guaranteed to pay a certain amount if the thing was lost. It was not a case of a breach of contract or the non-performance of any particular agreement by the defendant. It was a sort of contract on hire with the reservation that if the article is not returned the value stipulated in the agreement should be paid to the owner. In our opinion this contention fails.

The result is that all the points urged on behalf of the appellant fail and this appeal is dismissed with costs. The appellant will pay full costs to the plaintiff respondent Bageswari Rani and half costs to defendant 1, respondent Bhagyamal Bama. We make no order as regards costs in favour of defendant 2, respondent.

Rule 860 (S) of 1926.

This Rule was obtained from this Court by defendant 1 respondent for the purpose of transporting that defendant-respondent to the category of appellant on the ground that he apprehended that the plaintiff and the appellant might collude and did not place the case properly before the Court. Such contingency has not arisen and the learned advocate for the defendant does not press the application. The Rule is accordingly discharged

N.D. *Appeal dismissed :
Rule discharged.*

A. I. R. 1928 Calcutta 60

PAGE AND GRAHAM, JJ. "

Monmatha Nath Ghose—Auction-purchaser—Appellant.

v

Mt. Luchmi Debi and others—Judgment-debtor and Decree-holders—Respondents.

Appeal No 96 of 1927, Decided on 14th June 1927, from the appellate order of the 2nd Additional District Judge, 24-Perganas, D/- 31st January 1927.

(a) *Civil P. C., O. 21, R. 22—Sub-R. 2 does not abrogate the mandatory nature of the provisions of sub-R. 1.*

Omission to issue notice to the judgment-debtor as required by O. 21, R. 22(1) renders the subsequent proceedings in execution void and sub-R. 2 does not abrogate the mandatory nature of the provisions of sub-R. (1). 44 Cal. 954, and A. I. R. 1924 Mad. 431, (F. B.), *Foll.*

[P 62 C 1]

(b) *Limitation Act, Art. 181—Application to declare a sale in contravention of O. 21, R. 22 (1), Civil P. C., is governed by Art. 181 and not by 166.*

An application for declaring that a sale in execution is void for non-compliance with Civil P. C., O. 21, R. 22 (1), not being an application to set aside the sale, is governed by Art. 181 and not Art. 166 : 27 C. L. J. 528 and A. I. R. 1924 Mad. 431, (F. B.), *Foll.*

[P 62 C 2]

(c) *Civil P. C., O. 21, R. 22 (1)—Notice served on judgment-debtor—Order dismissing application is not against judgment-debtor.*

An order dismissing an application for execution on account of decree-holder not taking steps, though passed after the service of notice on judgment-debtor, is not an order against judgment-debtor.

[P 61 C 2]

Sarat Chandra Roy Chowdhury, Shanti Kumar Roy Chowdhury and Bireswar Chatterjee—for Appellant.

Sarat Chandra Bose, Haradhone Chatterjee and Lal Mohan Mukerjee—for Respondents.

Page, J.—This is an appeal from an order of the learned Additional District Judge of Alipur, reversing an order of the Subordinate Judge of Alipur whereby the learned Additional District Judge set aside a sale under O. 21, R. 92, and also held that the application for execution was barred under S. 47, Civil P. C. As regards the application under O. 21, R. 90 it appears that the applicant was the widow of the judgment-debtor, and the learned Judge held that there was a deliberate and fraudulent suppression of the notices required by law on the part of the decree holder, and that by reason of such suppression the applicant had sustained substantial injury. Upon these findings the learned Judge set aside the sale under O. 21, R. 92. The case for the appellant has been presented to us in an exhaustive manner by Mr. Roy Chowdhury, and in respect of the order passed under R. 92 the learned advocate has contended that inasmuch as the application was not made within 30 days of the sale it was barred by limitation and that as there was no express finding that the applicant was prevented from making her application in time by reason of the fraud of the decree-holder the application under O. 21, R. 90 was barred. Now, in her application the applicant not only set out that there had been deliberate suppression of all necessary processes but added that she was an illiterate pardanashin lady, and that she knew nothing about the proceedings until she was informed by her father at a date after the time had expired within which her application under O. 21, R. 90 should have been made. In my opinion, having regard to the ruling in *Rahimbhoy Habibhoy v. Turner* (1) and *Ram Kinkar Tewari v. Sthiti Ram Panja* (2) this contention raised on behalf of the appellant must fail. In those circumstances the order in so far as it was based upon O. 21, R. 92, is confirmed.

In her petition the applicant also claimed that the judgment creditor's application for leave to issue execution was barred by limitation. It was alleged by the applicant that the application for leave to issue execution was made long after the decree in the suit had become obsolete by the lapse of time. The learned Subordinate Judge appears to have

(1) [1893] 17 Bom 341=20 I. A. 1=6 Sar. 256 (P. C.).

(2) [1918] 27 C. L. J. 528=46 I. C. 221.

thought that this allegation on the part of the petitioner amounted to an allegation that the claim upon which the decree was passed was barred by limitation, and he stated that in execution proceedings he could not go into that matter. Of course in so holding he was taking the right view. But that was not the allegation that was made; which was that the application for leave to execute the decree was made so long after the decree had been passed that it was barred by limitation. In the memorandum of appeal to the learned District Judge the applicant based her second contention both upon the general ground that the application for leave to issue execution had been made long after the execution had become barred, and also upon the more narrow ground that the application for execution was not made within a year from the date of the decree nor

within a year from the date of the last order against the party (that is the applicant) against whom execution was applied for,

and inasmuch as no notice was served upon the applicant as required by O. 21, R. 22, the application for execution was void and of no effect. The learned District Judge without coming to a definite conclusion upon the wider ground upon which it was contended that the application for execution was barred, held that the execution was illegal upon the narrower ground upon which the applicant relied. In my opinion, in so holding the learned Additional District Judge rightly appraised the legal position of the parties. The decree was passed on the 25th February 1916 and an application for leave to issue execution was dismissed for default on the 26th November 1923. The application for leave to issue execution upon which the present proceedings are founded was filed on the 10th November 1924. Therefore unless the decree-holder could satisfy the Court that within a year prior to 10th November 1924 an order had been made

against the party against whom execution was applied for

under O. 21, R. 22 the application for execution was barred by limitation. Mr. Roy Chowdhury referred to three orders one of which was made on the 26th November 1923, and was to the following effect :

Notice returned after service. Decree-holder takes no further steps. So the case is dismissed.

The learned advocate contended that that order was an order against the applicant under O. 21, R. 22. All I need say in order to refute that contention is to set out the order itself. It cannot reasonably be suggested that the statement "Notice returned after service" is an order against anybody. It is even more unreasonable to suggest that the words

decree-holder takes no further steps. So the case is dismissed

are an order against the judgment-debtor or within the meaning of O. 21, R. 22

Two later orders were referred to. But these orders which relate solely to an application for review of an order dismissing the execution case did not purport in any sense to be orders directed against the judgment-debtor or the applicant. What is the effect of process in execution being issued without the notice which must be served under O. 21, R. 22? Before the passing of the Civil P. C. in 1908, it had been held by the Privy Council that the effect of issuing processes without complying with the provisions of O. 21, R. 22 was that the execution proceedings were void. The decision in *Raghu Nath Das v. Sunder Das Khetri* (3) was according to reason and good sense, if I may be permitted to say so, and that decision was that after a year had elapsed from the date when the decree had been passed it was only fair to the judgment-debtor that he should be given notice of the application for leave to execute a decree in order that he might have an opportunity of showing cause why the process should not be issued against him; otherwise it might happen that a dishonest decree-holder would be able to snap an order granting leave to execute the decree from the Court and attach the debtor's property without the debtor having an opportunity of questioning the regularity or the fairness of the execution. In 1908, sub-R. (2), R. 22 was added, and it was strenuously contended by Mr. Roy Chowdhury that the effect of that proviso was fundamentally to alter the whole complexion of O. 21, R. 22, because as he urged, if once discretion is given to the Court to issue or not to issue execution the failure to comply with the machinery of sub-R. (2) is a mere irregularity. Is that a sound argument? In my opinion, a perusal of sub-R. (2) shows

(3) A. I. R. 1914 P. C. 129=12 Cal. 74=11 I. A. 251 (P. C.).

that the intention of the legislature was to maintain the necessity of a notice under sub-R. (1) and that the legal position of the parties concerned should remain unchanged except in cases where the terms of sub-R. (2) are complied with. The object of passing sub-R. (2) apparently was that there might be rare cases where insistence upon a strict compliance with sub-R. (1) might work hardship. It might be imperative in order that justice should be done that execution should be levied forthwith. It would not be difficult to enumerate instances in which the necessity for immediate execution would arise in order that justice should be done. It was to meet such exceptional cases that the legislature passed sub-R. (2). But, in my opinion, it was not intended by enacting sub-R. (2) that the mandatory nature of the provisions of sub-R. (1) should be abrogated, and as we read the amended rule the legislature intended that the status quo ante of sub-R. (1) should be maintained except under special circumstances in which "for reasons to be recorded" the Court should think in order that justice should be done that it ought to issue execution without notice under sub-R. (2). That, in my opinion, is the true construction of R. 22 apart from authority. But this construction is in consonance with the interpretation of R. 22 as amended by the Calcutta High Court in *Syam Mandal v. Sati Nath Banerjee* (4) and a Full Bench of the Madras High Court in *Rajagopala Aiyar v. Ramanujachariar* (5).

The result is that the execution proceedings founded upon the application of the 10th November 1924, are void. The sale took place on the 13th July 1925, and the petition upon which the order under review was found was filed on the 4th December 1925. The learned advocate for the appellant strenuously urged that the petition was out of time because it was an application to set aside a sale under S. 47 of the Code, and, therefore, must be brought within thirty days of the sale under Art. 166, Limitation Act. The fallacy underlying that contention, I think, is that although it is an application under S. 47 and, therefore, under the Code it is not an application to

set aside a sale as is the other branch of the application under O. 21, R. 90. For the sale being void need not have been set aside at all, and the order as passed was in substance merely a declaration that the sale was null and of no effect. For an application of that nature there is no special provision among the articles in Sch. 1, Limitation Act. It needs must come under the residuary Art. 181, and if Art. 181 is applicable the present application was within time. That appears to me to be clear on principle and it is also concluded by authority. See *Ram Kinkar Tewari v. Sthiti Ram Panja* (2) and *Rajagopala Aiyar v. Ramanujachariar* (5).

The result is that the order appealed from is varied by striking out the words "on the above consideration." In other respects the appeal is dismissed with costs the hearing fee being assessed at two gold mohurs.

This order is passed without prejudice to any right which the parties may possess inter se in respect of the premises that are the subject-matter of the present proceedings.

Graham, J.—I agree.

N.D.

Order accordingly.

A. I. R 1928 Calcutta 62

PANTON AND MITTER, JJ.

Dharani Mohan Ray—Petitioner.

v.

Kshitipati Ray—Opposite Party.

Civil Rule No. 330 of 1927, Decided on 28th March 1927, against the order of the Sub-J., Hooghly, D/- 7th March 1927.

(a) *Civil P. C., O. 21, R. 40* (3)—*Security must be proper.*

The security to be furnished by judgment-debtor must be proper and not illusory. [P 63 C 1]

(b) *Civil P. C., S. 55*—*Scope.*

Provisions of S. 55 are mandatory. [P 63 C 1]

N. Barwell and *Manmatha Nath Ray* for *Hiralal Chakrabarti*—for Petitioner.

Radhabinode Pal, Narayan Chandra Kar and *Nirmal Kumar Sen*—for Opposite Party.

Judgment.—Having heard the learned counsel who appeared in support of the rule and the learned vakil for the judgment-debtor, we are satisfied that the order made by the Subordinate Judge on the 7th March 1927, was not in accordance with law. In the first place, there

(4) [1917] 44 Cal. 954=24 C. L. J. 523=38 I. C. 493=21 C. W. N. 776.

(5) A. I. R. 1924 Mad. 481=47 Mad. 288. (F. B.)

was no evidence before him on which it was possible for him to arrive at the decision that the judgment-debtor was a person, who for any "other sufficient cause" within the meaning of O. 21, R. 40, was unable to pay the amount of the decree. The mere statement made at the bar to the effect that he was owner of landed property is insufficient for the purpose. In the next place, it was clearly wrong for the learned Subordinate Judge to release the judgment-debtor on his personal security, which was absolutely ineffective. Order 21, R. 40, sub-R. (3) provides that the Court may release the judgment-debtor on his furnishing security, which means furnishing proper security and not the illusory security with which the learned Subordinate Judge has been satisfied.

We, therefore, set aside this order and direct the judgment-debtor to surrender at once before the Subordinate Judge, 3rd Court, Hooghly, who will then consider, on proper materials being placed before him, whether he should be committed to jail or released, and if released, upon what security; the learned Subordinate Judge must comply with the provisions of O. 21, in the matter of security. We also draw the attention of the Subordinate Judge to the mandatory provisions of S. 55, Civil P. C.

We may say here that the learned vakil for the judgment-debtor states that his client is willing to furnish security. The opposite party will pay the costs in this rule to the petitioner.

D.D. *Rule made absolute.*

A I. R. 1928 Calcutta 63

CUMING AND ROY, JJ.

Sarat Chandra Rakshit—Defendant 1—Appellant.

v.

Sarala Bala Ghosh and others—Plaintiffs and Defendants—Respondents.

Appeal No. 368 of 1925, Decided on 3rd August 1927, from the appellate decree of the Addl. Dist. J., Khulna, D/- 22nd September 1924.

(a) *Evidence Act, 35—Chittas are admissible.*

Chittas are admissible in evidence, though what their value should be is a matter to be determined by the Court in the particular circumstances of the case: 9 Cal. 741, *Dist.*

[P 64 C 2]

(b) *Evidence Act, S. 48—Admission.*

Recitals regarding the boundaries in a document not inter partes are statements made by third parties and cannot be admitted: A. I. R. 1926 Cal. 948, *Foll.*

[P 64 C 2]

(c) *Civil P. C., O. 26, R. 10 (2)—The report and map prepared by a commissioner in one suit can be admitted in another suit on the commissioner being examined.*

Although a report and a map prepared by the commissioner can be taken into evidence only in the suit in which he made the inquiry, yet they can be admitted in evidence in another suit under the evidence Act on being proved by the person who made them: 12 C. L. R. 50, *Ref.*

[P 64 C 2]

Bejoy Kumar Bhattacharji, Gour Mohan Dutt and Hemendra Chandra Sen—for Appellant.

Dwarkanath Chakravarti, Satindra Nath Roy Choudhuri, Ramendra Mohan Majumdar for Surendra Nath Guha and Banku Behari Malik Choudhuri—for Respondents.

Roy, J.—This appeal is by defendant 1. The suit brought by the plaintiffs was one for recovery of possession of a certain plot of land on establishment of their title and also for correction of an entry in the record-of-rights. The plaintiffs' case was that this plot of land was plot No. 2732 of the zemindari's chitta prepared in 1234 B. E. It was at one time chakran land. The "chakran" was resumed, and thereafter the land was settled with Rowson Mamud Haldar, the predecessor-in-interest of defendants 4 to 8 in the suit. One Fazal Bhangi took settlement of the disputed land from the heirs of Rowson Mamud Haldar and, in execution of a money-decree obtained against him and the sale thereunder, the land was sold and purchased by the plaintiffs. The defendant is the gantidar of Beel Pabla and it was said in the suit that he dispossessed the plaintiffs and got himself wrongly recorded in the settlement "khatian" which was prepared in 1918. The plaintiffs brought a suit soon after the final publication of the record of rights and there was a local enquiry made by a pleader commissioner who prepared a map and submitted his report. But the suit was withdrawn with liberty to bring a fresh suit. The plaintiffs brought this fresh suit in 1921.

The settlement record states that the land in suit is in Beel Pabla. The chitta of 1234 describes the plot as situated in mouza Lata. It appears that mouza

Lata, Mouza Beel Pabla and another mouza are all within Dehi Pabla which goes under one Touzi. The defence was a denial that the disputed land was identical with plot 2732 of the chitta of 1234 and a denial of the tenancy of Rowson Mamud Haldar and the subsequent lease to Fazal Bhangi and of the plaintiff's purchase. The landlord happens in this case to be the Syedpur Trust Estate, the agent of which estate is the Collector of Khulna and he is a party to these proceedings. He also filed a written statement in which he supported the plaintiff's case in part in that he stated that there was a wrong entry in the record-of-rights. He denied any knowledge of the plaintiffs, but he said that Rowson Mamud Haldar's heirs should have been recorded as tenants under Syedpur Trust Estate.

The suit was tried by the trial Court. A number of witnesses were examined and the pleader commissioner who had made the local investigation in the previous suit which was withdrawn was also examined and he proved the map which he had prepared in the previous suit and also deposed that he had made the particular report which was before the Court. It appears that in the trial Court the map and the report were admitted without objection. An objection was taken that the evidence which the pleader commissioner had recorded should have also been put in as, without the evidence, the report was of little value. This has been considered by both the trial Court and the lower appellate Court and they are of opinion that the absence of that evidence detracts to some extent the value of the map and the report. The learned Munsif came to the conclusion that the plaintiffs had established their case and he thereupon gave the plaintiffs a decree. Defendant 1 appealed and the learned Additional District Judge who heard the appeal affirmed the decision of the trial Court; and defendant 1 has now come up here in second appeal.

A number of objections have been taken by the learned vakil who has appeared for the appellant. One of his points is that the chitta of 1234 is not admissible and in support of his argument he refers to the case of *Ram Chunder Sao v. Bunsedhar Naik* (1). As a matter of fact all that was held in that case was that

chittas prepared by Government for their khas mahal are not public documents. The question whether chittas were admissible under the Evidence Act was not considered in that case. Any commentary on the Evidence Act will tell us that chittas are admissible under appropriate sections of the Evidence Act. What their value should be is a matter to be determined by the Court in the particular circumstances of the particular case. As a matter of fact these chittas were admitted without any objection. Even in the grounds of appeal no objection was taken to their admissibility. The argument, therefore, has no substance.

The second objection of the learned vakil is that the lower appellate Court and apparently the trial Court also, because the Munsif had argued on the same line, have made an error in admitting a kabuliyat executed by Waresh and Fazal Sheikh in favour of Priyanath Majumdar and have wrongly relied on the boundaries mentioned in the kabuliyat. These are statements made by a third party and cannot be accepted as was held in the case of *Brojo Mohan Das v. Gaya Prosad* (2). There is that defect in the judgment of the two lower Courts. But as a matter of fact the son of Priyanath Majumdar was examined in the case and he deposed that this kabuliyat with these boundaries was accepted by his father and he also deposed positively that the two plots mentioned in that kabuliyat are one on the east and the other on the west of the disputed land. There is independent evidence, therefore, on the matters dealt with by the learned Additional District Judge. Apart, therefore, from the kabuliyat there is evidence of the facts on which he has relied.

Then the learned vakil has challenged the map and the report of the Commissioner which were admitted by the Munsif who tried the suit. It is, no doubt, correct that a map and a report of a commissioner who made a local enquiry can be evidence only in the suit in which he made the enquiry. That was held in the case of *Denobundhu Ghose v. Nistarini Dassi* (3). But in this case the report and the map were not taken into evidence by themselves as contemplated in the Civil Procedure Code, but they were taken in under the Evidence Act on

(2) A. I. R. 1926 Cal. 948.

(3) 12 C. L. R. 50.

(1) [1883] 9 Cal. 741.

being proved by the person who made them, that is the pleader commissioner who made them was examined in this case and he deposed that the map and the report were made by him and they were then marked as exhibits. As a matter of fact it does not appear that in the trial Court there was any objection taken to the admissibility of this map and the report.

If the defendant was really anxious that these documents should not go in, he should have objected at once and the learned Munsif could have ordered a fresh enquiry and put matters right. But his contention in the Court below was that they were of little value, in the first place, because the evidence which the commissioner had taken was not put in and in the second place because the commissioner was unable to remember anything except what he had written in his report. The Courts below have observed that the value of the map made by the commissioner and the value of his report suffer by the exclusion of the evidence that the commissioner had recorded. The lower appellate Court, however, has taken into account other facts in considering the value of the map and the report. He has observed, for instance, the broad features depicted by the commissioner and he has noted that they were consonant with the settlement map. After a prolonged discussion of various possibilities of the case both the Courts have come to this finding that plot 2732 of Chitta of 1234 has been identified with the land in suit and that it has been established that it was in the possession of Fazal Bhangi as tenant under the heirs of Rowson Mamud Haldar and that the plaintiffs have succeeded to that interest. On these findings it follows that the entry in the record of rights is incorrect. This is really a finding of fact and we do not see how that finding of fact can be interfered with in second appeal. The only way suggested by the learned vakil is that the case should be sent back to the lower appellate Court and a fresh local enquiry should be made. I do not think that this should be allowed at this stage. The defendant could have asked for a fresh local enquiry in the trial Court but he did not do so. He challenged the value of the commissioner's report. Both the lower Courts have come to the finding that it has some value, and that

taken along with the other facts of the case it has established the plaintiffs' case.

The learned vakil has taken another objection, namely, that the plaintiffs are not at liberty to pursue their remedy in to another person's land. It is based on the argument that in the Chitta of 1234 the land was described as situated in Mouza Lata while the land in suit is situated in Mouza Beel Pabla and it is so recorded in the settlement map. But when the plaintiffs have shown that this particular plot situated in Beel Pabla is really their land, there is no reason why they should not be allowed to retain it. It would appear from the evidence in the case that the disputed land is situated close to a place where three mouzas meet together. It is quite possible that at the time of the Chitta it was thought that it lay within the Mouza Lata though it has now been found that it is really situated in Mouza Beel Pabla. It is true that defendant 1 is the gantidar of Beel Pabla, but as it has been pointed out, the defendant got his lease of ganti of Beel Pabla on the stipulation that he would not disturb any of the existing tenancies. It has been found that the tenancy of Rowson Mamud Haldar was created before defendant 1 got his ganti.

On these grounds, I think, there is no case for our interference. The appeal is dismissed with costs.

Cuming, J.—I agree.

N.D.

Appeal dismissed.

A. I. R. 1928 Calcutta 65

RANKIN, C. J., and D. N. MITTER, J.

G. I. P. Ry. Co. Ltd.—Defendants—Appellants.

v.

Jesraj Patwari and others—Plaintiffs—Respondents.

Appeals Nos. 1123 and 1124 of 1924, Decided on 24th June 1927, from the appellate decrees of the Sub Judge, Bogra, D/- 5th March 1924.

(a) *Railways Act (9 of 1890), S. 72 (2)*—*Risk-note form B—Liability of railway is reduced.*

The general liability is not the liability known to English common law as the liability of a common carrier, but is the liability of a bailee as defined in Ss. 152 and 161 of the Contract Act; in other words, the railway company is not an insurer but is under the duty of taking a certain measure of reasonable care, the purpose of risk-note is to provide that notwithstanding

there may have been a breach of the duty to take reasonable care, the railway company shall not be liable for certain things in certain special cases. [P 66 C 2]

(b) *Railways Act, S. 72 (2)*—*Risk-note form B*—*Burden of proofs on railway to bring themselves within the risk-note.*

The burden lies on the railway company seeking the advantage of the guarantee, that they must be held harmless for certain things, to bring themselves within the language of the guarantee. *A. I. R. 1921 Bom. 443; A. I. R. 1924 Cal 725, and A. I. R. 1926 Cal. 612, Foll*

[P 67 C 2]

Surendra Nath Guha and Ramendra Mohan Majumdar—for Appellants.

Sarat Chandra Ray Chowdhury, Biraj Mohan Majumdar and Santi Kumar Ray Chowdhury—for Respondents.

Rankin, C. J.—This is an appeal by the Great Indian Peninsula Railway Company Limited against a decree whereby they have been ordered to pay compensation to the plaintiff in respect of non-delivery of part of two bales of piece-goods. It would appear that the goods in question were forwarded in two consignments delivered to the Great Indian Peninsular Railway Company at the Victoria Terminus in Bombay in November and December respectively of 1920. For the present purpose it need only be stated that these goods were consigned upon the terms of the risk-note B—a form of note approved by the Governor-General in Council under S. 72, Indian Railways Act (9 of 1890)

The first question which has been raised by the railway company in this appeal has reference to the point decided against it in the lower Court that the risk-note B is not applicable to the case. The contention that the risk-note is not applicable to the case arises out of the circumstance that the person who actually tendered the goods to the railway company for carriage signed his name on behalf of C. Karnani in the place provided for the signature of the sender. The Courts below have held that as it is not shown that he had authority of the sender to sign his name the risk-note is invalid and does not apply in the present case. That contention which is of great importance to the railway company and which no doubt accounts for this matter being brought before this Court I do not think it necessary to decide. I will only say that it seems to me that there is much to be said on behalf of the railway company before such a contention can be accepted.

I pass from that matter because, in my judgment, that important question does not arise at all. We ought not, therefore, to decide it.

Assuming that risk-note B applies, the learned advocate for the respondent contends that the judgment of the lower appellate Court is right in this respect that the burden was on the railway company, independently altogether of the exception clause in the form, to show that there had been a loss of part of these two bales in the present case. Now, when one turns to risk-note B, one finds that it is a limit put up on the general liability of the railway company. That general liability is not the liability known to English common law as the liability of common carrier, but the liability of a bailee as defined in S. 152 and S. 161 of the Contract Act; in other words, the railway company is not an insurer, but is under the duty of taking a certain measure of reasonable care. The purpose of risk-note B is to provide that notwithstanding there may have been a breach of duty to take reasonable care, the railway company shall not be liable for certain things except in certain special cases. The form says that the railway company shall not be legally liable for the following things, or any of them, namely, "any loss, destruction, or deterioration of or damage to the said consignment."

There is an exception which does not apply in the present case at all because to come within that exception there must be a loss of a complete consignment or of one or more complete packages.

But although that exception does not in the present case apply the language of it throws some light upon the meaning of the previous words in the form, upon the meaning in particular, of the words "any loss," in the previous part of it. The exception speaks of a loss

due either to the wilful neglect of the railway administration, or to theft by or to the wilful neglect of its servants,

and so forth. It is clear, therefore, that as the word "loss" is used in the form there may be a loss although it is caused by theft of the servants of the railway administration or its agents, and there may be a loss although it is due to wilful neglect of the railway administration itself.

We have, therefore, to apply in the light of the language used in the excep-

tion the phrase any loss, destruction or deterioration of or damage to, the consignment. •

If the plaintiff's claim were for damages for the railway company's damaging the consignment, damages for the deterioration of the goods comprised in the consignment or damages for the destruction of the consignment, then prima facie the contract itself would be a complete answer and the plaintiff could not get on at all unless he got on under the exception clause. The plaintiff's claim in the present case is for damages for non-delivery of part of the consignments and the questions arise, first, whether it is necessary that it should be shown that there has, in fact, been a loss of part of the consignment and, secondly, whether the burden of showing that there has been a loss is on the railway company or on the plaintiff. Both these matters are covered by decisions of Courts co-ordinate with this Court. The form says that the railway company is to be harmless and free from all responsibility for any loss and, therefore, it is prima facie for the railway company to bring itself within that warranty. It is not necessary in the present case to endeavour to define what circumstances would come under the word "loss". If, for example, the railway company by negligence or mistake had parted with the goods to wrong consignee I am very far from holding that that would not be "loss" within the meaning of the section. If the railway company still had the goods under its control and could have produced them or if the railway administration had converted them to its own use as distinct from some servant of theirs converting them in wrong of his masters to his own use, again it would not appear that the circumstances would be covered by the phrase "any loss." It is, however, necessary for the railway company, to get the benefit of this warranty, to show that the goods are lost, at least to show in the first instance that the goods are not then and there in the control of the railway administration, so that they might have been delivered to the proper consignee. In my judgment, therefore, on both the propositions—the necessity of showing that there has been a loss and that the initial burden of proof is on the railway company the cases which I shall now refer to have to be followed. •

The first case is the case of *Ghalabha Punsu v. E. I. Ry. Co.*, (1), which was a decision of Chief Justice Sir Norman Macleod and Mr Justice Shah. That case proceeds upon certain English cases and upon a previous Bombay case decided by Mr Justice West in 1883. It definitely lays down the principle that the burden is on the railway company to show that the goods have been lost. Mr Justice West's language is this :

The natural presumption under such circumstances is that all the goods arrived, and that the railway company was in a position to deliver them.

The reasoning of that case is followed by a Division Bench of this Court presided over by Mr Justice Suhrawardy and Mr Justice Page in the case of *E. I. Ry. Co. v. Jogpat Singh* (2) and it was this case which was really in the mind of the lower appellate Court which decided the present case. Again in the case of *Gopiram Behariram v. Agents, E. I. Ry. and O. and R. Ry.* (3), Acting Chief Justice Chatterjee and Mr Justice Cuming held that before the plaintiff is called upon to prove that the goods were lost by the wilful neglect of, or theft by, the railway servants, it must be shown that the goods have been lost; and unless the fact of the loss is admitted by the plaintiff, the onus is, in the first instance, on the railway administration to prove that the goods have been lost and it will be then for the plaintiff to show that the loss was due to the wilful neglect of, or theft by, the railway servants.

That statement of law does not take account of the fact that the exception clause in risk-note B, as it then stood, covered cases only where a complete consignment or package, part of the consignment, had been lost. Otherwise, it is in entire agreement with the other cases I have cited.

We have to consider whether we should depart from these authorities. In my judgment, it must be that the railway company seeking the advantage of the guarantee that they will be held harmless for certain things must have the duty, in the first instance, of bringing themselves within the language of that guarantee. I have considered whether the reasoning in the Bombay case and in the subsequent cases in so far as they proceed upon English cases and the Indian cases prior to the Indian Railways Act of 1890 should be dissented from on the ground that prior to 1890 in India and up to present

(1) A. I. R. 1921 Bom. 448=45 Bom. 1201.

(2) A. I. R. 1924 Cal. 725=51 Cal. 615.

(3) A. I. R. 1926 Cal. 612.

time in England the liability of a railway in respect of goods in the absence of a special agreement would be that of a common carrier. No doubt, in the circumstances, it is easier to say that the burden of proof is, in the first instance, on the plaintiff. It seems to me, however, that where the general liability of a railway company is merely that of taking a certain measure of reasonable care it is still correct to say that *prima facie*, until certain other facts are proved, the railway company taking reasonable care of goods would have them at the end of the journey to deliver to the consignee.

Even although the railway company is not any longer a common carrier in India it is in my opinion, still right to say that the railway company, to get the benefit of the special contract in this risk-note, must bring itself under the terms of the warranty and prove, unless it is admitted, that there has been a loss. In my judgment, this consideration concludes the present appeal.

It has been pointed out that in the trial Court not much attention appears to have been paid to this particular point. It is not shown to us, however, that in the plaint there was any admission that the goods had been lost and the form of the issue is such that the railway company is not entitled to assume that it did not have to prove that the goods had been lost. No doubt, the point in many cases—and probably in this case—is a purely technical one. It may well be that the railway administration would have had no difficulty at all in showing that at the time these goods should have been delivered they were lost to the railway administration. The railway company must remember when defending suits under this risk-note what the law is. They must take proper measures to show at all events that the goods were lost to the railway administration at the time when they ought to have been delivered. In my judgment, that being so, this appeal fails and must be dismissed with costs. This judgment governs appeal No. 1124 which is also dismissed with costs.

Mitter, J—I agree.

N D.

Appeals dismissed.

A I. R. 1928 Calcutta 68

CUMING AND MUKERJI, JJ.

Dasharathi Ghosh — Plaintiff—Appellant.

v.

Khondkar Abdul Hannan — Defendant—Respondent.

Appeal No. 53 of 1925, Decided on 27th July 1927, from the appellate decree of the District Judge, Hooghly, D/- 12th September 1924.

(a) *Bengal Land Revenue Sales Act, (11 of 1859)*—*Payment of land revenue—Appropriation—General law of appropriation will apply only in the absence of specific provision in the Act on the point—Contract Act, Ss. 59 to 61.*

The general principles of appropriation as contained in the Contract Act can only be resorted to in the case of the matter of payment of land revenue, where there is no provision in the Bengal Land Revenue Sales Act (11 of 1859) itself which may be applicable to the case and nothing which would militate against their application. [P 71 C 1]

(b) *Bengal Land Revenue Sales Act, (11 of 1859), S. 8 and Bengal Towzi Manual, Rr. 102, 110, 114 and 115—Non-compliance with rules makes sale for arrears invalid.*

Where the proprietor of an estate sent the revenue payable by him by money order and the same was received by the Collectorate before the due date, but due to mistake in towzi number and name of the thana, it was not credited in the register and a note was made in the money order acknowledgment that due to discrepancy in the particulars of the estate the money was not credited and was kept in deposit, but the proprietor did not care to look at the acknowledgment and the estate was sold for arrears of revenue.

Held: that the question whether an estate is in arrears is not a mere matter of form but of substance—a legal position to be inferred from all the circumstances rather than a fact to be determined by a mere reference to the entries in the register as relating to the particular estate. [P 69 C 2]

Held: further, that if the clerks of the Collectorate did not make a reasonable effort after kist day had expired to find out what the remittance was meant for, they failed in their duty. [P 71 C 1]

There is no duty cast upon a remitter to be on the look out for the return of the acknowledgment or for any endorsement that may happen to be made therein, unless he is warned to do so, and non-compliance of the rules providing for a notice to the proprietor of the fact that the revenue was not credited, by the revenue authorities, would make the sale contrary to the provisions of the Act and must be annulled. [P 73 C 1]

(c) *Contract Act, S. 59 — Valid tender amounts to actual payment.*

A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as an actual payment. [P 70 C 1]

Bijan Kumar Mukherji and Bhudeb Mukerji—for Appellant.

Harendra Kumar Sarbadhikari and Annada Charan Karkoon—for Respondents.

Mukerji, J.—The plaintiff who was successful in the Court of first instance but whose suit has been dismissed by the lower appellate Court has preferred this second appeal.

The suit was for setting aside a revenue sale, held on the 27th June 1921, in respect of Towzi No 1366/2 of the Hooghly Collectorate, named mehal Anantarampur in Pargana Balia, Thana Chanditala, District Hooghly. The towzi belonged to the plaintiff. The revenue payable for it is annas 14, and cesses annas 12 pies 9 only. The amount is due on the 28th March every year. The plaintiff sent the amount due for 1921 on the 18th March 1921, through the Post Office. It was received in the Collectorate on the 24th March 1921, but it was not credited in the proper register as in the money-order the number of the towzi was given as 66 and the name of the thana as Jangipara. The Collector's Office on receipt of the money noted on the acknowledgment that there was a discrepancy and so the money was kept in deposit in the Collectorate, and not credited in the accounts of the plaintiff's estate. This receipt came back to the plaintiff on the 3rd April 1921. The plaintiff's case was that he never cared to look into the receipt and only saw it after he had heard of the sale. The plaintiff heard about the sale after the time for preferring an appeal to the Commissioner was over. Hence he filed this suit.

The Subordinate Judge decreed the suit but that decree has been reversed, and the suit dismissed by the District Judge. The Subordinate Judge held that the sale was premature. The District Judge has held otherwise and has given very good reasons for his view. This view has not been seriously challenged before us and, in my opinion, rightly so.

The substantial question that has been argued before us is whether the estate was in arrears or not. The Subordinate Judge took the view that as the plaintiff had one revenue paying estate, viz., Anantarampur, the misdescription in the money-order could easily have been corrected and the towzi for which the money was meant could have been found out

easily if the clerks in the Collectorate had taken some trouble. The District Judge on appeal expressed his view in these words:

Had the plaintiff cared to look into the receipt he would have learnt that the revenue was not credited in the proper register in his name and could have taken proper steps in the matter. It is admitted that he gave the wrong description in the money-order. There is no doubt that the plaintiff was to blame for all this. It was not the duty of the Collectorate clerk to find out the correct number. The fact that the money was not credited was notified in due course to the plaintiff. In these circumstances I hold that the estate was in arrears.

The idea underlying the decision of the learned District Judge is that it is the last word on the question as to whether the estate is in arrears or not, and unless the amount received by him has been credited in favour of the estate, the estate is to be treated as being in arrears. The question, however, is not a mere matter of form but of substance—a legal position to be inferred from all the circumstances rather than a fact to be determined by a mere reference to the entries in the register as relating to the particular estate.

At the outset it would be convenient to deal with an argument that has been advanced on behalf of the appellant that the case should be decided on the footing of the relations between a creditor and his debtor. The question whether the law regulating those relations does not apply to the realization of the land revenue arose in this Court in the case of *Ganga Bishun Singh v Mahomed Jan* (1). That was a case where the question arose in this form; whether, where payment of revenue was made with the express intimation that the payment was to be applied to the discharge of the revenue due for a particular instalment and it was received and acknowledged on that account, it was within the competency of the Collector, without the assent of the payer to appropriate the amount in discharge of an earlier instalment that was in arrears. This Court while holding in the affirmative observed as follows:

The Sale Law under Act 11 of 1859 is complete by itself and we are of opinion that the relation between the Government and the holders of estates liable to pay revenue under the Act stands on an entirely different footing from that on which the relation between the creditors and debtors is based, and that arrears of Government revenue are not a debt within the meaning of S. 69, Contract Act.

(1) [1906] 33 Cal. 1193=10 C. W. N. 943.

On appeal the Judicial Committee reversed this decision and answered the question in the negative and observed as follows.

Much was said in the argument about the bearing upon the present case of certain provisions of the Contract Act, relating to the appropriation of payments. Those enactments might perhaps have had a bearing upon the case, if the parties had not by their own actions placed the matter beyond doubt. The money in question in the present case was expressly paid to satisfy the January kist, and it was received and acknowledged on that account. It requires no statutory provisions to show that when money has been so paid and received and appropriated, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

The question of the applicability of the law relating to creditor and debtor arose again in the meantime in the case of *Jogendra Mohan Sen v Uma Nath Guha* (2). That was a case where there was no appropriation by consent and the question arose whether the provisions of Ss 59 to 61, Contract Act, would apply. It was held that there being nothing specific on the subject in Act 11 of 1859, the general law, which is practically embodied in Ss 59 to 61, Contract Act, would apply.

If the general law applies, what is the position? A valid tender on a contract of debt is as much a performance and discharge of a debtor's duty as an actual payment. The amount having been received by the Collector and not appropriated to the payment of the arrear that was due in respect of the appellant's estate, it cannot be said that the appellant was in a worse position than a person who has made a tender in respect of the debt due. The requisites of a valid tender were all complied with in the present case except only one, namely that the debtor must declare upon what account the tender is made. In Harris' Law of Tender, p 19, it is said:

But it would, notwithstanding, always be for the debtor the wiser course, even where there exists but the single recoverable debt, to indicate to the creditor, at the time of the tender, the identity of the debt, in respect of which the tender is made. For, although the words of Lord Ellenborough that a payment of the exact amount of one of several debts would be irrefraggable evidence to show that the payment was intended for that debt [per Lord Ellenborough in *Marryatts v. White* (3); see also *Mayfield v.*

Wadsley (4)] would, no doubt, apply with a force, if possible still more conclusive, where there existed but one recoverable debt, still the general commercial transactions of the creditor may be on a scale so extensive, so as to prevent an instant appreciation by him, of the circumstances attending the particular debt in question, and it would probably save misunderstanding and perhaps not a little trouble and expense thereafter, if the debtor at the time identified the debt in respect of which the tender is made.

In a case where a mistake is made at the time of the tender as to the number of the towzi and the name of the thana, the position is somewhat different from that of a debtor making a payment when he has only one debt due and is rather analogous to a case where several debts are due and no declaration has been made upon what account the tender is made or perhaps worse still because the Collector would not be justified in going by the name of the mahal any more than the towzi number, leaving aside the further complication that arises by reason of the name of the thana being wrong. The general law is as put by Knight Bruce, L. J., in the case of *Nash v Hodgson* (5).

If a man sends money to another and that other receives it, the first point is what was the intention with which it was sent; and if that cannot be ascertained by direct proof, it must be got at by circumstantial evidence, and whatever is the intention that must prevail, unless only the other elects to return the money.

The creditor cannot appropriate in opposition to the debtor's expressed intention. The right of appropriation of the tender in the first instance is in the debtor alone. Where, however, the debtor has neither declared his intention regarding the appropriation, and where the circumstances surrounding the transaction, betray no indication of such intention, the right passes to the creditor but it does only on the failure of the debtor to exercise his prior right. Where debts exist and tenders have been made, but the transaction between the debtor and the creditor presents a prospect sterile of any indication from which it can veraciously predicate the intention of either of them, the law asserts an exclusive jurisdiction over the entire transaction and with that lofty scorn of heteronomy which always distinguishes its unfettered operations, proceeds to appropriate the tenders in accordance with those dictates of elevated

(2) [1908] 35 Cal. 636=12 C. W. N. 646=8 C. L. J. 41.

(3) [1817] 2 Stark 101.

(4) [1824] 3 B. & C. 357=3 L. J. (O. S.) R. & B. 31=5 D. & R. 224.

(5) [1855] 25 L. J. Ch. 186=3 D. G. M. & G. 474=1 Jur. (N. S.) 946.

reason which in the jealous record of leading cases, compel the proud concurrence of contemporary and the sacred submission of succeeding jurists (Harris on the Law of Tender, p. 33). These general principles, however, can only be resorted to where there is no provision in the statute itself which may be applicable to the case and nothing which would militate against their application. Where the money is in the hands of the Collector and the remitter has by his own act created a position which precludes the Collector from crediting the money in the accounts of any particular estate, the case attracts the operation of the statute itself, the relevant provision being that contained in S. 8, Act 11 of 1859. This section or rather the latter part of it which is directly applicable will be presently considered.

Before doing so, however, it would be convenient to dispose of another question that has arisen, viz., whether there was any duty cast upon the clerks of the Collector to endeavour to find out the correct estate for which the remittance was meant. The Subordinate Judge says :

Under the circumstances, although the plaintiff was in fault the clerk in question could detect it if he had taken some trouble.

The District Judge holds it was not the duty of the Collector's clerk to find out the correct number. In my opinion neither view is reasonable. So long as the declaration of the intention of the remitter as contained in the money-order coupon stood with the wrong number of the towzi and wrong name of the thana, it would be idle to think of being sure as to whether it was Mehal Anantarampur that was meant or any other mehal. Just before the sale, however, when possibly a few towziz were in arrears it was perhaps not difficult with a little effort to find out the real intention of the remitter. If the clerks of the Collectorate did not make a reasonable effort after kist day had expired to find out what the remittance was meant for they failed in their duty but the question we have to consider is not whether the sale need not have been made, but whether it was invalid or void by reason of its having been made contrary to the provisions of the Act.

Turning now to the latter part of S. 8, Act 11 of 1859 it runs thus :

No^o shall the plea that money belonging to the defaulter, and sufficient to pay the arrear of

revenue due, was in the Collector's hand bar or render void or voidable a sale under this Act, unless such money stands in the defaulter's name alone and without dispute, and unless, after application in due time made by the defaulter, or after the written agreement provided for in S. 15 of this Act, the Collector shall have neglected, or refused on insufficient grounds, to transfer it in payment of the arrear of revenue due.

This section was considered by the Judicial Committee in the case of *Balkishendas v. Simpson* (6). The plaintiffs in that suit prayed to have a revenue sale set aside upon the following facts : They were the proprietors in possession of a separate five-annas share of a village till the date of the sale, viz., the 5th September, 1891. Down to 1884 the revenue payable for the said share was Rs 89 and odd. In the beginning of 1884 the Board of Revenue sanctioned a reduction of the revenue at Rs 82 and odd from Rs 89 and odd. The decision of the Board was communicated to the Collector by a letter in March, 1884, but the abatement was entered erroneously in the Collector's books in respect of another estate which belonged to some different owners. The result of this mistake was that while the revenue paid yearly by the plaintiff was duly credited in the Collector's books as it was paid, the plaintiffs were wrongly debited every year with Rs. 89 and odd instead of Rs. 82 and odd on account of the revenue payable by their estate. In consequence of this error on the debit side of the account, the books showed in March 1891, at the end of the revenue year 1890-91, the revenue of the plaintiff's estate as being in arrears ; whereas if the debts had been rightly made the books would have shown a balance of Rs. 44-15-3 at the plaintiff's credit. In that case their Lordships explained the latter part of S. 8 in these words :

It is enacted that the Collector's possession of the money belonging to the defaulter, shall afford no answer to the default, unless the money stood in the defaulter's name alone and without dispute, or the Collector has failed, after application by the defaulter, to impute his money towards payment of the revenue. The enactment has no application, except there be (1) default in the payment of the revenue, and (2) possession by the Collector of money of the defaulter not indisputably placed to his credit. But the appellants were not in default. All moneys paid by them have been correctly credited ; and their alleged default, which is a pure fiction, is based upon erroneous debit entries to which they were not parties.

(6) [1898] 25 Cal. 833=25 I.A. 121=2 C.W. N. 513=7 Sar. 363 (P.C.).

From these observations two propositions clearly emerge : first, that possession by the Collector of money belonging to the defaulter, not indisputably placed to the credit of a particular estate cannot save the estate from being sold : second, that in the event of the money received by the Collector being in his hands but standing not in the defaulter's name alone or not without dispute and on the defaulter having applied for such credit, if the Collector neglects or refuses to impute the money towards the payment of the revenue, the estate cannot be sold. As regards the first of these propositions so long as the number of the towzi and the name of the thana were wrongly stated, the intention of the remitter of the money was not clear to the Collector and it is only reasonable to hold that the money was not indisputably placed in the hands of the Collector for credit in respect of the appellant's estate. The Collector may very well have hesitated to credit it in respect of one estate rather than another, lest he might act contrary to the intention of the remitter. Here then the second proposition comes into operation and for its application it is necessary to give the remitter an opportunity of making an application for credit of the money for the revenue of the estate for which it was meant. To give him such an opportunity rules have from time to time been framed and it is the violation of these rules which deprives the remitter of an opportunity to have the money which is in the hands of the Collector imputed towards the payment of the revenue of the estate for which it was meant.

In the case of *Hamid Hossein v. Mukhdum Raza* (7) there was infraction of R. 29 of the Land Revenue Rules then in force and this deprived the remitter of an opportunity to rectify the mistake that he had made as regards the number of the towzi and the name of the proprietor. To hold the sale of an estate for its arrears of revenue, the proprietor whereof had been deprived of a chance of correcting the mistake by reason of the non-compliance of the rule aforesaid, was held to be without jurisdiction, and the sale was accordingly set aside. In the present case the clerk of the Collectorate noted in the money-order receipt that there was a discrepancy and so the money was kept in deposit in the Collectorate.

The judgment of the District Judge states that the receipt reached the plaintiff on the 3rd April, 1921. Probably that was the date of the postal seal which the receipt bears. The appellant's case is that the receipt was in his house and that he saw the receipt after he had heard about the sale. The District Judge has believed this case of the appellant and has blamed him for his negligence. The point is, had the appellant notice that his remittance had not been credited because there was a discrepancy, for on this depends the question whether he had opportunity to rectify the discrepancy. To provide for this, very salutary rules have been framed and if these rules are strictly followed, the remitter will always have such notice.

Rule 102, para. 2, of the Rules of the Bengal Touzi Manual, 1918, runs in these words :

If owing to omissions or errors in the particular of remittance there is any uncertainty as to whether a remittance can be correctly credited according to the intentions of the remitter, a note should be made across the acknowledgment in red ink, stating how the remittance has been credited or what particulars are required, and in the latter case the remitter should be asked to send the required information immediately by letter. . . .

Very stringent rules follow as regards the treatment of acknowledgments with red ink note. Rule 109 enjoins how the acknowledgments are to be distributed to postmen for delivery. Rule 110 says :

The postman or village postman will obtain the remitter's signature or mark when delivering each acknowledgment in the postman's book or the village postman's register.

Then follow some rules as regards undelivered acknowledgments. Rule 114 is a very stringent rule attaching responsibility to the Post Office for punctual and free delivery of acknowledgments. Rule 115 is very important and runs in these words :

Remitters of revenue money-orders should be advised to examine carefully their acknowledgments for the money-orders in case there should be any red ink note by the Collectorate calling for further particulars or indicating doubt as to whether a remittance has been correctly credited according to the intentions of the remitter.

These rules, if worked properly, will place the question of notice beyond the range of all possible doubts in any particular case. There is nothing to show and indeed it is not suggested that these rules, especially Rr. 110 and 115, have

been complied with in the present case and, on the other hand, the ignorance of the appellant as regards the existence of the acknowledgment or its contents till after the sale was over has been believed by the District Judge. What is contended is that the appellant was negligent but it cannot be said that there is any duty cast upon a remitter to be on the look out for the return of the acknowledgment or for any endorsement that may happen to be made therein, unless he is warned to do so. The principle of the decision in the case of *Hamid Hossein v. Mukdum Reza* (7), therefore, applies to this case.

In my judgment the sale must, in the circumstances, be held to have been made contrary to the provisions of the Act and must be annulled. The appeal is allowed, the decision of the District Judge is reversed and that of the Subordinate Judge restored with costs in this Court and of the Court of appeal below.

Cuming, J.—I agree.

G.B.

Appeal allowed

A. I. R. 1928 Calcutta 73

PAGE AND GRAHAM, JJ.

Akshoy Kumar Bhattacharjee and others—Defendants—Appellants.

v.

Ashutosh Bhattacharjee and others—Plaintiffs—Respondents.

Appeal No. 495 of 1925, Decided on 25th July 1927, from the original order of the 4th Sub-Judge, 24 Pargannas, D/- 2nd December 1925.

Civil P. C. O. 47, R. 7—Order going beyond the scope of application for review is without jurisdiction.

Where a Court in considering an application for review and in granting the same passed an order which went beyond the scope of application for review,

Held : that the order was without jurisdiction and can be set aside in appeal. [P 73 C 2]

Nasim Ali and Apurba Charan Mukerji—for Appellants.

Bijan Kumar Mukerji and Hiralal Chakravarti—for Respondents.

Prafulla Charan Chakravarti—for Deputy Registrar.

Judgment.—This is an appeal against an order of the learned Subordinate Judge of the 24 Pargannas whereby he pur-

ported to grant an application to review an order dated the 6th August 1925.

A preliminary objection was taken to the maintenance of this appeal upon the ground that if this is an appeal against an order of review passed on an application under O. 47, R. 1, then an appeal will only lie upon the grounds set out in O. 47, R. 7. We are of opinion that the preliminary objection is pro tanto a good one and that in so far as the order under appeal is an order granting an application for review it is not subject to an appeal. But in our opinion, the learned Subordinate Judge in considering the application for review and in making an order thereon made an order which went beyond the scope of the application for review, because the application was to review the order of the 6th August 1925, whereby the report of a commissioner appointed to determine the boundaries of the land for purposes of the execution of the decree was sought to be set aside, and in passing the order under appeal the learned Subordinate Judge not only granted the application to review the order of the 6th August but went further and passed an order that the map and the report of the commissioner, the subject-matter of the order of the 6th August 1925, be accepted. That further order in our opinion he had no jurisdiction to make upon the application which was before him.

The result is that that part of the order which granted a re-hearing of the application which was the subject-matter of the order of the 6th August 1925, is confirmed and pro tanto this appeal is dismissed. But that part of the order which directed that the report and map of the commissioner be accepted cannot stand and must be set aside, and the proceedings will be returned to the learned Subordinate Judge in order that the application and the order thereon setting aside the final report of the commissioner may be re-heard on the merits.

Costs of, and incidental to, this appeal, the hearing fee being assessed at two gold mohurs, will abide the result.

N D.

Appeal partly allowed.

* * **A. I. R. 1928 Calcutta 75**

CHOTZNER, J.

Kessoram Poddar and Co—Plaintiffs.

v.

Secretary of State—Defendant

O C S No 2152 of 1922, Decided on 17th May 1926

(a) *Contract—Verbal contracts.*

Where the statute says that the contract to be valid must be in writing, verbal contracts, even if established, have no effect. [P 80, C 2]

* (b) *Contract — Commandeering order — Goods ordered by Government under—Contract is not ordinary commercial contract—Defence of India (Consolidation) Act (1915).*

In the case of commandeering order there can be no ordinary commercial contract for sale and purchase, because one of the parties may be unwilling to surrender his goods and yet may be compelled under the commandeering order to do so. He has no option once the order has been made and issued. He is bound to place his goods at the disposal of Government when called upon to do so. The only right he has is that if he does not accept the price offered by Government he can have it settled by arbitration. The arbitrator's order is final. [P 81, C 2]

* * (c) *Government of India Act (5 and 6 Geo. 5 ch. 61 etc.) Ss. 29 (b) and 32—Commandeering order—Civil P. C. Ss. 9 and 79.*

A commandeering order is one which no one but Government can make, and being an act of the Sovereign, the Secretary of State evidently cannot be sued in respect of it.

[P 81, C 2]

* (d) *Government of India Act, S. 29—Payments made on contracts not in conformity with the Act, is no answer to render such subsequent contracts binding on Secretary of State—Contract must be in strict conformity with statute—Civil P. C. S. 79.*

When a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that that should be taken as a precedent which will be binding upon the Secretary of State in every case. Contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him.

[P 82, C 1]

(e) *Civil P. C., S. 80—"Cause of action" in S. 80 is not to be taken in a narrow sense but it must be stated with precision.*

Although the cause of action in S. 80 should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground for complaint, yet the section requires the cause of action to be stated with some precision: 24 *Mad.* 279, *Rel. on.* [P 83, C 1]

(f) *Civil P. C., S. 80—Notice.*

Where the cause of action has not arisen at the time of the notice, the notice is invalid.

[P 83, C 1]

N. N. Sircar, S. M. Bose and S. C. Roy—for Plaintiffs

L. P. E. Pugh and T. Ameer Ali—for Defendant

Judgment.—In this suit Kessoram Poddar and Company sues to recover, from the Secretary of State for India in Council, Rs 23,35,835 together with interest Rs 10,44,613-4-0 being the loss and damage sustained by the plaintiff firm by reason of the defendant's failure and neglect to pay for or take delivery of certain goods bought by the defendant from it. The purchases are said to have been made by one Charles Sutherland Waite, an officer of the Indian Munitions Board, Bengal, on four dates, namely 4th, 14th, 17th June and 26th August 1918.

It appears that the Indian Munitions Board, Simla, was established on 1st March 1917 and the office of the Controller, Munitions, Bengal, was opened in June that year. Mr Peterson of the Indian Civil Service was the first Controller, being appointed on the 30th June. He continued to hold office till 19th April 1919. Under him were two Assistant Controllers, Mr. Nixon of the Indian Civil Service and Dr. Meek of the Educational Service. Nixon left office on 2nd February 1918. Meek succeeded Peterson on 19th May 1919. There were also four Deputy Controllers one of whom was Mr. Waite, who was appointed in November 1917 and went on leave on 23rd January 1919. His services were dispensed with on 20th February 1919.

The plaintiff firm opened their metal department in March 1918 and Mr A. H. Ghaznavi was in charge of it. From May 1918 Ghaznavi began calling on Waite for orders and it is alleged that prior to the purchases now in suit, he had received orders from Waite for goods costing Rs. 27 lakhs for which payment has been made.

The plaintiff firm's case is that Waite's method of purchase was not to call for tenders from merchants having war materials to supply or to make out written contracts for such goods as he wished to buy but to take the list submitted by the firms (of whom there were at least 100 different European and Indian representatives), discuss the price and after discussion, put tick marks in pencil against such items on each list as he wanted, noting, in some cases, also the price

agreed upon and that these tick marks indicated that he had bought the goods so ticked. Thereafter, when he wanted delivery of the goods purchased, he would send a delivery order through his office requiring the seller to deliver the goods at the Narcaldanga depot or at such other place as might be specified in the order, but owing to the congested state of the depots months often elapsed before such delivery orders were issued. He would also purchase goods by what was popularly known as a "commandeering" order. It appears that under the rules framed under the Defence of India Act, certain classes of goods such as corrugated iron sheets, galvanized plates, barbed wire and the like, could not be sold by merchants except under license from Government and when a commandeering order was issued, the goods had to be delivered at such places as were specified therein. Such an order could only be signed by the Controller of Munitions himself. In such cases the price of such goods was agreed upon but where there was a dispute, the price was ultimately settled by reference to arbitration. The restrictions under these rules were withdrawn in December 1918. Waite had authority to buy both for stock and indent and could buy ahead for stock on the basis of the previous three months' requirements. In the exercise of these powers the plaintiff firm says that on the four dates mentioned above, he purchased the goods from it in the manner indicated. In some cases, delivery orders were issued and the goods were delivered and paid for, but in the case of the rest, no delivery orders were issued though the plaintiff firm repeatedly asked for them and it was always ready and willing to deliver the goods. Subsequent to the 26th August, it is said, that there were further purchases by Waite from the plaintiff firm and it is also said that in September 1918, for instance, some scrap iron was bought and paid for

The Armistice was signed in November 1918 and on 13th December 1918 Mr Keatinge Controller of Hardware, Metals and Implements, wrote to the plaintiff firm cancelling an order for seven items placed with them by Waite on 16th August 1918. The plaintiff firm replied on the 18th denying the Controller's right to cancel the order and

giving reasons which the Controller declined in his letter to accept. To this the plaintiff firm replied on 3rd January 1919 :

The order was a contract and therefore delivery or non-delivery thereunder was to be regulated by the provisions of the law.

On the same date, Mr Peterson wrote :

the materials delivered at the time prior to the issue of the letter cancelling the order have been taken into account, but with regard to other materials it will be necessary for you to prove to the satisfaction of the Controller, Hardware, that these were in your possession when the letter cancelling the order was received by you.

The plaintiff firm apparently succeeded in satisfying Keatinge, as, on the 15th January, he wrote a letter in which the following expression occurs :

This will, as explained by your representative to me, complete all outstanding orders placed with you by the Deputy Controller, (that is, Waite.)

On 1st February 1919 the Controller in a circular letter to all English and Indian firms wrote as follows :

Would you kindly note that no deliveries should be made after the date of receipt of this letter or of any orders placed with you by the Deputy Controller (Inspection) without first of all making a reference to me and obtaining my permission.

The effect of this letter was to discontinue all deliveries. The plaintiff firm's case is that it does not affect the previous purchases made by Waite for indent although he had been forbidden on the 20th August 1918 from purchasing for stock. The plaintiff's case further is that in November 1918 they had received Waite's promise to take delivery of all goods purchased by him by July 1919. The question of limitation would, therefore, not arise as Waite admits that the dealers would hold the goods till he called on them for them. This he never did. The plaintiff firm through their attorneys, Messrs Morgan & Co., wrote a letter on 26th July 1919 to the Controller giving particulars of the goods alleged to have been purchased by Waite and threatening a suit in the event of necessary delivery orders not being issued. A copy of the letter was sent to the Financial Secretary, Government of Bengal, Secretary, Munitions Board, and Controller of Hardware. In their letter to the Financial Secretary, the plaintiff firm gave the requisite notice under S. 80, Civil P. C. Dr Meek, the new Controller, replied, on 29th July offering an interview but this offer was not accepted.

On the 22nd December 1919 the premises of the plaintiff firm were searched by the police, apparently with a view to prosecution, and all books and papers were seized. The documents were scrutinized by the authorities and Ghaznavi was asked for answers to certain inquiries which he gave. In the end no prosecution was launched. The papers were returned to the plaintiff firm in March 1922 and in the following June this suit was filed. The plaintiffs' case is that during all this time Government never repudiated their claim.

The Secretary of State in his written statement denies that Waite was his agent or was competent to bind him by the alleged purchases or that there was any contract between him and the plaintiff firm in fact or in law. He denies the purchases by Waite and the plaintiff's loss by reason of the breach of contract. He avers that in February 1919 the Munitions Board declined to receive goods or orders placed by Waite without reference to the Controller. Thereafter, the plaintiff firm had notice and the cause of action, if any, is barred by limitation.

In para. 10, he says that the transactions alleged can give rise to no cause of action against the defendant inasmuch as the same relate to the exercise of sovereign powers, namely, the purchase of munitions for the purposes of war, and do not relate to trade. In para. 11, he says that the formalities required by law to create a contract binding on the defendant have not been complied with. In para. 12, he says that for a considerable period prior to the transaction alleged in the plaint the plaintiff firm had been systematically defrauding the Government of India by supplying goods at exaggerated prices under false weights and measures and quantities and that the quotations put forward by the plaintiff firm as amounting to a contract were part and parcel of the same scheme of fraud and can give rise to no cause of action.

With regard to the allegations contained in this paragraph, they are further explained in the particulars furnished by the defendant in February 1925 as meaning that the plaintiff firm and Waite entered into a conspiracy to defraud Government in various ways by antedating the orders showing purchases by

Waite purporting to have been made before his authority had been withdrawn and by short delivery.

The following issues were framed:

(I) Was the purchase of munitions for the war an act of State? Can any legal liability arise in relation to such purchase?

(II) Was there any legal and binding contract operating under S. 20, Government of India Act? If not, is there any liability on the defendant?

(III) Did Waite in fact enter into any agreement to buy the goods in the plaint mentioned?

(IV) If so, has such agreement any legal effect to bind the defendant?

(V) Did the said Waite agree also that delivery should be made when called for?

(VI) Did Mr. Waite, or any successor of his, promise that orders would be given in due course as alleged in paras. 3 and 4 of the plaint?

(VII) If issues 5 and 6 be answered in the affirmative, is defendant in any way affected thereby?

(VIII) Was there refusal to take any more goods, and if so, on what date or dates?

(IX) Is the suit barred by limitation?

(X) Was the statutory notice duly served?

(XI) Was the plaintiff ready and willing to perform?

(XII) Was there a fraudulent conspiracy to defraud the Munitions Board?

(XIII) To what damages, if any, is the plaintiff entitled?

The original lists upon which the present claim is based consists of 11 sheets of paper marked at Waite's examination on commission in London (Exs. 1A to K.) No. 1 is on a plain piece of paper in Ghaznavi's handwriting and the remainder are typewritten on the office paper of Kessoram Poddar and Co., 15, Clive Row Nos. 1, 3, 5, 6, 7, 9 and 11 bear tick marks or pencil lines indicating, according to the plaintiff's case, that all the goods so marked were purchased by Waite. Nos. 1, 2, 3, 4, 5 and 11 have various endorsements in Waite's handwriting which according to the plaintiff's case are his orders to the office how to deal with the goods thus purchased. (After dealing with evidence, his Lordship proceeded). I have given the evidence very close and careful attention, and in my judgment it discloses so incredible a state of things as not to be worthy of acceptance. Had it been a true account I have no doubt that the plaintiff firm could have produced many witnesses, respectable merchants, who had dealt with the Munitions Board during the time when it was in existence and who would unhesitatingly have come forward to say that goods were purchased in large quantities by Waite by no other means than

by ticking lists and that there were no formal contracts or anything of the kind. It is plain that what the Munitions Board looked to by way of check upon purchases made were the delivery orders issued. They did not accept nor is there any record in the office books to show that they regarded purchases by ticking as real purchases. There is one thing which is perfectly evident and that is this: that if Ghaznavi had believed that he was making contracts for the sale of very large quantities of war material, he must have made entries in his own books. It has been said that Waite was unbusinesslike. Nobody can say that Ghaznavi was unbusinesslike, and for him to pretend that orders covering large sums would be treated with so little care as not even to merit an entry in his ordinary account books seems to me preposterous. The burden of proof in this case is on the plaintiff and upon the evidence before me I am not satisfied that he has succeeded in discharging that onus.

At the same time I think it my duty to say that the evidence which has been adduced on the side of Government is not satisfactory. With regard to the purchase, the only material witness examined on behalf of the Government is Waite himself. Keatinge's evidence, to which I shall refer later, does not deal directly with Waite's method of purchase although he deals with another question of importance. It seems to me that when the credit of an important branch of a Government department such as the Munitions Board, is assailed, it was the duty of Government to examine the superior officers who were in charge of that branch. Both Mr. Peterson and Dr. Meek were apparently available in Calcutta. As successive Controllers of the Board in Calcutta, they might be expected to know the procedure that obtained in the office. They could certainly have told the Court whether Waite's alleged practice of purchasing by ticking was authorized and whether goods were delivered and paid for accordingly. More important still, Peterson could certainly have told the Court whether Ghaznavi's interview with Waite was held in his presence and whether Waite's alleged promises were also so made. Even though it be found that the surrounding circumstances are sufficient to refute

Ghaznavi's allegations, the position would have been rendered more certain and infinitely clearer if there was Mr. Peterson's sworn evidence on the record that the allegations made were in fact wholly untrue. No doubt the determination not to put the controlling officers in the box was not taken without due consideration, but, in my judgment, the decision was unwise and lays Government open to charges to which it should not have been exposed.

As I say the only witness examined is Waite, who, according to the particulars furnished by the Government Solicitor, "has entered into a conspiracy" with the plaintiff firm "to defraud the Government." A party to a suit presumably calls a witness to represent him to the Court as worthy of credit. What is to be said when the witness is, according to the party's own showing, of no repute? It might perhaps be said that if he had not been called, an inference adverse to Government would have been inevitable, and it might perhaps also be said that as regards the transactions which form the subject-matter of this claim, no one else was competent to testify, but what reliance can be placed upon his evidence? Mr. Pugh intimated to the Court that he did not propose to call evidence to prove the alleged conspiracy between Waite and the plaintiff firm but that does not rehabilitate Waite. Can it be said, as Mr. Sircar for the plaintiff firm has put it, that on this occasion only he has spoken the truth? It is surely not open to Government to say that though he is disreputable he is still a witness of truth. At the highest his evidence can only be considered as showing that he is not the imbecile that Ghaznavi makes him out to be. (After referring to the evidence of Waite his Lordship proceeded.) Whatever his character may be, and howsoever little worthy of credit he may be in consequence, it is in my judgment plain that he had some sort of method in his conduct of business. He was not the incompetent fool Ghaznavi pretends. As I say, I can place no great reliance upon his evidence from the fact that he is obviously a man of no repute. At the same time what he says is reasonable and is, therefore, at all events more probable than what Ghaznavi had to say.

I now turn to the evidence of Mr. Keatinge who was examined *de bene esse*.

on 3rd March last He was Controller of Hardware, Implements and Materials in 1918 and on 20th August he sent a telegram to the Controller, Calcutta :

Kindly instruct Minister and Deputy Controller, Inspection, not to make any further purchases of hardware implements and materials for stock without reference to me.

Waite was then the Deputy Controller, Inspection. A copy of this was sent to Mr. Nixon, the Assistant Controller, who sent it to Waite who initiated it on 22nd August (Ex. 2). Keatinge proves the correspondence which is to be found in part 3 of the brief between himself and the plaintiff firm. It begins with the letter of 13th December 1918, wherein he cancelled certain orders placed by Waite with them on 16th August and these are the first seven items on p 11 of the list of 26th August. This was followed by Kessoram Poddar's protest of 18th December and their letters of 3rd and 8th January 1919 and resulted in the revocation of the cancellation. This was contained in his letter of 15th January to Messrs. Kessoram Poddar & Co.:

The Assistant Controller in charge, Narcaldanga Depot, will take over such quantities of the material as you have delivered at the depot to date and the further lot which you hope to deliver at the depot next week at latest. This will, as explained by your representative to me, complete all outstanding orders placed with you by the Deputy Controller (Inspection).

The "representative" here mentioned... ..in the letter is admittedly Ghaznavi. (His Lordship dealt with the evidence of Mr. Keatinge and proceeded.) In commenting upon this evidence Mr. Sircar has referred to the entry on p. 11 of Exs 1 A to K : "Take this lot Rs. 64 " : and he says that the seven items are covered by Keatinge's letter of 13th December 1918, and since they have been delivered and paid for by Government. Waite was, therefore, wrong when he stated that his pencil line was only against four items and had been subsequently extended to cover the remaining items on that page. As, therefore, fraud has no longer been pleaded by the Government as a defence to this suit, it must be taken to be admitted that the order for 200 tons and six other items of 160 tons is still outstanding. In reply, Mr. Pugh pointed out that delivery order No. 2814-A. (Ex. 4) bears date 16th August 1918 though the list was not handed to Waite till the 26th August.

In his letter of 13th December Keatinge purported to cancel all outstanding orders, but on the plaintiff's remonstrance he agreed to take delivery of the balance, not knowing that the delivery orders had been antedated and not suspecting any irregularity.

It is not for me to conjecture how nearly Rs 6½ lakhs of public money which was paid for these items was paid without a proper enquiry having been made, if not by Keatinge himself, then by some other competent officer. Had such enquiry been made it must have been evident that the order made on 16th August for delivery of goods which could not have been bought before the 26th August must have been antedated. Had the enquiry been pursued, it would have been discovered that Waite's authority to buy against stock was withdrawn on 20th August. Had the register been inspected, it would have been found that the order appears at the foot of a page and that the last preceding entry was No 2814 and the one that follows at the top of the next page was No 2815 and that this particular order had been numbered 2814-A. Had the register been more closely examined it would have been found that there were two other similar instances, namely, 2788-A and 2819-A, where a capital letter was added to the number of the delivery order that in both of these cases the order was inserted at the foot of the page and that both of them were in favour of Kessoram Poddar. The inference to be drawn is, in my judgment, irresistible that these orders were smuggled into the register to show that Waite had ordered the goods before he had been deprived of his authority and that a huge fraud had been perpetrated by the plaintiff firm upon Government in collusion with some one in the office. The orders were, however, passed as good orders and paid for, it being recognized that Waite's purchases by ticking were valid if they were followed by delivery orders.

With regard to Waite's note on p 5 of the list : "Have we met all demands," Mr. Sircar points out that ten tons were delivered and paid for. If the remark meant that he would not buy till he was satisfied that he had met all demands why should ten tons be taken? Mr. Sircar's contention has been that the market was rising daily, so Waite,

whether acting honestly or dishonestly, would be likely to buy in what he did not require in anticipation of a further rise when goods were actually required. In my view the construction which these words naturally bear are simply that Waite meant:

I want ten tons now, which I take; do we want any more?

Similarly, in regard to the first note "Have we demands for others, but 14," Mr. Sircar points out that there was a delivery order for five tons and that this purchase was by reason of the line against it. If that is so, it must follow that Waite bought all the items and having bought all the items asked the office whether any more were wanted. I should construe the words as meaning

I know there are demands for 14, do we want others than 14?

With regard to the aluminium ingots which appear on p. 6 of the list, Mr. Sircar points out that these were covered by delivery O. 2819-A (Ex 5) and paid for which shows that if there was a contract it must have been by ticking. Waite said that he was buying for indent which authority he retained till October 1918 (Q. 225), but that though he had originally intended to buy for indent, he had changed his mind subsequently and converted the goods so purchased to stock. There can be no doubt that these articles were purchased by tick marks followed by the antedated delivery order and that is also true of the galvanized plain sheets which is covered by delivery order No. 2788-A to which I have already referred.

There are thus two conflicting versions to be considered; the plaintiff's version that Waite made a purchase merely by saying "I take this" and putting a tick against the item he wanted, and Waite's version that he ticked off on the lists what he considered of interest or of importance for future use, but when he actually wanted to buy, he issued directions to his office "Take this," "Make out delivery order or commandeering order." Despite Waite's character I cannot, but hold that this is the more reasonable explanation and I think I may go so far as to say this that even if Waite's evidence be ignored, Ghaznavi's story is so improbable as to deserve no credence. That a man in charge of a Government department, however dishonest or however

unbusinesslike he may be, would buy before he knew that the goods were wanted at all seems incredible. Waite could buy for stock based on three months' previous indents and also for indents which had not been executed and that no doubt is what he meant when he noted on 26th August "put up cases relating to these demands" or in other words "let me see the indents which have come in with the necessary orders." It is proved by Keatinge that the Munitions Board took no notice of anything else, but the actual delivery orders. Ghaznavi has no books to show that he regarded tick marks as indicating concluded purchases. He says that he has his copy of the list and that is enough for him, but as Mr. Pugh has pointed out, in the list attached to Messrs. Morgan & Co.'s letter of 24th July, the tick marks do not appear while in the list annexed to the plaint all Waite's remarks are not entered.

Mr. Sircar has urged that Ghaznavi's statement that 27 lakhs worth of goods had been taken over and paid for, has not been controverted. These goods were purchased by ticking Ghaznavi's earlier lists and the plaintiff firm has called upon the defendant to produce those lists and also Stoddart's private books. Nothing has been produced and no one has come from the office to swear that these books could not be found. This leads to an inference adverse to the defendant: *Murugesam Pillai v. Gnanasambadha Pandara Sannadhi* (1), *Ram Prosad v. Raghunandan* (2), *Parthasarathy Appa Rao v. Secretary of State* (3), and is in accordance with S. 114, Evidence Act.

I agree with Mr. Sircar that these lists were relevant to the enquiry and if in existence should have been produced. If they were not in existence there should have been some evidence on the defendant's side to prove it, but I am not prepared to infer from their non-production that a method of purchase was then in vogue which has not been established here. As I have said before, had it been a fact, Ghaznavi could have produced some trustworthy person from the hundred firms dealing with the Munitions Board to support him. Mr. Sircar next urges that there has been no repu-

(1) A. I. R. 1917 P. C. 6=40 Mad. 402=44 L. A. 98 (P. C.).

(2) [1885] 7 All. 738=(1885) A. W. N. 160.

(3) [1913] 38 Mad. 620=26 M. L. J. 39=21 I. C. 871=(1913) M. W. N. 959.

diation of the contract alleged in Messrs. Morgan & Co.'s letter of the 26th July 1919. On the other hand, Dr. Meek in his reply on the 29th July, says:

I cannot question your statement in any way. I only want to see exactly what Mr. Waite has written.

It is necessary to read this letter.

In your letter you state that Mr. Waite has made some definite written remarks on certain papers which your clients hold. Would you very kindly ask your clients to bring all the papers to me, so that I may see exactly what Mr. Waite has written. I am not questioning your statement in any way, but only want to see the originals in order that I may decide what action to take. I shall be in office between 11 a. m. to 1 p. m. on any date this week, but if these hours are not suitable I shall be quite glad to make a definite appointment with your clients.

It is, therefore, clear that though at that time Dr. Meek could not, of course, question the statements made because he had not seen the papers he wished to see the originals to decide what action to take, and he offered to make an appointment with the plaintiff firm for the purpose at any time convenient to them. The plaintiff firm, however, took no note of the invitation, though, if the claim had been a genuine and true claim, the chance would obviously have been welcomed. That being so, to construe a courteous offer to make an appointment as being equivalent, if not to an acknowledgment of a contract or at all events to a non-repudiation, seems to me unwarrantable. The most emphatic repudiation lay in the action of Government when on the 23rd December the police seized all the plaintiff's books and papers evidently because they intended to see whether there was evidence sufficient to prosecute the firm criminally.

The next question is, Supposing as a fact Waite had purchased goods by ticking, had he authority to do so? Is his act binding on the Secretary of State? Mr. Pugh has referred to S. 20, Government of India Act, which deals with the revenues of India and Cl. 2 (c) relates to the liabilities to which these revenues are subject. He refers to S. 29 which lays down the contracts which may be made by or on behalf of the Secretary of State. Clause 5 of that section provides how these contracts are to be made and who is competent to make them:

Provided that any contract for or relating to the manufacture, sale, purchase or supply of goods, or for or relating to affreightment or the carriage of goods or to insurance, may, subject to such rules and restrictions, as the Secretary

of State in Council prescribes, be made and signed on behalf of the Secretary of State in Council by any person upon the permanent establishment of the Secretary of State in Council who is duly empowered by the Secretary of State in Council in this behalf. Contracts so made and signed shall be as valid and effectual as if made as prescribed by the foregoing provisions of this section.

Particulars of all contracts so made and signed shall be laid before the Secretary of State in Council in such manner and form and within such times as the Secretary of State in Council prescribes.

Now, it is plain that according to this section the contract to be valid must be in writing and must be signed by a person who has been specially empowered to sign it. That person must be upon the permanent establishment of the Secretary of State. Mr. Pugh observes that Waite was not on the permanent establishment nor was he specially empowered in that behalf. Any authority that he had to deal with munitions at all was derived from Peterson who delegated certain of his own powers to him. Moreover where the statute says that the contract to be valid must be in writing, verbal contracts, even if established, have no effect. Mr Pugh has referred to a number of cases in support of this, viz.: *Shivabajan v. Secretary of State* (4), *Srinibas v. Kesho* (5), *Kinlock v. Secretary of State* (6), *Grey v. Charusila* (7), *Ashbury v. Ricke* (8), *Young v. Mayor of Leamington* (9), *Doya Narain v. Secretary of State* (10).

Mr. Sircar contends that it is not the plaintiff firm's case that the Secretary of State has signed the contracts or that somebody else has signed it for him. The Secretary of State is liable because he is the person to be sued when the plaintiff wants to get his money out of Indian revenues. The plaintiff says that these were purchases by a servant of the Government of India which were in some cases paid for by the Government of India and for which in the present case the Government of India is liable. Here the Government of India had decided

(4) [1904] 18 Bom. 314=6 Bom. L. R. 65.

(5) [1911] 38 Cal. 754=13 C. L. J. 365=9 I. C. 862=15 C. W. N. 475.

(6) [1879] 15 Ch. D. 1=49 L. J. Ch. 571=42 L. T. 667=28 W. R. 619 and (1882) 7 A. C. 619=47 L. T. 133=30 W. R. 845=51 L. J. Ch. 885.

(7) [1910] 38 Cal. 53=7 I. C. 247.

(8) [1875] 7 H. L. 653=44 L. J. Ex. 185=33 L. T. 451=24 W. R. 794.

(9) [1883] 8 A. C. 517.

(10) [1886] 14 Cal. 256.

that it would buy goods in the open market like any tradesman. Mr. Sircar relies on S. 20 (2) (c), Government of India Act and S. 32 (1) and (3):

There shall be charged on the revenues of India alone, all expenses, debts and liabilities lawfully contracted and incurred on account of the Government of India.

Section 32 (1) says that the Secretary of State in Council may be sued and may sue as a body corporate and Cl. (3) provides that

the property for the time being vested in His Majesty for the purposes of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company, if the Government of India Act and this Act had not been passed.

Mr. Sircar contends that though there is no contractual relationship between plaintiff and the Secretary of State, yet under S. 32 (1), the Secretary of State has to be sued as a body corporate and under Cl. (3) he is liable in the same way that the East India Company would have been liable. He has referred to *Sarat Chandra Dass v. Secretary of State* (11), *Secretary of State v. Hari Bhargji* (12) and *Kishen Chand v. Secretary of State* (13).

There can, I think, be no question that the Secretary of State can be sued as a body corporate as provided in S. 32 (1), Government of India Act. As was pointed out in *Doya Narain Tewary v. Secretary of State* (10):

A suit brought against the Secretary of State is not one against any person or any real body corporate but is one brought against a nominal defendant, such nominal defendant being put upon the record merely to enable the plaintiff to obtained the remedy secured to him by S. 65.

It is plain from S. 32 (3) that the property for the time being vested in His Majesty for the purpose of the Government of India shall be liable to the same judgments and executions as it would have been liable to in respect of liabilities lawfully incurred by the East India Company.

The position has been explained in the case of *Peninsular and Oriental S. N. Co. v. Secretary of State* (14), the head-note of which says:

The Secretary of State is liable for damages occasioned by the negligence of servants in the service of Government, if the negligence is such as would render an ordinary employer liable. The test really is whether the contract was a Sovereign act or was one which a private individual could have entered upon in his ordinary business pursuits. If it is the former, the Secretary of State is liable.

(11) [1910] 38 Cal. 378=9 I. C. 853=15 C. W. N. 470.

(12) [1882] 5 Mad. 273.

(13) [1881] 3 Ald. 829=(1881) A. W. N. 87.

(14) [1861] 5 B.H.C.Appl. 1=Bourke A.O.C.166.

tary of State is not liable, but if it is the latter he can be sued in the same way that the East India Company could have been sued for acts done in their capacity as traders and not as the Sovereign Power.

Where commandeering orders are concerned, I think the position is plain. Power was taken by Government under the Defence of India (Consolidation) Act, 1915, and under R. 11A (a) an officer specially authorized in this behalf is enabled by an order in writing to require the owner of any particular class of goods (these goods were specially notified by Government) to place them at the disposal of Government at such time and place as was specified in the order, making disobedience to the order punishable at law. Provision for payment of the price by reference to arbitration is also made. In this case, therefore, there can clearly be no ordinary commercial contract for sale and purchase, because one of the parties may be unwilling to surrender his goods and yet may be compelled under the commandeering order to do so. He has no option once the order has been made and issued. He is bound to place his goods at the disposal of Government when called upon to do so. The only right he has is that if he does not accept the price offered by Government he can have it settled by arbitration. The arbitrator's order is final. Plainly, therefore, a commandeering order is one which no one but Government can make, and being an act of the Sovereign Power, the Secretary of State evidently cannot be sued in respect of it.

It has, however, been argued by Mr. Sircar that the process of acquisition by Waite has been exactly the same whether it has been by delivery orders or by commandeering orders, and the contract in either case was a good contract, though the method of payment may be different. A sale is a good sale though no price may be fixed at the time of the purchase, when the arrangement is that the price will be subsequently settled by a particular agency: *Valpy v. Gibson* (15).

I do not think this argument is well founded. Waite had no authority to issue a commandeering order. That could only be done by Peterson, who as Controller was specially authorized in that behalf. When, therefore, Waite wrote "Make out commandeering order" and the like, he was really giving instructions to his office to make out the order in anticipation

(15) [1847] 4 C. B. 837.

tion of Peterson's sanction. But until the order was signed by Peterson and served on the owner, it had no legal or binding effect and the owner might, if he had been so inclined, have disposed of the goods in any way he pleased. Ghaznavi says, it is true, that a person holding goods which came under the special class notified could not sell these goods without a license from the Government. That no doubt is so. But the embargo on this class of goods was withdrawn in December 1918, and it is idle to say now that after that date Ghaznavi could not have disposed of these goods in any manner that suited him.

A further question then arises whether contracts other than those specified in S. 29 (5), Government of India Act, can be held to be binding on the Secretary of State. In my judgment they cannot. In *Young v. Mayor of Royal Leamington* (9), where the statute provided that where the subject-matter of contract exceeds £50 in value, contracts must be under seal, and when the contract was not under seal it was held to be bad and unenforceable. Lord Bramwell said, at page 528:

The legislature has made provisions for the protection of rate-payers, share-holders, and others, who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards, and improvident engagements are entered into.

If these principles are applied to the present case it may be said that while there is no magic in a written contract, it is a safeguard which has been laid down by the statute for the protection of the public revenues. When, therefore, a statute lays down certain mandatory provisions in regard to the framing of contracts between the Secretary of State and a private individual, it is no answer to say that because the provisions were ignored on particular occasions and payments were made on contracts which were not in conformity with the statute, that should be taken as a precedent which will be binding upon the Secretary of State in every case. In my judgment contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him.

I now proceed to consider the question of the sufficiency of the notice under S. 80, Civil P. C. with which the question of limitation is bound up. This section says :

No suit shall be instituted against the Secretary of State for India in Council . . . until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary of the Local Government . . . stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims.

In this case the notice was given to the Financial Secretary to the Government of Bengal on the 26th July. Mr. Pugh argues that if the alleged breach of contract took place, then, the notice is good. But if the plaintiff firm wishes to get out of limitation by saying they had not to deliver till called on to do so, then there was no cause of action of which they could give notice and the notice was bad.

Mr Sircar replies that there was no question of giving delivery till asked for and therefore, under S. 93, Contract Act, the plaintiff was not bound to deliver until such application was made. Further, under S. 46, Contract Act, plaintiffs had not to perform their engagements until after a reasonable time, and it is argued that the joint effect of these sections is to free the plaintiffs from liability to deliver at any time, reasonable or otherwise, until they were called upon to do so. It was for Waite to indicate when and where the delivery was to be made, and until he did so, the plaintiff firm had not to move, and limitation had not begun at all. The delay of seven months, therefore, could not be held to be unreasonable in view of the congestion which prevailed in all the Government depots. Further, Mr. Sircar has urged that the words "cause of action" as used in S. 80 should not be too strictly construed. He relies on *Secretary of State v. Perumal Pillai* (16), *Jehangir v. Secretary of State* (17), *Jones v. Bird* (18), *Manindra Chandra Nandi v. Secretary of State* (19). He points out that in the letter of 26th July the plaintiffs had stated their grounds of complaint and as the object of the section is merely to intimate to the Secretary of State the details of the complaint and to give him

(16) [1900] 24 Mad. 279=11 M.L.J. 117.

(17) [1902] 27 Bom. 189=5 Bom. L. R. 80.

(18) [1822] 5 B. & Ald. 837.

(19) [1905] 34 Cal. 257=5 C. L. J. 148.

two months within which to make amends *Perumal's* case (16) is directly in point as the claim had arisen after the notice was given.

It is quite true, as was explained in *Perumal's* case (16), at p. 282, that the cause of action should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground for complaint. But it is, in my judgment, equally true to say that the section requires the cause of action to be stated with some precision. Now, what is the cause of action stated in the attorney's letter of the 26th July? In the third para, it is said no instructions have been given to our client for delivery of the goods, and lower down:

Unless our clients are given the requisite orders to deliver the materials, which Capt. S. C. Waite agreed on behalf of the Munitions Board to take over, they will have no course but to adopt legal proceedings.

The letter does not say the cause of action is a breach of the contract between the Board and the plaintiff firm. The breach is still in futuro, and depends upon the definite refusal of the Government to issue the delivery order. That being so, the cause of action does not appear to have arisen at the time of the notice and the notice must, therefore, be invalid. If on the other hand, the plaintiff's case that there was a stipulation that the goods were not to be delivered till called for is true, a term must be inferred from the contract or read into it, but there is in fact no such term. If such a term is to be inferred it must be a reasonable term, i.e., it must be within a reasonable time of the receipt of the last order of the 26th August 1918. It is plain from Keatinge's letter of 15th January 1919 that he regarded "all outstanding orders" placed with the plaintiff firm as finished. This was followed by Peterson's notification of the 2nd February stopping all further deliveries. The suit was not filed till June 1922. It was, therefore, plainly the duty of the plaintiff firm to show that there was a term in the contract by which delivery was not to be called for up to July 1919, that is to say, ten months after the contract. This, in my judgment, he has failed to do and Ghaznavi's statement that Waite promised to take delivery in July is falsified by the fact that the suggestion neither appears in his attorney's letter threatening the suit nor in

the plaint itself. There is also the undoubted fact that Waite went on leave in January 1919 to Ghaznavi's knowledge, and that his services were dispensed with in February following. Ghaznavi was perfectly aware of that too, and if his claim had been well founded he must have pressed it as soon as he heard that Waite was no longer in a position to issue the delivery orders which Ghaznavi says he promised him the previous November.

In my judgment, the breach of alleged contract should be held to have occurred on 1st February 1919 when Peterson issued his circular letter and limitation began to run from then, and as the suit was not filed within three years from that date it is barred by limitation.

I therefore answer the issues as follows:

Issue 1.—First part, Yes, in so far as commandeering orders were concerned, Second part, No.

Issues 2, 3 and 4.—No.

Issues 5, 6, 7.—No.

Issues 8.—Yes, 15th January 1919 and 2nd February 1919.

Issues 9 and 10.—Yes.

Issue 11.—No evidence was led by the defendant. I answer this issue in the affirmative.

Issue 12.—No evidence was led by the defendant. I answer this issue in the negative.

Issue 13.—None.

The result, therefore, is that the suit will stand dismissed with costs on scale 2, including costs of the commission and reserved costs, if any.

R.D.

Suit dismissed.

* * A. I. R. 1928 Calcutta 83 Full Bench

RANKIN, C. J., BUCKLAND, CUMING,
B. B. GHOSE AND MUKERJI, JJ.

Kedar Nath Mahto and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Full Bench Reference No. 1 of 1927, Decided on 5th December 1927, in Cr. Appeals Nos. 302, 377 and 468 of 1927.

* * *Criminal P. C., S. 276—Procedure in empanelling a jury described. A. I. R. 1927 Cal. 242 and A. I. R. 1927 Cal. 787, Overruled.* S. 276 provides, in the first instance, for a bal-

lot among the persons summoned under S. 326, all of whom may or may not be present. When their names have been exhausted, if a jury has not yet been empanelled, the Court may, in its discretion allow the number requisite to complete the jury to be chosen from among the bystanders, or may adjourn the case for a fresh jury to be summoned. As each name is drawn and called aloud if the person summoned answers, or as each juror is chosen from among the bystanders, should that point have been reached and that course be permitted, the accused shall be asked, if he objects to be tried by such juror. Should the objection be allowed the Court should proceed as laid down in S. 279 (2), adopting the course prescribed according as there are or not persons left from among those summoned whose names have not been drawn: **A. I. R. 1927 Cal. 242 and A. I. R. 1927 Cal. 787, Overruled.** [P 85 C 1]

Per Mukerji J—S. 276 with all its provisos is a general section, dealing with the general nature of the procedure, and the details of that procedure are given in Ss. 277 to 279. The words: "with the leave of the Court," in Prov. 2, S. 276, give a discretion to the Court to proceed or not to proceed in this particular way, viz., allowing persons in Court to come in as jurors accordingly as it thinks fit. [P 87 C 1]

N. K. Basu, Probodh Chandra Chatterjee, Mrityunjay Chatterjee, Suresh Chandra Talukdar, Gopal Chandra Mukerjee, Suresh Chandra Talukdar and Amulya Chandra Sen—for Appellants.

B. L. Mitter, Khundkar and Sachindra Nath Bannerji—for the Crown.

Opinion

Rankin, C J—I have had an opportunity of reading the judgment which is going to be delivered by Mr. Justice Buckland with which I agree

Buckland, J—Under Ch 7, R. 5 of the Rules of the Court, the three appeals, Nos. 377, 468 and 302 of 1927, have been referred to a Full Bench for the purposes of a final determination of the construction to be put upon Prov. 2, S. 276, Criminal P. C. So far as the facts of these cases relate to the manner in which the juries were empanelled, they are set out in the order of reference as follows:

In appeal No 377, the accused were charged under S. 147 and under S. 325 read with S. 149, I. P. C. Ten persons were summoned to serve on the jury. Of these ten, six persons attended. Of these six, it was ascertained that one was serving in the office of a society of which the Public Prosecutor was the President. An objection being taken to this individual, the objection was sustained, and he was discharged. This left five persons who had been summoned. The learned Judge chose one man from among the bystanders in Court, added his name to those of the five persons summoned, and from these six he jury of five was chosen by lot.

In appeal No. 463, the accused was charged under S. 302, I. P. C. The number of persons summoned does not appear from the affidavits, but it is agreed that seven jurors were present, two of whom were European gentlemen. These two were discharged on the ground that they did not understand Bengali. Two persons were chosen from among the bystanders and added to the five who remained, thus making a jury of seven. It is said that in these circumstances there was no choosing by lot.

In appeal No. 302, the charges were laid under Ss. 304, 147 and 304 read with S. 149, I. P. C. Twelve persons had been summoned to serve on the jury. Seven of these attended, of whom one was excused. Out of the remaining six, five jurors were chosen by lot.

The questions which arise for determination in each case are: (1) Was the jury empanelled as required by law? (2) If not, must the convictions and sentences be set aside, and a new trial ordered?

The determination of the first of these two questions will depend in each case on the view taken of the proviso to be considered. Consideration of the second question only arises after the first has been determined

Stating the matter broadly, there are two opposite views, which have been submitted, of the effect of the proviso. One is that in the event of there being a deficiency of persons summoned a sufficient number of persons from among those present may, with the leave of the Court, be added to the number of persons summoned who have attended, and that a choice should then be made by lot from the composite body so formed

The other view is that the choice by lot referred to at the beginning of the section is confined to a choice by lot from among the persons summoned, and that when the deficiency appears, the number of jurors required may be chosen from such other persons as may be present, and the jury thereby completed without any further drawing of lots.

Whichever view is the correct one, it is subject to the right of the prisoner to object to a juror. The sections relating to such right do not directly affect the construction of the proviso, but they may be considered for the purpose of arriving at its correct meaning.

The view first stated is that which has been advanced on behalf of the appellants. The argument presented to us proceeds in the first instance from S. 326, which provides for summonses to be issued to the number of jurors required for the sessions, the number to be summoned not being less than double the number required for any trial.

Assuming a jury to consist of five at least ten persons must be summoned, and it is said that that figure is to be taken as the number of persons among whom lots are to be drawn for the purpose of choosing a jury. From this point it is argued that the words "deficiency of persons summoned" means deficiency of persons summoned for the purpose of making up the minimum number of ten among whom lots are to be drawn. This argument then leads to the conclusion that the word "jurors" in the proviso refers to potential jurors, or, as they are termed in the first part of the section, to "persons summoned to act as such."

It is not possible to find any logical reason for this indiscriminate and indeed, one might say, careless use of the word "jurors" within the compass of one section for the purpose of indicating different sets of persons. The argument, however has this support, so far as it is, a question of mere terminology, that Ss 327 and 323, and it may be others, refer to "jurors" when what is meant is persons directed to attend for service as jurors.

The argument also involves that the expression "chosen by lot" and the word "chosen" have been both employed to convey the same meaning, viz., a selection by ballot. Again, for this no logical justification can be found, and the two cannot be regarded as synonymous, unless there is no other possible construction to be placed upon them.

In the course of the argument, it was suggested that the ballot required by S. 326 (2) as to the persons to be summoned, and that required by S. 276, were intended to benefit the prisoner, by ensuring as far as possible an unbiased and impartial jury, chosen haphazard, and that this furnishes an additional reason for requiring that even when the proviso has to be invoked there shall nevertheless be a ballot. With this, in some measure, I agree, but inasmuch as the prisoner has the right of challenge conferred by S. 278, I should be disposed to think that the object of the several ballots was as much to ensure the fair and impartial incidence of the duty of service upon those who are liable to it.

The position when a successful objection to a juror has been made is dealt with by S. 279. In the first instance, the place of the juror is to be supplied by any other juror attending in obedience to

a summons and chosen as S. 276 provides, that is by ballot. If no such juror is present, the place of the juror to be supplied shall be filled by any other person present whose name is on the jury list or whom the Court considers a proper person to serve on the jury, subject, of course, to a successful objection, as stated in the proviso to S. 279. Here the argument for the appellants has to concede that in such circumstances no ballot is possible.

In my opinion, the view which I have discussed is fallacious, and proceeds entirely from an erroneous conception as to the deficiency to which the proviso refers. In the course of argument, we were informed that it is the practice in District Courts to ascertain beforehand how many of the persons summoned to serve as jurors have attended and thus determine the "deficiency" to be supplied. If that is the case, in my judgment it is a practice which is not authorized by law and should be discontinued. No doubt, persons summoned as jurors who do not attend are liable to fine. But the stage at which it should be ascertained whether they have attended or not is not reached until their names are called out for the purpose of empanelling a jury.

The procedure to be followed in nominating a jury is laid down in Ch. 1, R. 54, of the G. C. Orders. If carefully observed, step by step, no difficulty will occur. It is to be presumed that the total number summoned is that required by S. 326 that is to say, at least ten, for a jury of five, and in the aggregate there may be more. This will depend upon the number required for the Sessions and stated in the letter to the District Magistrate. On the names being drawn from the box, one by one, each after another, and called aloud as each is drawn, it will become apparent who has not attended, and it is only when all the names have been so drawn and a number of persons insufficient for the purpose of constituting a jury have answered to their names, that the deficiency will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist. It is then and not until then that, in my opinion, the proviso begins to operate, and on that point being reached, the Court has to exercise a dis-

cretion whether to allow persons to be chosen from among the bystanders in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh jury to be summoned.

The circumstances in which such discretion should be exercised, and how, do not call for consideration in this case. It suffices to say that it must be exercised in such a way as to secure to the prisoner a fair and impartial trial.

I should like to draw attention to a recent alteration of the rule referred to, which provides that as the name of each juror is drawn, it shall be called aloud, and upon the juror appearing, the prisoner or person to be tried shall be asked if he objects to be tried by such juror. This furnishes the opportunity of challenging under S. 277, and if the procedure prescribed is followed, no difficulty will arise in compliance with the provisions of S. 279 (2), since all the names of persons summoned will have been placed in the box.

I have endeavoured to state my conclusions in a form which may be of practical utility, and I will now summarize them. The section provides, in the first instance, for a ballot among the persons summoned under S. 326, all of whom may or may not be present. When their names have been exhausted, if a jury has not yet been empanelled, the Court may, in its discretion, allow the number requisite to complete the jury to be chosen from among the bystanders, or may adjourn the case for a fresh jury to be summoned. As each name is drawn and called aloud, if the person summoned answers, or as each juror is chosen from among the bystanders, should that point have been reached and that course be permitted, the accused shall be asked if he objects to be tried by such juror. Should the objection be allowed, the Court should proceed as laid down in S. 279 (2), adopting the course prescribed according as there are or not persons left from among those summoned whose names have not been drawn.

It now only remains to give, with respect to the three appeals, the replies to the questions submitted to us, but before so doing I may state that it follows from the foregoing that *Bholanath Hazra v. King-Emperor* (1) and *Roshan Ali v. King-Emperor* (2), so far as they lay

down a different principle, should not be followed.

As regards Appeal 377 : the answer to the first question is that the jury was not empanelled as required by law. In this case, therefore, the convictions and sentences will be set aside, and there must be a re-trial with a jury duly empanelled in the manner prescribed. The accused persons in this case will be on bail to the satisfaction of the District Magistrate.

As regards Appeal 468 : the jury was in effect empanelled as permitted by law from the five persons summoned and the two chosen from among the bystanders and the case, therefore, will be remanded to the Division Bench to dispose of it on such other points as may yet have to be determined. As regards Appeal 302, the jury was empanelled as required by law, and there will be the same order of remand in this case as in Appeal 468.

Cuming, J. — I agree and have nothing to add.

Ghose, J. — I agree in the judgment just now delivered by my learned brother Mr Justice Buckland.

Mukerji, J. — I agree in all that my learned brother Buckland, J., has said in his judgment, and desire to add a few words.

To put upon the Prov. 2, to S. 276, any of the interpretations contended for on behalf of the appellants would lead to an absurd position which could never have been intended. Suppose out of ten persons summoned to act as jurors, five, namely, S1 to S5, attend. According to one of these interpretations at least, one more, say P1, will have to be taken from the persons present in order that there may be a choosing of five by lot out of six ; according to another, at least five more say P1 to P5, will have to be so taken so that there may be an effective lottery with equal chances ; according to a third, the whole body of persons present, say P1 to Px, will have to be taken though on the face of it such a procedure would be impracticable. According to all the said interpretations, the word "chosen" in the proviso, means "chosen by lot." All of the two series S and P will, therefore, be in the ballot box. If Ss. 277 to 279 are now applied, suppose the drawing gives one of the S series as the first man, and he being objected to with success goes out. So long as the drawing does not give another of the S

(1) A.I.R. 1927 Cal. 242.

(2) A.I.R. 1927 Cal. 787.

series, but of the P series only, all the latter will have to go out automatically and not have to serve, though never objected to, unless one or more of them are again selected from the general body under the last part of the first paragraph of Cl. (2), S. 279. Could such a result have been intended?

In my opinion, S. 276 with all its provisos is a general section, dealing with the general nature of the procedure, and the details of that procedure are given in Ss. 277 to 279. I am also of opinion that the words "with the leave of the Court" in the Prov. 2 to S. 276, give a discretion to the Court to proceed or not to proceed in this particular way, namely, allowing persons in Court to come in as jurors accordingly as it thinks fit: it is not difficult to imagine cases in which such a procedure will not be resorted to. I am further of opinion that the words

the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided in S. 276 in S. 279, Cl. (2), clearly point to S series only taking part in the ballot, and that the section cannot be worked if P series are to take part in it.

D D.

Reference answered.

A. I. R. 1928 Calcutta 87

B. B. GHOSE AND ROY, JJ.

Jaladhar Mondal and another—Defendants—Appellants.

v.

Amrita Lal and another—Plaintiff and Pro forma Defendant—Respondents.

Appeals Nos. 263 and 264 of 1925, Decided on 7th July 1927, from the appellate decrees of the Sub-Judge, Khulna, D/- 26th September 1924.

(a) *Evidence Act, S. 115—Landlord and tenant—Estoppel—Granting a lease by the holder of ganti interest in land—Lessor cannot assert his right as a ryot—Purchaser of that interest is not so bound.*

Although a person holding a ganti interest in the land and granting a permanent lease of the same land will be estopped from asserting his right as a ryot, the purchaser of that interest at an auction sale, who obtains a new title from the landlord at an increased rent, will not be so estopped. [P 88 C 1, 2]

(b) *Landlord and tenant—Payment of rent by heir of under-ryot to superior landlord without direction from the ryot—No right is created in favour of the former.*

If after the death of the under-ryot his heir,

without any direction from the ryot pays rent to the superior landlord representing himself to do so on behalf of the ryot, that will not confer upon him any right if the ryot does not choose to accept him as a tenant. [P 88 C 2]

(c) *Landlord and tenant—The gomasta is not authorized to settle tenants on the land.*

The gomasta cannot be held to be authorized to settle tenants on the land of the ryot or to recognize any person as tenant, and his mere knowledge that the under-ryot was paying rent to the superior landlord cannot be said to bind the ryot in any way so as to compel him to recognize the under-ryot as his tenant. [P 88 C 2]

(d) *Landlord and tenant.*

Suit against a person for damages for use and occupation does not amount to recognition of tenancy. [P 89 C 1]

Mukanda Behari Mallik—for Appellants.

Sarat Chandra Basak and Hemendra Chandra Sen—for Respondents.

B. B. Ghose, J.—These two appeals are by the defendant. They arise out of two suits for ejectment brought by the plaintiff on the allegation that the plaintiff was a ryot with regard to two holdings. The father of the defendant was his under-ryot. The under-ryot having died in 1921, the defendant had no right to remain on the land as the interest of an under-ryot is not heritable under the law. The defendant, therefore, is in the position of a trespasser and is liable to be ejected.

The plea of the defendant was that his father was an occupancy-ryot and that the predecessor-in-interest of the plaintiff, namely, Jogendra Ghose, was a tenure-holder, and Jogendra having granted a permanent lease to the defendant's predecessors, he was estopped from asserting that the defendant's predecessors were under-ryots and so the plaintiff who has obtained the interest of Jogendra by purchase at a sale in execution of a decree is also estopped from asserting that defendant's father was an under-ryot. The Munsif declared the interest of the plaintiff as a purchaser of the interest of Jogendra but dismissed the claim for ejectment and for mesne profits. The Subordinate Judge reversed the decision of the Munsif and held that the plaintiff is a ryot and, therefore, the defendant's father was an under-ryot under him and after the death of the defendant's father defendant had no right to remain on the land. He further held, reversing the decision of the Munsif, that the fact that the defendant had paid rent to the super-

rior landlord on behalf of the plaintiff does not confer any title upon him. It is contended on behalf of the defendant by his learned vakil that the Subordinate Judge is in error in holding that the plaintiff was a ryot and that defendant's father was an under-ryot. He relies upon the fact that this tenancy has been in existence for a great number of years. It was said to be the holding of one Najibulla which appears from the maliki karcha of 1290, i. e., 1883. In 1291 this was described as a jote. A jote may mean the interest of an occupancy ryot or of a tenure-holder. This is not conclusive. Under the tenant Najibulla or his successor-in-interest Jogendra, one Mahima held the land as a pure cultivating tenant. Jogendra held the land in the name of his benamdar Jadav. Mahima's interest was sold in auction in execution of a rent-decree and it was purchased by Jogendra who let it out by accepting a kabuliyat from the defendant's father Gobinda. In that kabuliyat the interest of Jogendra was described as a ganti and it purports to have conferred upon Govinda a permanent lease. Under these circumstances there is no doubt that Jogendra would have been estopped from asserting his right as a ryot and to eject the defendant on the ground that his father was a mere under-ryot. The Subordinate Judge, however, has found that the interest of Jogendra was merely that of a ryot which was purchased in execution by the plaintiff and after his purchase the plaintiff had to get his name mutated in the sherista of the superior landlord on payment of an enhanced rent. The Subordinate Judge holds that Jogendra also had to pay enhanced rent, but the learned vakil for the appellant says that there is no ground for so holding. Assuming that it is so, still there is no doubt that the plaintiff had to pay an enhanced rent in order to have himself recognized by the superior landlord. If Jogendra's interest had been that of a tenure-holder, there would have been no necessity for this payment of enhanced rent for his recognition and this fact supports the finding of the Subordinate Judge that what the plaintiff purchased was the interest of a non-transferable occupancy-ryot.

With regard to the question of estoppel it is only necessary to point out that the plaintiff cannot be held to be bound by the estoppel of Jogendra as after having

purchased at an execution sale he obtained a new title from the landlord at an increased rent.

The next question is whether after the death of defendant's father, by payment of rent to the superior landlord on account of the disputed land on behalf of the plaintiff, the defendant has constituted himself a tenant. There is no allegation or finding that the plaintiff ever authorized the defendant to pay rent on his behalf. It is urged that this payment was made by the defendant with the knowledge of the plaintiff's gomasta and the plaintiff subsequently took advantage of that payment by paying only the balance of the rent due from himself to the superior landlord. It is urged that by this the plaintiff has precluded himself from suing the defendant in ejectment. This argument cannot be supported on any principle. If after the death of his father the defendant without any direction from the plaintiff pays rent to the superior landlord representing himself to do so on behalf of the plaintiff, that would not confer upon him any right if the plaintiff does not choose to accept him as a tenant.

As to the plaintiff's taking advantage of the payment the only thing that can be said in answer is that the plaintiff had no option left. The landlord had credited the amount paid by the defendant in his books. The only amount he demanded from the plaintiff was the balance. The plaintiff, of course, might have repaid the amount to the defendant as he was morally bound to do, as the Munsif has observed. But the Subordinate Judge found that the defendant's father was in arrears at the time of his death and, therefore, the plaintiff was entitled to receive some money from the defendant on account of his father's debt. The fact that the gomasta of the plaintiff knew about the payment by the defendant also cannot support the defendant's case. The gomasta cannot, in the absence of evidence, be held to be authorized to settle tenants on the land of the plaintiff or to recognize any person as tenant and his mere knowledge that the defendant was paying rent to the superior landlord cannot be said to bind the plaintiff in any way so as to compel him to recognize the defendant as his tenant.

One last point was sought to be urged that after the death of the defendant's

father, the plaintiff sued the defendant for rent, under protest, it is said, for a period after the death of the defendant's father. If the plaintiff had really sued the defendant for rent for any period after the death of the defendant's father, that would be a recognition of the defendant's right as tenant and, that being so, he would not be entitled to eject the defendant without taking proper steps under the Bengal Tenancy Act for terminating the tenancy. But it seems that that suit was brought for use and occupation and that would not constitute a recognition of the defendant's tenancy. This ground was not specifically taken in the grounds of appeal as the learned vakil for the respondent points out.

These two appeals, therefore, fail and must be dismissed with costs.

Roy, J.—I agree.

N.D.

Appeals dismissed.

* A. I. R. 1928 Calcutta 89

C. C. GHOSE AND BUCKLAND, JJ.

Ezra Meyer Aaron Cohen—Defendant—Appellant.

v.

Kumar Debendra Lall Khan—Plaintiff—Respondent.

Appeal No 42 of 1927, Decided on 11th November 1927, from the original decree passed by Page, J., D/- 25th February 1927, Reported in *A. I. R. 1927 Cal., 908.*

* *Landlord and Tenant*—General covenant to repair extends to newly erected buildings.

A general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term. If, however, the covenant to repair is only one to keep in repair the demised premises, it applies to those existing at the date of the lease only unless the new buildings are made part of the old ones: *Feld v. Curnick* (1926) 2 K. B. 374, *Foll.* [P 90 C 2 & P 91 C 1]

Where an indenture of lease contained the following proviso: "And at all times during the said term of years keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor his heirs or assigns at the expiration or sooner determination of the said term and it is hereby agreed and declared by and between the parties hereto notwithstanding anything therein before contained that the said lessee shall be at liberty to make all necessary additions and alterations to the demised premises to improve the buildings with the written consent of the lessor at his own cost during the continuance of the said term and all such changes, additions, fittings and fixtures so made shall become and be considered the property of the said lessor and the

lessee shall have no right to remove the same either before or after the expiration of this lease":

Held: that the covenant to repair was in very general terms and it would extend to the subsequently erected buildings: *A. I. R. 1927 Cal. 908, Affirmed.* [P 91 C 1]

N. Sircar and A. K. Roy—for Appellant

B. C. Mitter, A. N. Chowdhury and S. C. Roy—for Respondent.

C. C. Ghose, J.—This is an appeal against a judgment and decree passed and made by my learned brother Mr. Justice Page on the 25th February 1927 in an action by the plaintiff to recover possession of a block of buildings lying at the corner of Wellington Street and Dhurumtolla Street. The plaintiff based his cause of action for recovery of possession of the premises upon the breach of (1) a covenant to pay rent, and (2) a covenant to repair contained in the Indenture of lease dated 3rd August 1906. As regards the covenant to pay rent, it appears that, before the suit came on for hearing, the defendant who is the assignee of the original lessee had deposited in Court the amount of rent due by and from him to the lessor. Mr Justice Page came to the conclusion that in these circumstances the Court was entitled to exercise its powers under S. 114, T. P. Act and give the necessary relief to the tenant. On the question whether there had or had not been a breach of the covenant to repair Mr Justice Page came to the conclusion that, so far as the demised premises were concerned, there had been no breach of the covenant to repair but that, in respect of certain buildings which were erected after the date of the Indenture of lease and which buildings had been so constructed that they, in his opinion, formed part of the demised premises, there had been a breach of the covenant to repair, and accordingly he passed a decree in ejectment in favour of the lessor.

On appeal before us it has been contended that the additional buildings referred to in the judgment of Mr. Justice Page and which were subsequently erected on a part of the demised premises which was then vacant land, did not form part of the two storeyed house as it stood at the date of the Indenture of lease but were entirely separate buildings having no connexion with the original buildings and that, therefore, the covenant to repair did not extend to the new erections, and ac-

ordingly there had been no breach of the covenant to repair, and in the circumstances no decree for ejectment should have been made in favour of the lessor.

Apart from what is contained in the said Indenture of lease Mr. Justice Page relied in support of his finding that the new erections had been and were made part of the original buildings, upon the evidence of the original lessee S. J. Cohen wherein he stated that the new buildings were joined on to the original buildings and made a portion of the same so that the buildings, i. e., the original buildings and the subsequent erections became thereafter one whole building. The expression "joined on to the old buildings" is somewhat misleading and it does not convey with any degree of precision what exactly became the state of things after the new buildings had been erected. In these circumstances, Sir Benode Mitter for the respondent and Mr. Sarkar for the appellant invited us to go down to the spot and see for ourselves the state of things and appreciate the evidence on record on the new buildings in such a manner that the new buildings became part of the old buildings, or whether the new buildings were separate by themselves having no sort of connexion whatsoever with the original buildings. Having regard to the evidence to which our attention was drawn and having regard to the difficulty which we experience in understanding and appreciating the evidence on record, we thought it proper to accept the invitation and to go down to the spot and see for ourselves the state of things for the purpose of understanding and appreciating the evidence.

Having seen the premises as they stand now, I have no difficulty in understanding the evidence of S. J. Cohen and I have no hesitation whatsoever in saying that on the evidence on record the new buildings were so constructed that in various portions thereof they were made part of the original buildings and in other portions they were so constructed that they could be made part of the original buildings at a moment's notice. The beams supporting the roof of the new one-storeyed building had been introduced into the walls of the original building and the roof of the new buildings is used as a terrace by the occupants of the first floor of the original building. In these circumstances it is difficult to resist the conclusion that

the new buildings were so constructed as to form part of the original buildings and that they have been treated ever since as parts of the original buildings. Therefore, on the question of fact bearing on this issue, I am in entire agreement with Mr. Justice Page in holding that the new buildings could not be treated as separate by themselves but were, in fact and in truth, made part of the original buildings.

Now the question arises whether the covenant to repair contained in the Indenture of lease extended to such new erections. It has already been stated above that Mr. Justice Page did not find that there could be any reasonable complaint on account of the breach of the covenant to repair so far as the original buildings were concerned. The only question that arises, therefore, is whether the covenant to repair extended to such new erections. It is unnecessary, in my opinion, to go through the cases on the subject from 1688 downwards. The cases are all collected in a very concise form on pp. 325 and 326 of Vol. 31 of the English and Empire Digest and it would be sufficient for our purpose if we refer for the enunciation of the law on the subject to the last case bearing on it, namely, the case of *Field v. Curnick* (1). In that case it appears that by a lease dated 1837 the lessors demised to the lessee for 99 years a piece of ground together with the messuages or tenements and all other erections and buildings which at any time thereafter during the said term should be built on the same piece of ground or any part thereof

and the lessee covenanted to build on the lands demised two good and substantial brick messuages or tenements, and to repair and keep repaired "the said premises." The lessee built six houses as to which it was impossible to say which two were actually completed first. In that state of things the learned Judge came to the conclusion on the evidence on record that the six houses were built simultaneously and finished at the same time. He further held that the covenant to repair extended not only to the two houses which the lessee covenanted to build but to all the six houses. Mr. Justice Sankey then observed as follows :

In my view, the law is as follows : If a lessor demises a house and there is an express covenant to repair, the lessee is of course bound by it. If, on the other hand, the lessor demises a piece of land and there is an express covenant by the

(1) [1926] 2 K. B. 374.

lessee to repair any houses subsequently erected thereon, equally the lessee is bound by it. Further a general covenant to repair includes not merely buildings existing when the demise is made, but all those which may be erected during the term: see *Cornish v. Cleife* (2) and *Foa on Landlord and Tenant*, 6th Edition, p. 248. If, however, the covenant to repair is only one to keep in repair the demised premises, it applies to those existing at the date of the lease only unless the new buildings are made part of the old ones.

Now in this case the Indenture of lease contained the following proviso:

And at all times during the said term of years keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor his heirs or assigns at the expiration or sooner determination of the said term.

Further:

And it is hereby agreed and declared by and between the parties hereto notwithstanding anything thereinbefore contained that the said lessee shall be at liberty to make all necessary additions and alterations to the demised premises to improve the buildings with the written consent of the lessor at his own cost during the continuance of the said term and all such changes, additions, fittings and fixtures so made shall become and be considered the property of the said lessor and the lessee shall have no right to remove the same either before or after the expiration of this lease.

Having regard to the terms of the Indenture of lease in the present case, there is no doubt that the covenant to repair is in very general terms, and it would in my opinion extend to the subsequently erected buildings. But, even if it be held that the covenant to repair does not extend to the subsequently erected buildings, in this case there could not be much doubt on the evidence that the new buildings were, in fact, additions to and had become part of the two-storeyed buildings which were originally demised and that, therefore, the covenant to repair would extend to the subsequently erected buildings. It follows, therefore, that the finding of Mr. Justice Page on the evidence on record that the covenant to repair extended to the newly erected buildings is one that cannot be seriously quarrelled with and that the appeal so far as it relates to that point must fail.

A small point has been taken that there is internal evidence in the Indenture of lease that the covenant to repair is restricted to what is described as the demised buildings, that is, the original buildings as they stood at the time of the grant of the lease. The argument is as

follows: It is said that the landlord is under no obligation to restore any portion of the subsequently erected buildings if and when they are destroyed by reason of the causes specified in the Indenture of lease, whereas if any portion of the original building is destroyed by any of the causes the landlord is under an obligation to repair. In the second place it is stated that no additional rent was payable by reason of the erection of the subsequently erected buildings. So far as the last point is concerned, it may be stated that the lessee was under no obligation to erect new buildings. But if he did erect additional buildings with the consent of the lessor, they were to be considered the property of the lessor and the lessee would have no right to remove the same before or after the expiration of the lease. As Mr. Justice Page points out, the special provisions introduced into the lease with respect to the additions and alterations were inserted for two reasons, first, in order to get out of the provisions of S. 108, Transfer of Property Act, and, secondly, in order that it should not be open to the defendant in the event of some part of the additional premises, that he might erect, being destroyed in the manner set out in the lease to escape proportionate payment of rent so long as the additional structures were not rebuilt or repaired. I think, therefore, that the appellant cannot derive any comfort whatsoever from the provisions in the lease last referred to.

There is still a further small point to be noticed. It is stated that at the time when the lease was executed a sum of Rs. 2,500 was deposited with the lessor for the due fulfilment of the terms of the lease. The lease having now come to an end, the appellant urges that he should be given credit for this sum in calculating the amount ultimately payable to the lessor. Sir Benode Mitter on behalf of the respondent states that there has been no question at any time that the appellant is entitled to the credit of the said sum and he is willing that in the accounts when they are taken credit should be given to the appellant for the said sum of Rs. 2,500.

The result, therefore, is that the appeal fails on all the points which the learned counsel for the appellant has taken and it must stand dismissed with costs subject to credit being given to the defendant for Rs. 2,500 as stated above.

(2) [1864] 3 H. & C. 446=13 W. R. 339=34 L. J. Ex. 19=11 Jur. N. S. 181=11 L. T. 603

Buckland, J.—I agree. I only desire to add a few words with regard to the principal question of fact which has been argued on this appeal; that is, as to whether or not the state of the premises is such that the general covenant to repair applies to the additional premises. The evidence on that point has been quoted in extenso by the learned Judge in his judgment. What has to be proved is expressed in the passage which my learned brother has referred to in the judgment of Mr. Justice Sankey in the case of *Field v. Curnick* (1). It is necessary to establish that the new buildings are made part of the old ones.

The evidence has not been read to us; but we have been informed by learned counsel for the appellant that the passages quoted in the judgment of Mr. Justice Page are all the evidence on the point and he has also informed us that no evidence was given on behalf of the plaintiff on this point and that the answers on which the plaintiff relied were elicited in the cross-examination of the witness for the defendant. On two occasions, this witness, S. J. Cohen, was asked whether or not the new rooms were made part of the premises of the two-storeyed building and to each question his answer was that they were joined. He did not accept the questions in the form in which they were put and he expressed his answer in different words. In consequence, I felt considerable difficulty in knowing what the witness meant by using the word "joined." A horse is joined to a cart, but nobody suggests that the horse becomes a part of the cart. The word "joined" is not necessarily, therefore, conclusive on the point and I was very glad to welcome the invitation of learned counsel on both sides that we should go and see the buildings for ourselves. We have done so and, having seen the buildings, what I have observed with my own eyes has enabled me to understand the witness's evidence. I am satisfied that when the witness Cohen used the word "joined," he referred to conditions and a state of facts which brings the matter within the passage in the judgment of Mr. Justice Sankey to which I have referred. The view which I have had of the premises has enabled me to understand what the witness meant and his evidence, therefore, in my judgment, supports the finding beyond all

question. I concur in the order to be made in this appeal.

D.D.

Appeal dismissed.

* A. I. R. 1928 Calcutta 92

CUMMING AND MUKERJI, JJ.

Sm. Radha Rani Dasi and another—
Plaintiffs—Appellants.

v.

Sukdeb Bhattacharjee and others—
Defendants—Respondents.

Appeal No. 24 of 1925, Decided on 26th May 1927, from the appellate decree of the Sub-Judge, Burdwan, D/- 8th September 1924.

* *Civil P. C., O. 2, R. 3—Persons seeking individual reliefs—They can join in same suit if investigation is likely to be identical to a great extent if separate suits are brought.*

Subject to the control of the Court, persons can unite as plaintiffs though seeking individual reliefs in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid, needless expense where it can be done without injustice to anyone: *Markt v. Knight Steamship Co.* (1910) 2 K. B. 1021 and *Payne v. British Time Recorder Co.* (1921) 2 K. B. 1 Rel. on. [P 93 C 2]

Jadu Nath Kanjilal and Nripendra Chandra Das for Purna Chandra Chandra
—for Appellants.

Panchanon Ghose and Radhika Rangan Guha for Jatis Chandra Guha—for Respondents.

Mukerji, J.—This appeal arises out of a suit instituted by two persons as plaintiffs for recovery of khas possession of some lands by evicting the principal defendant and for mesne profits.

The case as laid in the plaint was that the two plaintiffs acquired jamai right to the plaint lands on taking settlement thereof from the owners, that one Panchu Gope and one Bhupati Ghose used to hold the lands as korfa tenants under the said owners, that the said Panchu Gope and Bhupati Ghose mortgaged their rights to the principal defendant who sued upon the mortgage, and in execution of the decree which he obtained, purchased the same. The plaintiffs alleged that the principal defendant acquired no title by his purchase and was accordingly liable to be evicted. It is not necessary to refer to the defence for the purposes of this appeal.

The Munsif decreed the suit in part with proportionate costs. He gave the

plaintiffs a decree directing that they do get khas possession of the plaint lands by evicting the principal defendant therefrom* and also awarding them certain amount as mesne profits.

The principal defendant, therefore, preferred an appeal. The Subordinate Judge who dealt with the appeal allowed it, set aside the decree of the trial Court and dismissed the suit with costs of both the Courts. He observed, however, thus, at the conclusion of his judgment :

The decision of this suit would not operate as res judicata in any subsequent suit brought by plaintiffs for the same relief.

The plaintiffs have then preferred this appeal. A point has been raised as to the competency of this appeal it being urged that in view of the remarks of the learned Subordinate Judge quoted above, he has decided nothing and his decision does not amount to a decree within the meaning of S. 2, sub-S. (2) of the Code. This objection is not without substance, though perhaps it is also possible to take the view that the decision on the face of it amounts to a decree, and that the remarks to which reference has been made are obiter. It is unnecessary, however, to pursue this matter any further as it is always open to us to treat the memorandum of appeal as a revision petition, and we think we should be prepared to do so in the present case.

The Subordinate Judge has found that though in the plaint the two plaintiffs alleged that they had obtained settlement from the owners by registered patta or pattas (the word as used in Bengali being capable of either interpretation), in point of fact, of the three plots which the suit lands consist of, plaintiff 1 alone obtained settlement of plots Nos. 1 and 2 and plaintiff 2 alone obtained settlement of plot No. 3, the settlements being under two separate pattas, and one plaintiff having nothing to do with the other. On this finding he has held that plaintiff 1 is not entitled to get any decree for possession in plot No. 3 and plaintiff 2 is not entitled to get any decree for plots Nos. 1 and 2 and that, therefore, the joint decree in favour of the two plaintiffs for khas possession as well as for mesne profits for the three plots taken together is wrong and cannot be upheld. This view is entirely correct and can hardly be challenged.

But then the Subordinate Judge pro-

ceeded to dismiss the suit on the ground that the suit was not maintainable as there was misjoinder of parties and cause of action. He took the view that the misjoinder has affected the merits of the case, but all that he has said in support of this view is that a wrong decree was passed by the trial Court.

Learned advocate for the appellants says in the first place that in view of O. 1, R. 13 and O. 2, R. 7 the objection as to misjoinder not having been taken in the trial Court should not have been entertained at the appellate stage. This contention in my opinion should be overruled as the suit as framed was not bad for misjoinder: the plaintiffs themselves are to blame for not having disclosed the details of their respective titles in the plaint.

It is next urged on behalf of the appellants that the merits of the case or the jurisdiction of the Court have not been affected and so in view of S. 99 of the Code, the trial Court's decision should not have been reversed. But before this question is considered it is necessary to see whether in fact, there has been any misjoinder. On this question it is practically conceded on behalf of the respondent that taking O. 1, R. 1 and O. 2, R. 3 together and applying the same to the facts of the present case, as disclosed in the evidence, the suit is maintainable. The words of these rules are very wide. Their scope and the authorities bearing upon the same have been dealt with by this Court in *Miscellaneous Appeal No. 231 of 1926*, decided on 31st March 1927, the judgment of which case, I understand, is about to be reported. I shall quote only two passages from two of the more recent English decisions bearing upon this question as these rules are drawn upon the lines of the English Supreme Court Rules. In *Markt v. Knight Steamship Co* (1), Fletcher Moulton, L. J., observed thus :

Subject to the control of the Court, persons can unite as plaintiffs though seeking individual reliefs in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid needless expense where it can be done without injustice to anyone. And it carries out its object.

The Court of Appeal (Lord Sterndale, M. R., Warrington, L. J. and Scrutton,

(1) [1910] 2 K. B. 1021=79 L. J. K. B. 989
11 Asp. M. C. 460=108 L. T. 369.

L. J.) in *Payne v British Time Recorder Co* (2) have said :

Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

The result then is that the decree of the learned Subordinate Judge cannot be allowed to stand. It is accordingly set aside and the case will now go back to the lower appellate Court so that the appeal before that Court may now be dealt with on the merits and disposed of in accordance with law.

Costs of this appeal will abide the result.

Cuming J.—I agree.

J V Case remanded.

(2) [1921] 2 K. B. 1=90 L. J. K. B. 445=37
T. L. R. 295=124 L. T. 719.

A. I. R 1928 Calcutta 94

PANTON AND MITTER, JJ.

Krishna Chandra Dutta Chowdhury—
Petitioner.

v.

Dina Nath Biswas—Opposite Party.

Civ. Revn. Nos. 952 and 953 of 1926,
Decided on 11th April 1927, from the
order of the Sub-Judge Pabna, D/- 30th
July 1926

(a) *Bengal Tenancy Act, S. 170—Applica-
tion—A portion of the holding cannot be sold in
execution*

Under S 170 attachment and sale of the
entire holding is contemplated in execution of
a decree for rent. A portion of the holding can-
not be sold in execution of a decree for rent:
3 C. W. N. 386, *Foll.* [P 95 C 2]

(b) *Civil P. C., S. 47—Objection to attachment
by purchaser of judgment-debtor's interest—
S. 47 applies.*

Objections to attachment raised by a party to
the suit in which the decree under execution
was passed or by his representative fall within
the scope of S 47. One who has purchased the
judgment-debtor's interest in his putni tenure
prior to the decree for rent obtained by the
landlord is bound by that decree and as such is
representative of the judgment-debtor within
the meaning of S. 47, Civil P. C.: 32 Cal. 1031,
Rel. [P 9, C 2, P 96 C 2]

(c) *Civil P. C., O. 21, R. 58—Objection by
third party.*

Objections to attachment raised by a third
party come under O. 21, R. 58. [P 96 C 1]

(d) *Bengal Patni Regulation—Purchase of
patni tenure—No registration of name—Zamindar's
right is not affected—Recorded tenant is
still responsible for rent.*

Until the registration of purchaser's name has

been effected the transfer does not affect the
zemindar's right, and in spite of the transfer,
the landlord may ignore the transferee and may
continue to hold the recorded tenant responsible
for the rent and other obligations imposed upon
the tenure: 15 Cal. 345, 20 W. R. 380, *Rel.*

[P 96 C 1]

Atul Chandra Gupta and *Jitendra
Kumar Sen Gupta*—for Petitioner

Krishna Kamal Moitra—for Opposite
Party.

Mitter, J.—This Rule was issued on
the opposite party to show cause why the
order of the Subordinate Judge of Pabna,
dated the 30th July 1926, refusing to
entertain the claim of the petitioners
under O. 21, R. 58, Civil P. C., should
not be set aside. The facts which have
given rise to this Rule are :

That Rai Bahadur Dinanath Biswas,
who is the opposite party to the Rule,
is the 8-annas owner of certain mehals
and he created a patni tenure in respect
of 9-annas share of his interest, treating
the 8-annas as 16-annas, in favour of the
Sanyals; that on the 22nd of Falgun,
1317 B S, the Sanyals sold the patni
tenure by registered deeds of sale to the
petitioners before this Court; that not-
withstanding notice of purchase of patni
by the petitioners, the zemindar brought
a suit for rent in respect of the said patni
against the Sanyals, who had parted with
their interest in the patni at the date of
the said suit and obtained a decree for
arrears of rent on the 7th July 1925; that
the decree-holder zemindar made three ap-
plications for execution, the last of which
was on the 1st May 1926; that in this
last application, the decree-holder, oppo-
site party, instead of applying for attach-
ment and sale of the patni tenure, under
Ch. 14, Bengal Tenancy Act, applied for
attachment and sale of only one-fourth
share of the said tenure; that the
said one-fourth share of the tenure was
attached in pursuance of the application
of the decree-holder and the petitioners
preferred a claim to the attachment of
the said share of the patni under O. 21,
R. 58, Civil P. C., before the Subordinate
Judge of Pabna.

The learned Subordinate Judge rejected
the claim holding that the claim was not
maintainable by reason of the provisions
of S. 170, Bengal Tenancy Act. It may
be mentioned here that the Subordinate
Judge arrived at this conclusion 'not
without great hesitation. In support of
this Rule, the learned advocate for the

petitioners has argued that the decision of the Subordinate Judge is wrong and that he has put a wrong interpretation under S. 170, Bengal Tenancy Act, in holding that that section applies not merely when a tenure or holding is attached in execution of a decree for arrears due thereon, but also when a portion of a tenure is attached in execution of a decree for arrears of the whole tenure. It seems to us that this contention is right. S. 170, Bengal Tenancy Act, runs as follows:

Section 278 to 283 (O. 21, Rr. 53—63) (both inclusive) of the Civil Procedure Code shall not apply to a tenure or holding attached in execution of the decree for arrears due thereon.

The words "tenure" or holding mean the whole of the tenure or holding and not part of the tenure or holding. The intention of the legislature seems to be that in order to attract the operation of S. 170, Cl. (1), not only should the decree be for arrears of rent of the tenure, but that it should be executed as a rent decree, i.e., by the attachment and sale of the entire tenure. It is true that the word "tenure" includes a portion of the tenure, but, in order to understand the meaning of the section, the general scope of the chapter in which it occurs must be taken into consideration. S. 158 B (1), which is the first section of Ch. 14, Bengal Tenancy Act, says:

Where a tenure or holding is sold in execution of a decree for arrears of rent due in respect thereof (omitting immaterial portions) the tenure of holding shall, subject to the provisions of S. 22, pass to the purchaser, if, such decree was obtained by (i) a sole landlord or (ii) the entire body of landlords, or (iii) one or more co-sharer landlords who has, or have, sued for the rent due to all the co-sharers in respect of the entire tenure or holding and made all the remaining co-sharers parties defendant to the suit.

In other words, the scheme of the chapter is that if a decree is a decree for rent, in the true sense of the term, then the entire tenure will pass in execution of such decree. Ss. 160 and 161 deal with the encumbrances which a purchaser of the entire tenure cannot avoid except under certain conditions. S. 162 says:

When a decree has been passed for an arrear of rent due for a tenure or holding, and the decree-holder applies under S. 235 [O. 21, R. 11 2] Civil P. C., for the attachment and sale of the tenure or holding in execution of the decree, he shall produce a statement showing the pargana, estate and village in which the land comprised in the tenure or holding is situate, the yearly rent payable for the same

and the total amount recoverable under the decree.

This section also shows that attachment and sale of the entire holding was contemplated in execution of a decree for rent. It does not appear from any of the provisions of the chapter that a portion of the holding could be sold in execution of a decree for rent. We think, therefore, the contention of the petitioners should prevail. The point raised, however, is not covered by authority. It should seem, however, that there are observations in the case of *Chandra Sekhar Patra v. Rani Manjhee* (1) which would indirectly lend support to the view we take. There the question arose that, where a rent decree had been obtained and the defaulting tenure was attached, whether the provisions of S. 170 could apply? The learned Judges held that S. 170 applied and made the following observations which are pertinent to the present question:

The lower Court has held that, as a matter of fact, he had attached the tenure in respect of which the arrears had been decreed. Some question has been raised before us to the effect that what was attached was not the tenure, but interest of the judgment-debtor in the land. Looking, however, at the terms of the application, we are not prepared to say that the attachment was not of the tenure itself.

From these observations one can infer that if it could be shown in that case that the interest of the judgment-debtor in the tenure and not the tenure was attached, the Court would have answered the question in the negative and would have held that S. 170 had no application to such a case. Whether I am right in drawing this inference or not from those observations, for the considerations to which I have referred as to the scope of Ch. 14, I think the Subordinate Judge's view is wrong.

Although S. 170, Bengal Tenancy Act, does not bar the entertainment of the claim in the present case, O. 21, R. 58, Civil P. C., cannot govern the present case and the petitioners are not competent to perfer an objection to the attachment under the provisions of the said Rule. The petitioners, as I shall show presently, are representatives of the judgment-debtors within the meaning of S. 47, Civil P. C., and objections to attachment raised by a party to the suit in which the decree under execution was passed or by his representative fall with-

(1) [1899] 3 C. W. N. 386.

in the scope of S. 47. Objections to attachment raised by a third party come under O. 21, R. 58.

The tenure in question is admittedly a patni tenure. By S. 3 of the Patni Regulation (8 of 1819) the tenure is capable of being transferred by sale, gift or otherwise, at the discretion of the holder, as well as answerable for his personal debts, and subject to the process of the Courts of Judicature in the same manner as other real property.

By S. 5 of the regulation, the transferee, however, is subject to the payment of fee and security to the landlord, and until the conditions mentioned in the said section are fulfilled, the landlord has a right to

refuse to register, and otherwise to give effect to such alienations, by discharging the party transferring his interest from personal responsibility, and by accepting engagements of the transferee.

It is open to the transferee to seek his remedy in the civil Court to compel the zamindar to give effect to the transfer if the security tendered is not accepted by the landlord. But until the registration of his name has been effected the transfer does not affect the zamindar's right and, in spite of the transfer, the landlord may ignore the transferee and may continue to hold the recorded tenant responsible for the rent and other obligations imposed upon the tenure. As has been pointed out by Sir Comer Petheram, C. J., in *Joykrishna Mukhopadhyaya v. Sarfannessa* (2) that until the fee (as required by S. 5) has been paid, the zamindar shall not be bound to register the transfer and further than that, until the transfer has been registered he shall not be bound to recognize the transfer in any way; that is to say, until his demand has been satisfied and the registration has been effected, the old tenant remains his tenant.

Their Lordships of the Judicial Committee in the case of *Luckhinarrain Mitter v. Khettro Pal Singh Roy* (3) laid down that until the assignment has been registered or the assignee has been accepted by the patnidar as his tenant, the assignor is not discharged from liability and such liability may be enforced by the sale of the darpatni in execution of a decree against him for the rent.

In the present case the petitioners, who have purchased the judgment-

debtor's interest prior to the decree for rent obtained by the landlord are bound by that decree and as such are representatives of the judgment-debtors 'within the meaning of S. 47, Civil P. C. This view is in consonance with the view taken by this Court in the case of *Surendra Narain Singh v. Gopi Sundari Dasi* (3). The petitioners, therefore, being representatives of the judgment-debtors, can raise objections to the attachment under S. 47 of the Code. They cannot, as we have already stated, raise objections to the attachment under O. 21, R. 58, as they cannot be said to claim the property on their own account as a third party (not being a party to the suit or his representatives) could raise. It has been suggested to us by the learned advocate for the petitioners that their application before the lower Court might be treated as one under S. 47 of the Code and dealt with as such, but we are not prepared to do that, as the objections under S. 47 might not stand on the same footing as objections to the claim under O. 21, R. 58. The former class of objection may cover other and different grounds. We, therefore, discharge the present Rule, and in doing so we observe that it will be open to the petitioners, if so advised, to raise objection to the attachment in question under S. 47, Civil P. C.

In the circumstances of the present case each party will bear his own costs.

This judgment will govern Rule No. 953 of 1926.

Let the records be sent down at once.

Panton, J.—I agree.

N.D.

Rules discharged.

(4) [1905] 32 Cal. 1031=9 C. W. N. 824.

A. I. R. 1928 Calcutta 96

C. C. GHOSE AND CAMMADE. JJ.

Akhoy Sardar—Petitioner.

v.

Lalchand Sardar and others—Opposite Party.

Cr. Revn. No. 178 of 1927, Decided on 29th April 1927, from an order of the Sub-Divl. Magistrate, Howrah, D/- 19th January 1927.

Criminal P. C., S. 133—Order without giving party opportunity to prove his claim is bad.

Where an order under S. 133 was made without the first party being required to adduce evi-

(2) [1888] 15 Cal. 345.

(3) [1878] 20 W. R. 880=13 Beng. L. R. 146 (P. C.).

dence in support of their claim, but the second party was called upon to show cause and they were required to adduce evidence in support of their denial of the right claimed by the first party :

Held : that the order was made without the first party being called upon to give evidence to prove their claim, and it cannot stand.

[P 97 C 1]

J. N. Batabyal and Indu Prokash Chatterji—for Petitioner.

Narendra Nath Chatterji—for Opposite Party.

Judgment.—It appears from an examination of the record that the order complained of was made without the first party being required to adduce evidence in support of their claim. The second party was called upon to show cause and they were required to adduce evidence in support of their denial of the right claimed by the first party. No doubt the second party did not appear to give evidence. But that did not get rid of the fact that the order complained of was made without the first party being called upon to give evidence to prove their claim.

In this view of the matter the order cannot stand and must be set aside and the rule is accordingly made absolute.

D.D. *Rule made absolute.*

A. I. R. 1928 Calcutta 97

CUMING AND GRAHAM, JJ

Carmen—Petitioner.

v.

O'Brien—Opposite Party.

Cr. Revn. No. 105 of 1927, Decided on 23rd March 1927.

(a) *Criminal P.C., Ss. 528-A and 29-A*—*Claim be tried as a European British subject must be made before trial.*

The claim to be tried as a European British subject under S. 29-A, Criminal P.C., must be made before the inquiry or trial actually begins so far as a case which falls within S. 528-A, Criminal P.C., is concerned. Not having made this claim when a person is first brought before the Magistrate for the purpose of trial or inquiry, it is not open to revive or make it at any subsequent stage. [P 99 C 1]

(b) *Criminal P.C., Ss. 528-A-D*—*Claim to be tried as European British subject.*

Magistrate is not obliged to ask the accused whether he would claim to be tried as a European British subject. [P 99 C 1]

Swinhoe, Bir Bhusan Dutt and Sudhrendra Nath Bose—for Petitioner.

S. K. Sen and Debendra Nath Bhatdohari—for Opposite Party.

Cuming, J.—The facts of the case out of which this rule arises are briefly as

follows: On 18th October the petitioner in this rule obtained a warrant against the opposite party under S. 406, I. P. C., in the Court of the Police Magistrate at Alipur. On 9th November the case was made over by the Police Magistrate, Mr. Mahmood Ali, to Mr. S. C. Gupta for disposal. Mr. S. C. Gupta is a Magistrate exercising the powers of a Magistrate of the second class. Mr. Gupta began the trial on 9th November. When he examined one prosecution witness and adjourned the case till the 10th, when three more prosecution witnesses were examined. The trial proceeded also on 22nd November, when the accused was questioned and the charge was framed. The learned Magistrate then asked the accused if he claimed trial as a European British subject. The learned Magistrate was apparently under the impression that he was obliged to ask an accused, who apparently was a European British subject, whether he claimed to be tried as such. I may point out here that such a procedure is no longer necessary, so far as a case which comes within Ch. 44-A, Criminal P.C., is concerned. The accused apparently then stated that he did not desire to be so tried. His counsel then filed a petition claiming to be tried as a European British subject. Apparently he subsequently waived this claim and stated that he desired to cross-examine the complainant next day, and his client would waive his right to be dealt with as a European British subject. The case was then continued on 24th November, when more witnesses were examined and cross-examined, and the case was continued on 25th and 27th November and 4th and 21st December. On 21st December the accused once more claimed the right to be dealt with as a European British subject. The learned Magistrate holding that he had already been asked whether he claimed this right and had waived this right, rejected the application.

The accused then asked for time to move the District Magistrate or the appellate Court for a decision on the point. This, however, was refused and the case was continued. The accused then seems to have moved the Additional District Magistrate for a transfer of the case to the file of a 1st Class Magistrate, the contention of the accused being that as a European British subject under S. 29-A, Criminal P.C., he was entitled to be tried

by a Magistrate of the 1st Class. The complainant, opposite party, contended before Mr. Blair, the Additional District Magistrate, that as the accused had waived his right to be so tried he could not now re-assert it. Mr. Blair, however, held that the right might be exercised by the accused any time up to the time when the Court was going to pass judgment in the case. He further held that it was open to him to revive his claim even though he specifically abandoned it. In this view of the law he withdrew the case from the file of Mr. S. C. Gupta and made it over to Mr. Alfred Bose, a Magistrate exercising first class powers.

The complainant has moved this Court, and she contends first of all that the claim to be dealt with as a European British subject, in other words, in this particular case, that the case should be heard by a 1st Class Magistrate, must be made before the trial actually began; and secondly she contends that once the accused has waived his right to be dealt with as a European British subject or, in other words, to have his case tried by a Magistrate of first class powers, he cannot revive his right.

The rule has been granted on four grounds, first that the learned Additional District Magistrate is wrong in holding that the claim to be tried as a European British subject, in a case contemplated by Ss 29-A, 528-A and 528-B, Criminal P. C., could be made at any time before judgment is delivered; secondly, that the learned Additional District Magistrate acted without jurisdiction in using the provisions of S 528, Criminal P. C., for the purpose of getting over an order which under the Code he could not do before the final orders in the case were passed; thirdly, that the learned Additional District Magistrate should have held that a claim to be tried as a European British subject, under Ss 29-A, 528-A and 528-B, Criminal P. C., had to be made at the very beginning of the trial, and if the claim so made was disallowed by the trial Court the remedy against the order disallowing the claim lay before the Court which would hear the appeal after a conviction or other order in the said case had been passed; and lastly, that the accused having once waived his right, the learned Additional District Magistrate should have held that the accused having

once waived his right could not re-assert it in a later stage of the same case.

The decision of this rule turns upon the interpretation to be put upon Ss 528-A and 528-B, Criminal P. C. These sections are new, and hitherto have not formed the subject matter of judicial interpretation. Hence the question may be considered as one of more or less of first impression. S 29-A provides that no Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is a European British subject who claims to be tried as such.

The point is, as I have already said, when that claim is to be made. S. 528-A provides that

where, in any case to which the provisions of Ch. 33 do not apply, any person claims to be dealt with as a European or Indian British subject, or where any person claims to be dealt with as a European (other than a European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial and such Magistrate shall inquire into the truth of such statement.

Mr Swinhoe, who has argued this case on behalf of the petitioner, has contended that these words make it quite clear that the accused must exercise his option to claim the privilege under S 29-A, Criminal P. C. before the trial actually commenced. Mr. Sen, who has appeared for the opposite party, on the other hand contends, looking at the analogy of S. 451-A, that the accused may apply at any time before the judgment is pronounced by the Magistrate. He points out that under the old Code, under S. 451-A, privilege might be claimed in a summons case at any time before the accused was heard in defence or in a warrant case before he entered on his defence, and the learned counsel's argument is that, as no such limitations are put down in the present S. 528-A, the legislature intended that the privilege might be claimed at any time before the judgment is pronounced.

Apart from the manifest inconvenience which must follow, if Mr. Sen's contention is correct, I think it is quite clear, reading the sections as we have them, that the legislature intended that the claim should be made before the trial or inquiry actually commenced. The words used are:

He shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial.

I understand these words to mean that he should make his claim as soon as he is brought before the Magistrate for the inquiry or trial, that is to say, before the inquiry or trial is commenced. Mr. Sen argues from S. 528-B, that the claim may be made at any time during the trial, because we find in that section the following expression :

If in any such case a European or Indian British subject or a European (other than a European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed,

and Mr. Sen argues from that that the claim may be made at any time during the trial before the Magistrate. I do not think that these words really support Mr. Sen's contention. I am inclined to think, reading the section as a whole, that these words refer to the case of a person who has been tried or whose case has been inquired into, but who has not claimed the privilege S. 528-B deals, I think, with the case of a person whose case has reached either the appellate stage or the trial in the Court to which he has been committed.

I do not think that any useful purpose will be served by considering the sections as they stood in the various Acts at various times. The sections are, I think, by themselves reasonably clear. There is no doubt that the claim must be made before the inquiry or trial actually begins so far as a case which falls within Ch. 44-A, is concerned.

That being so, it is unnecessary for us to determine whether the accused, having once waived his right to so claim, can revive that claim and be ordered to be tried as a European British subject. In the present case, not having made his claim when he was first brought before the Magistrate for the purpose of trial or inquiry, it was not open to revive or make it at any subsequent stage. In this case admittedly he made no claim at that stage.

The rule is, therefore, made absolute. The order of the learned Additional District Magistrate is set aside, and the case will be re-transferred to the file of Mr. S. C. Gupta to be continued from that point where the learned Magistrate left off the trial of the case, and the case disposed of without any further delay.

Graham, J.—I agree with my learned brother. One of the points for decision

is as to the stage when the claim to be dealt with as a European British subject should be made. The learned counsel on behalf of the opposite party argued that that claim could be made at any time up to the delivery of judgment, and in support of his argument referred to the previous history of the Criminal Procedure Code and to certain authorities.

It appears to me that, unless the sections of the Code as it now stands are held to be obscure, we should not be justified in referring to the previous legislation. In my opinion on a proper construction of the sections of the Code, as it now stands, and in particular Ss. 528-A, and 528-B, it seems to be clear that the intention is that the claim shall be made at the commencement of the inquiry or trial as the case may be, and that if it is not then made, it cannot be asserted at any subsequent stage. The question of status involves the mode or venue of trial, and it is in accordance with the fitness of things that the claim should be made at the outset.

The authorities to which reference has been made relate to the former Code and in particular to S. 451, of the old Criminal P. C. which has now been repealed. They do not, therefore, give us any assistance.

In my judgment there was a failure in this case to make the claim at the time contemplated by the Code, possibly due to the fact that the provisions of the new Code on the subject were not at the time appreciated.

I concur in the order which my learned brother proposes to make, and agree that the rule should be made absolute.

N D.

Rule made absolute.

* A I. R. 1928 Calcutta 99

PAGE, J.

Bejoy Lal Seal and others—Plaintiffs.

v

Benarasidas Khandelwal and others—Defendants.

Original Civil Suit No 283 of 1924,
Decided on 14th April 1927.

* *Lease*—Allowing sub-letting but prohibiting assignment—Assignment means parting with interest completely.

A let the premises to B for 61 years; under the lease, lessee was entitled to sub-let but not to assign his rights in any other way. B mortgaged the said lease by way of sub-demise

to *C* whereupon *A* informed *B* that he regarded the lease having determined by reason of the execution of the mortgage which was alleged to be a breach of a covenant in the lease against assignment and *A* continued to receive rent from *B* who subsequently became insolvent.

Held that although for certain purposes a sub-demise of a term without the reservation of any part of the residue thereof is treated as an assignment of the term, assignment means parting with absolutely and, as there was no parting with possession absolutely on the part of the lessee, the execution of the mortgage by lessee did not work forfeiture *Beardman v. Wilson*, (1868) 4 C. P. 57 and *Russell v. Beecham*, (1924) 1 K. B. 525, *Foll.* [P 100 C 1, P 101 C 1]

S N Banerjee and *A K. Ray*—for Plaintiffs

S C Bose, *S. C. Mitter*, *D. N. Basu* and *S. N Banerjee (Jr)*—for Defendants

Judgment—On 23rd August 1910 the predecessor-in-title of the plaintiffs let the premises in suit, now known as No 7-2, Halliday Street, Central Avenue, Calcutta, to the predecessor of defendants 1 and 2 for a term of 61 years. On 7th May 1923 defendants 1 and 3 mortgaged the said lease by way of sub-demise to defendant 3. On 20th August 1923 the plaintiff through his solicitors informed the defendants that he regarded the lease of 23rd August 1910 as having been determined by reason of the execution of the mortgage of 7th May 1923, which he alleged operated as a breach of the sixth covenant in the lease to be performed by the lessees. On 30th June 1925 defendants 1 and 2 became insolvent, and subsequently, pursuant to an order of Court, the official assignee in the Court of the Judicial Commissioner of Sind was added as a party defendant.

Two defences have been raised by defendants, one involving an issue of fact, the other an issue of law. The issue of fact is whether by the acceptance of rent, after the plaintiffs had become aware of the mortgage, the forfeiture (if any) was waived. The issue of law is whether, having regard to the terms of the lease and the mortgage, and in particular the fifth and sixth covenants in the lease and Cl. 3 of the mortgage, a forfeiture of the lease took place.

The fifth covenant by the lessee is to the following effect:

5th. That the said lessee shall be at liberty or shall have the full power and authority without having recourse to previously securing to that effect the consent of the said lessor, written or verbal, to underlet the said demised land and the buildings, structures, sheds, godowns,

stables or any portion thereof to be so erected and built by them as aforesaid.

6th. The said lessees shall have no power, save amongst themselves as hereafter mentioned to assign transfer or in any way to alienate their right, title and interest in the demised land and the buildings so to be erected by them thereon as aforesaid created by virtue of these presents.

Clause 3 of the mortgage runs as follows:

3. In further pursuance of the said agreement and for the consideration aforesaid the mortgagors do hereby demise and sub-let unto the mortgagee all the hereditaments and premises comprised in and demised by the said lease and more fully described in Sch. A hereunder written (which is valued at Rs. 10,000) and covenant to hold the same unto the mortgagee for the unexpired residue of the term of 61 years granted by the said lease subject to the proviso that this sub-lease shall terminate forthwith as and when the amount of money advanced by the mortgagee shall be repaid with interest hereinbefore mentioned and all costs as between attorney and clients and all dues for the time being as hereinbefore and hereinafter mentioned either by the mortgagors personally or by realization of rents and profits by the mortgagee himself and from the tenants now occupying or those who will occupy in future less the expenses and costs of realization and all other payments to be incurred and paid in connexion therewith.

In the mortgage it is further provided:

That if the mortgagors shall repay to the mortgagee all principal moneys interest and costs charges and expenses as aforesaid on the days and in the manner aforesaid or in the event of the principal money with interest thereon having fully been reimbursed through the rent profits and income of the premises then and in such case the mortgaged premises and the premises sub-let shall at any time thereafter at the request and cost of the mortgagors be respectively reconveyed or surrendered to them or their respective heirs, administrators and assigns or as they may direct.

Now, the danger into which one is tempted to fall in construing these documents, I think, is that one is prone to regard them in the light of the events that have occurred. It so happens that the lessees who became the mortgagors are now insolvent, and the lessors are experiencing great difficulty in obtaining payment of their rent. The official assignee, although, as I am informed, he has not disclaimed the lease, has not filed a written statement, the reason being that it would probably not be worth the creditors while to contest the suit having regard to the mortgage.

I conceive it to be my duty, however, to construe these documents, not in the light of the knowledge that I now possess—for it is easy to be wise after the event—but having regard to the cir-

circumstances that existed at the time when they were executed

It is admitted by learned counsel for the defendants that the effect of Cl. 3 of the mortgage was to create a mortgage by way of sub-demise of the whole of the term created under the lease, and it is further conceded that for certain purposes a sub-demise of a term without the reservation of any part of the residue thereof is treated as an assignment of the term: *Beardman v. Wilson* (1).

Therefore, for purposes such as creating privity of estate between the lessor and the under-lessee, or liability to pay rent, or to perform covenants running with the land, Cl. 3 of the mortgage is to be regarded as an assignment of the term. That, however, does not conclude the matter in favour of the plaintiffs, for the question that I have to consider is a very different one, namely, whether Cl. 3 amounted to a breach of the sixth covenant by the lessee. In other words, was the effect of the mortgage that the lessees, assigned, transferred, or in any way alienated their right, title and interest in the demised land and buildings, and that the lease for that reason became liable to forfeiture.

As I construe the fifth and sixth covenants of the lease it was contemplated that the lessees should be entitled to under-let, and by way of under letting to part with the possession of the demised premises and the buildings thereon if they were so minded; and it is conceded that if under Cl. 3 of the mortgage one single day at the end of the term created by the lease had been excluded from the term created by the sub-demise, no forfeiture would have occurred. Nevertheless, the plaintiffs are entitled to insist upon their legal rights.

I do not think that it was the intention of the parties to the lease of 23rd August 1910, however, that a transaction in which the term was mortgaged, whether the mortgage was a legal or equitable one, should work a forfeiture under the sixth covenant in the lease. The Court leans against forfeitures, and, in my opinion, the principle of law to be applied is that laid down by Abbott, C. J., and Bayley, J., in *Doe v Hogg* (2). In the course of his judgment Bayley, J. observed:

(1) [1868] 4 C. P. 57=38 L. J. C. P. 91=19 L. T. 282=17 W. R. 54.

(2) [1824] 4 D. & R. 226=1 Car. & P. 160=2 L. J. (O. S.) K. B. 121.

The question in *Crusoe v. Bugby* (3) was whether the fact of the lessee having granted an under-lease of the premises worked a forfeiture, and the Court said that the Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them... The lessee has only deposited the lease as a security, which it was competent for him to do. There is no 'parting with the legal interest' within the meaning of the covenant, because the lessee might at any time redeem the indenture by paying off the encumbrance upon it.

In *Russell v. Beeccham* (4) the principle laid down in *Doe v. Hogg* (2) was followed and applied by the Court of Appeal in England, and in that case their Lordships observed that the authorities have decided that "assign" means "part with absolutely"

Applying the principles enunciated in those cases to the fifth and sixth covenants in the lease, in my opinion the parties intended and agreed that by way of sub-demise or otherwise the lessee should be entitled to part with possession of the land and premises demised, so long as they did not absolutely transfer the whole of their right, title and interest therein.

In my opinion, it cannot reasonably be contended that under the mortgage of 7th May 1923 the lessees parted absolutely with the whole of their right, title and interest in the said premises. I need not enumerate or discuss the several clauses of the mortgage, but it appears to me to be clear that the execution of the mortgage was not a breach of the sixth covenant; and I cannot bring myself to believe, upon a true construction of the sixth covenant in the lease, that it was intended or agreed by the parties thereto that where the term was mortgaged as security for a loan in such a way that upon re-payment the term should be surrendered to the mortgagors, the mortgage should operate as a forfeiture of the lease.

In my opinion, what really has happened is that the lessors, finding that the lessees have become insolvent, are now attempting to take advantage of the ruling that a sub-demise of the whole of the term of a lease for certain purposes operates as an assignment in order to regain possession of the premises that they had demised in 1910 for 61 years.

In my opinion, upon a true construction of these documents, this attempt must

(3) [1771] W. Bl. 766=3 Wils. 234.

(4) [1924] 1 K. B. 525.

fail, and the suit will be dismissed with costs on scale No. 2, including the costs of the original defendant Lala Raghumull, which will be paid to the executors who have been substituted as defendants in his stead

As my decision upon the construction of the document is in favour of the defendants, it becomes unnecessary to determine the issue of fact as to whether or not after the forfeiture occurred it was waived by the lessors, nor do I determine whether, having regard to the state of the pleadings, it was open to the defendants to raise the issue of waiver

N D.

Appeal dismissed

A. I. R. 1928 Calcutta 102

PAGE AND GRAHAM, JJ

Jatindra Nath Mukerjee and others—
Petitioners—Appellants

v.

*Suradhani Debi and another—*Respondents

Appeals Nos 1 and 58 of 1927, Decided on 20th July 1927, from the original orders of the Addl Dist Judge, Howrah, D/- 13th December 1926.

Civil P. C., O. 17, R. 1—Application for adjournment should not be summarily disposed of.

An application made by a party for an adjournment of a case on the ground that he was very ill and unable to attend should not be summarily disposed of without giving the applicant an opportunity of substantiating his application. [P 102 C 2]

Rupendra Kumar Mitter, Jyotindra Nath Batabyal and Dharmadas Set—for Appellants

S C Bysack and Kalyan Kumar Das Gupta—for Respondents

Page, J.—These appeals are against the two orders of the learned Additional District Judge of Howrah, dated the 13th December 1926. Two appeals had been preferred to the learned Additional District Judge from an order of the learned Munsif of Howrah, dismissing certain objections by the appellant to the recording of a solenama and dismissing an application by the appellant to set aside the confirmation of a sale under O 21, R 92. On the 2nd December 1926, when the appeals were fixed for hearing, the appellant was ill, and the appeals were dismissed under O 41, R 17. Thereupon, the appellant preferred an applica-

tion under O 41, R 19, for the purpose of obtaining the re-admission of each of these appeals. On the 13th December the appellant filed a petition stating that he was suffering from malaria and kala-azar and was too ill to attend, and prayed for an adjournment and there was already upon the file the certificate of a medical gentleman to the effect that he was suffering from malaria, and was very ill and unable to attend. Now, if it had been the fact that the learned District Judge had considered the matter upon the merits and had come to the conclusion that there were really nothing before him upon which he could reasonably act, I should have been slow to interfere with his order; but from the language which he used in his orders, passed on the 2nd December and on the 13th December, I think that the learned Additional District Judge acted in too summary a fashion. The conclusion at which I arrive is that he was not disposed to hear applications for postponements on account of illness on that day at all. That, as he himself stated, 95 per cent of the appeals were alleged not to be ready because of illness, and the conclusion at which I have arrived is that the learned Additional District Judge acted too summarily in the matter. What he ought to have done was to have given the appellant an opportunity of substantiating his application. Instead of that I collect from the orders themselves that he summarily disposed of the matter upon the ground that there were too many applications for adjournment on the score of illness.

For these reasons I think that the order cannot stand, and that the cases should be sent back to the learned Additional District Judge of Howrah in order that he shall consider the application of the appellant in each case which he has filed under O 41, R 19, and otherwise dispose of the appeals according to law, Costs will abide the event, the hearing-fee being assessed at two gold mohurs in each case.

Graham, J.—I agree that the orders cannot be supported and that the appeals must be allowed.

N D.

Appeals allowed

A. I. R. 1928 Calcutta 103

B. B GHOSE AND ROY, JJ.

Mahoruddi Sheikh—Plaintiff—Appellant.

v.

Safed Ali Khalifa and others—Defendants—Respondents.

Appeal No 457 of 1925, Decided on 18th July 1927, from the appellate decree of Addl Dist Judge, Khulna, D/- 11th December 1924

Landlord and Tenant—Tenant agreeing to pay rent to superior landlord but making default in payment—Superior landlord obtaining decree and selling the lessor's right in execution—Tenant purchasing them does not acquire independent title to himself.

Where the tenant holding land under a landlord on condition to pay rent to superior landlord made a default in payment of the rent, upon which the superior landlord obtained ex-parte decree in a rent suit and in its execution sold the lessor's right which was again purchased by the tenant:

Held. that the tenant constituted himself as a trustee for the landlord and did not acquire an independent title. [P 103 C 2]

Abinash Chandra Guha and Bhupendra Nath Das—for Appellant

Jadunath Kanjilal and Subodh Chandra Datt—for Respondents

Judgment.—This is an appeal by the plaintiff against a decree of the Additional District Judge of Khulna reversing the decision of the Munsif of Bagerhat. The suit out of which this appeal arises was for a declaration that the title of the plaintiff and the pro-forma defendant 9 to the property in suit has not been affected by a rent sale held in April 1921.

The facts are these: The plaintiff as well as defendant 9 were the owners of two nim howlas. These nim howlas were let out in ijara by the owners by a deed, dated 29th Jaishta 1319, by which the father of defendant 7 named Rahimulla Akan was granted a lease for eight years of these tenures which was to end in Chaitra 1326. Rahimulla sold his pattai right to defendant 1 by a kobala dated 1st Asar 1319, (Ex 3). It is evident that by virtue of his purchase defendant 1 went into possession and paid rent to the superior landlords for two years. There was a condition in the patta of Rahimulla that he would pay the rent due to the superior landlords on behalf of his lessors, the plaintiff and defendant 9, on account of the two nim howlas. Defendant 1, as already stated, paid rent for two

years of his purchase of the ijara right; but he defaulted in the payment of rent for the years 1321 to 1324. Thereupon, the landlords brought two rent suits against their tenants, that is, the plaintiff and defendant 9, and obtained two ex-parte rent decrees. In execution of those decrees the nim howlas were sold and they were purchased by defendant 1 himself. After the sale, the present plaintiffs presented an application for setting it aside on the ground of irregularity and other matters which fall within O 21, R. 90, Civil P C. That application was rejected.

After failing to have the sale set aside, the plaintiff has brought this present suit for a declaration that his right as well as that of defendant 9 in the nim howlas have not been affected by the auction sale. The plaintiff alleged that after the expiry of the ijara in 1326, he and his co-sharers got into possession of the property and they are still in possession. Defendant 1 denied his purchase of the ijara right from Rahimulla, or that he was under an obligation to pay the rent due to the superior landlords on behalf of the plaintiff and his co-sharers. The learned Munsif decided the facts in favour of the plaintiff. He held upon the evidence adduced, not only by the plaintiff but also by defendant 1 himself, that defendant 1 did actually purchase the ijara interest of Rahimulla which he had got from the plaintiff and his co-sharer. He also found that defendant 1 was under an obligation to pay the rent to the superior landlords on behalf of his vendor's lessors and, as a matter of fact, he did pay the rent for two years. Afterwards he made default as alleged by the plaintiff and purchased the property himself at the execution sale.

Upon these findings, the Munsif came to the conclusion that defendant 1 constituted himself as a trustee for the plaintiff and his co-sharer with regard to the property purchased by him and had acquired no independent title himself. This view of the law can hardly be contested, because defendant 1 being under an obligation to pay the rent of the superior landlords cannot acquire a right in himself by making default in the discharge of his own obligation. The Munsif also found that although defendant 1 by virtue of his purchase took symbolical possession, the actual possession of the

tenures in question is with the plaintiff and his cosharers and he discusses the evidence in detail leading to that conclusion. He, therefore, made a decree in favour of the plaintiff and declared the *nim* howla rights of the plaintiff and the pro-forma defendant 9 in the lands in suit and he further declared that their title was unaffected by the auction-purchase of the defendant 1. Defendant 1 appealed against that decree. The Additional District Judge has reversed the decision of the Munsif solely upon the ground that this suit is not maintainable as it amounts to what is prohibited by the Civil Procedure Code, that is to say, a suit under O 21, R. 92, sub-R (3) which provides that no suit to set aside an order made under R 92 shall be brought by any person against whom such order is made. The Additional District Judge seems to us to be clearly in error in so holding.

The purpose of an application under O 21, R 90 is quite different. In the present suit, no decree can be made setting aside the sale for any irregularity or on any other ground mentioned in O. 21, R. 90, Civil P. C. The present suit proceeds rather upon the ground that the sale is a good one, but defendant 1 holds the property for the benefit of his lessors and so far as the plaintiff and his cosharers on the one hand and defendant 1 on the other are concerned, the title to the property remains unaffected. It is quit true that the proper prayer in this case should have been to ask that defendant 1 be directed to execute a conveyance of the property in favour of the plaintiff and his cosharers. But under the circumstance that defendant 1 has not been able to get into possession and the tenures are actually in the possession of the plaintiff and his cosharers, no serious harm has been done for the prayer in the plaint not having been made in the proper form. The learned Judge, however, did not find the facts in the case, that is to say, he did not determine the issues whether defendant 1 made default in payment of the rent to the superior landlord while under an obligation to pay it by reason of the covenant in the *ijara patta*, and whether he had actually purchased the *ijara* interest of Rahimulla. We have been led through the evidence by the learned advocate on behalf of defendant 1 and we

are satisfied that the estimate of the evidence by the Munsif is quite correct and the facts found by him which have not been upset by the District Judge are unassailable. There is only one passage in the Munsif's judgment with which we are unable to agree, that is, where he speaks about the mortgage-decree obtained by defendant 2, who is the son of defendant 1 against defendant 9 and his daughters in mortgage suit No 256 of 1920. The learned Munsif's view that the mortgage-decree has been wiped out by the rent sale is erroneous and it was absolutely unnecessary for him to express that opinion in the present case. The view with regard to the main question decided by the Munsif is accepted by us.

The result is that the judgment and decree of the lower appellate Court are set aside and that of the Munsif restored with this modification that defendant 1 alone will be liable for costs in all the Courts.

S D

Appeal allowed.

A. I R. 1928 Calcutta 104

RANKIN, C J., AND MITTER, J

Mohesh Chandra Chakraborty and others—Appellants

v.

Hemendra Nath Sen Chowdhury and another—Respondents

Appeal No 3 of 1925, Decided on 24th June 1927, from appellate decree of the Sub-Judge, 3rd Court, Mymensingh, D/- 28th June 1924

(a) *Limitation Act, Art. 142—Waste land—Possession presumed to follow title—No dispossession beyond twelve years of suit—No question of limitation arises.*

Possession in respect of waste lands is presumed to follow title and in the absence of any finding as to entry by some other person on these lands beyond twelve years of suit no question of limitation can arise. There is no dispossession or discontinuance of possession, unless one person's possession terminates and is followed up by somebody else's possession [P 105 C 2, P 106 C 1]

(b) *Landlord and tenant—Question of bona fides of settlement depends on whether it was taken from person actually in possession.*

The principle of the Full Bench decision in 20 Cal. 708 only applies where raiyats are settled upon land by a person in de facto possession as landlord who is afterwards found to have no title. It is not applicable to every boundary dispute or in every case where a question of parcel or no parcel arises. The ques-

tion as to whether a settlement is bona fide or not depends on the circumstances as to whether the settlement was taken from a person who, although was ultimately found to have no title, was at any rate in actual possession of the lands in suit. [P 106 C 6]

Sarat Chunder Bose and Rangati Sarakar—for Appellants

Surendra Nath Guha and Nuruddin Ahmed—for Respondents

Mitter, J—This is an appeal from a decision of the Subordinate Judge of Mymensingh, dated the 28th June 1924, which reversed a judgment and decree of the Munsif of Tangail, dated 12th February 1923. The appeal arises out of a suit commenced by the plaintiffs, now respondents, for a declaration of the plaintiff's zemindari right to the disputed lands and for recovery of khas possession. The case as stated in the plaint is that the suit lands were formerly waste lands and appertained to plaintiff's zemindari mouza Garaki and they were subsequently settled with the pro-forma defendants who possessed them and that sometime after the settlement defendants 1 and 2, now appellants, brought a suit against the pro-forma defendants for establishment of title to and for khas possession of the lands now in dispute.

The pro forma defendants contested the suit but ultimately they could not continue their defence with the result that defendants 1 and 2, now appellants, obtained an ex-parte decree and in execution of that decree took khas possession of the lands now in suit. This gave rise to the cause of action in the present suit. The defence of defendants 1 and 2 was that the suit lands appertained not to plaintiff's mouza Garaki but to mouza Baradam of the pro-forma defendants. There was a local investigation and after trial the Munsif dismissed the plaintiff's suit holding that the lands appertained not to plaintiff's mouza Garaki but to mouza Baradam. The Munsif also held that the defendants being settled raiyats of Baradam acquired occupancy right to the disputed lands and could not in any event be evicted.

An appeal was carried by the plaintiffs to the Court of the Subordinate Judge of Mymensingh. The learned Subordinate Judge held on a consideration of the evidence that the lands in dispute fell within the plaintiff's mouza Garaki. He also held that the plaintiffs had been in possession of the disputed lands with-

in twelve years of suit and that the defendant's possession for a period short of twelve years did not give them any right to resist the suit for possession commenced by the plaintiffs. The Subordinate Judge accordingly allowed the appeal and decreed the plaintiff's suit in part for 3 bighas 19 cottas and 2 chataks of the disputed lands which according to the commissioner's report and map fell within the plaintiff's mouza.

Defendants 1 and 2 have, as I already said, preferred a second appeal and three points have been taken before us by the learned advocate for the appellants. It is said in the first place that the lower appellate Court was not right in not entering into the question of limitation and in not deciding on the same. It is said in the second place that in any event the defendants having taken possession of the lands from a trespasser under the bona fide belief that the said trespasser had right to these lands, were protected from eviction by reason of the principle of the decision in the Full Bench case of *Binode Lal Pakrash v. Kalu Pramanik* (1). The third ground which related to the question of plaintiff's title to the suit lands was not ultimately pressed. It is now conceded on behalf of the appellants that the finding that a portion of the lands in suit (3 bighas 19 cottas 2 chataks) belongs to plaintiff's mouza Garaki cannot be challenged in second appeal.

We have now to consider the two grounds which were urged by the learned advocate for the appellants. With regard to the question of limitation the finding is that according to the defendant's own case they took settlement in the year 1316 corresponding to the English year 1909 and the suit was commenced in 1921 within twelve years of that date. Reliance has been placed with regard to this point on an entry in the settlement record, which shows that in any event the defendant's lessor was in possession in 1314 corresponding to the English year 1911. The possession was also within twelve years of the suit. The lands are waste lands and if title has been found with the plaintiffs possession in respect of these lands must be presumed to follow title and in the absence of any finding as to entry by some other persons on these lands beyond

(1) [1893] 20 Cal. 708 (F. B.).

twelve years of suit no question of limitation can arise. There is no dispossession or discontinuance of possession, unless one person's possession terminates and is followed up by somebody else's possession. It is not defendant's case that any body else was in possession beyond twelve years of suit and defendant's possession on his own case began in 1909/1316 within twelve years of suit. There is, therefore, no substance in the first ground urged.

With regard to the second ground taken, the finding of the lower appellate Court is that the entry of the defendants was not in good faith as the lessor was not in actual possession of the lands. This circumstance distinguishes the present case from the Full Bench case of *Binod Lal Pakrashī v Kalu Pramanik* (1). As will appear from the judgment of Sir Comer Petheram, C. J., in that case the persons from whom the tenants took the settlement were in actual possession of the zamindari within which the lands in dispute in that suit were situated and who were then the only persons who could give possession of the lands of the zamindari to the cultivators. One of the reasons of the decision in that case was that the tenant took settlement bona fide from the person who was in actual possession of the lands, which were ultimately ascertained by judgment of a Court of law not to belong to them. In this connexion the decision in the case of *Tepu Mahammad v Tefayet Mahammad* (2) might be referred to where Richardson, J., in delivering judgment of the Court said as follows :

Where a person has been in possession of particular estate or a particular portion of an estate as de facto landlord, it may be that raiyats settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far,

and again the learned Judge said :

No case is made, therefore, for the application of the principle of the Full Bench decision. That principle only applies where raiyats are settled upon land by a person in de facto possession as landlord who is afterwards found to have no title. It is not applicable to every boundary dispute or in every case where a question of parcel or no parcel arises.

The question as to whether a settlement is bona fide or not depends on the circumstance as to whether the settle-

ment was taken from a person who although was ultimately found to have no title, was at any rate in actual possession of the lands in suit. This distinguishes the present case from the Full Bench case. There is, therefore, no substance in the second ground urged. The appeal, therefore, fails and is dismissed with costs.

Rankin, C. J.—I agree.

N D

Appeal dismissed

A I R. 1928 Calcutta 106

PAGE AND GRAHAM, JJ.

Maharaj Bahadur Singh of Baluchar, District Murshidabad—Defendant—Appellant

v.

Sm Achala Bala Devi and others—Plaintiffs and Pro-forma Defendants—Respondents.

Appeal No 942 of 1925, Decided on 20th July 1927, from the appellate decree of the Dist-Judge, Murshidabad, D/- 26th January 1925.

Limitation Act, Arts. 29, 36, 48 and 49—Suit for value of crops wrongfully attached, cut and removed—Case comes under Arts. 48 or 49 and not 29 or 36.

In the case of a suit for damages representing the value of crops which has been wrongfully attached, cut and removed, the pertinent articles are 48 and 49 and not 29 or 36, Limitation Act. [P 107 C 1]

Neresh Chandra Sen Gupta and Urukram Das Chakravarti—for Appellant

Charu Chandra Sen and Ramani Mohan Banerjee—for Respondents.

Page, J.—This is an appeal from a decree of the learned District Judge of Murshidabad affirming a decree of the learned Munsif of Jangipur. The material facts are as follows : The appellant brought a suit and obtained a decree, and in execution of that decree attached certain standing crops. The respondent claimed that the land and the crops standing upon it belonged to her and on 25th January 1919 her claim was upheld. Meanwhile, notwithstanding the claim which had been presented by the respondent, the sale was held in execution of the decree, and the standing crops were sold to a servant of the appellant. The day after the respondent had vindicated her right to the crops and had obtained an order that the crops belonged to her

the appellant himself or by his agents came upon the land, cut the crops, took them away, and subsequently took possession of the proceeds of the sale. Thereupon, within three years of the decision in the claim case the plaintiff brought the present suit against the appellant and two of his servants in whose name the standing crops had been purchased for damages representing the value of the crops which had been cut and removed by the appellant, and she obtained a decree in both the lower Courts. The learned advocate who appeared for the appellant, if I may say so, had most skilfully endeavoured to obtain the reversal of these decrees upon the ground of limitation. He does not contend in second appeal, and it is not open to him to contend that the crops standing or cut did not belong to the respondent, but he claims that if the claim is to recover the crops upon the footing that they were immovable properties the plaintiff's cause of action is barred by Art. 36, Limitation Act, and if they are moveable properties it is barred by Art. 29, Limitation Act. I do not agree with him. In my opinion, this case is governed by either Art. 48 or 49, and Jenkins, C. J., in the case of *Jadu Nath v. Hari Kar* (1) distinguished the case (upon which the appellant relies) of *Hari Chanan Fadkar v. Hari Kar* (2), upon the ground that in the latter case the decision proceeded upon the footing that there is nothing to show that they (the standing crops) were cut when the distress was effected, whereas in the case before him there is a distinct finding by the Munsif that the crops had been cut and being so cut were removed by the defendant.

In the present case, the finding of both Courts is that the very next day after the claim case was decided in favour of the respondent the defendant and his agents came upon the land and cut and removed the standing crops. I agree with the decision of the learned District Judge that the present case is governed by the case of *Jadu Nath Dandapat v. Hari Kar* (1) with the result that the appeal will be dismissed with costs.

Graham, J.—I agree.

S D.

Appeal dismissed.

A. I. R. 1928 Calcutta 107

PAGE AND GRAHAM, JJ.

Barsik Nandi Mandal and another—
Defendants—Appellants.

v

*Gurudas Pal and others—*Plaintiffs—
Respondents.

Appeal No 970 of 1925, Decided on 3rd August 1927, from appellate decree of the Sub-Judge, Murshidabad, D/- 13th February 1925.

Registration Act, S. 17—Document purporting to assign mortgagor's right and interest in the immovable property under mortgage not registered—Mortgagee cannot sue mortgagor for possession on the document.

The document by which the mortgagor assigns all his right and interest in the immovable property subject to the mortgage in consideration of the mortgagee forgoing his right to recover the mortgage-debt and the interest thereon exceeding Rs. 100 must necessarily be registered under S. 17, Registration Act; and if it is not registered it is not permissible for the mortgagee to rely upon that document for the purpose of founding his claim for possession against the mortgagor. [P 108 C 1]

*Jagat Chandra Bose and Sekhar Kumar Bose—*for Appellants.

*Hemendra Chandra Sen—*for Respondents

Judgment—This suit is brought to recover khas possession of certain land on declaration of the plaintiff's title thereto. The lower appellate Court has passed a decree in favour of the plaintiff in respect of one only of the plots of land in dispute. Now, the plaintiff seeks to recover khas possession. He was a mortgagee of the property in suit and the mortgage-debt and the interest thereon at all material times exceeded Rs. 100 and it has been found as a fact by the lower appellate Court that the value of the mortgaged property was not Rs. 100. In his capacity as a mortgagee the plaintiff is not entitled to immediate khas possession of the property. But in support of his claim to khas possession he tendered in evidence a document in the following manner:

Being unable to pay up the mortgage debt, principal and interest I give up the right and possession of the properties mortgaged to the mortgagee and by so doing I am absolved from the liability of the mortgage debt.

That document was not registered, but it was the foundation of the plaintiff's claim to possession in the suit.

The only issue which need be considered upon this appeal is whether or not

(1) [1913] 17 C. W. N. 308=18 I. C. 258=17 C. L. J. 206.

(2) [1905] 32 Cal. 459=9 C. W. N. 376.

it was incumbent upon the plaintiff to prove that this document had been duly registered before it became admissible in evidence for the purpose of proving his title to khas possession. The document was in Bengali, but as we apprehend the meaning of the document, (it has been translated into English) we think that the effect of the document was that the mortgagor assigned all his right and interest in the immovable property subject to the mortgage in consideration of the mortgagee forgoing his right to recover the mortgage-debt and the interest thereon. In our opinion, a document of that description must necessarily be registered under S. 17, Registration Act, and if it was not registered it was not permissible for the plaintiff to rely upon that document for the purpose of founding his claim in the suit. The result is that this document was not admissible in evidence and the plaintiff's claim to khas possession of the one plot for which the decree was passed in the lower appellate Court must fail.

The result is that the appeal is allowed, the decree appealed against set aside and the suit dismissed with costs in all Courts.

The cross-objection is not pressed and is dismissed without costs

N D *Appeal allowed ;
Cross-appeal dismissed*

A I. R. 1928 Calcutta 103

MUKERJI AND ROY, JJ

Dwarkan Math Chakrabarti Chowdhury
—Plaintiff—Appellant

v

Atul Chandra Chakrabarti Chowdhury
and others—Defendants—Respondents

Appeal No 50 of 1926 and Civil Revision No 364 of 1926, Decided on 14th April 1927, from the original decree of the 2nd Sub-Judge, Mymensingh, D/- 2nd January 1926.

(a) *Civil P. C., S. 96 (3)*—*Nature of compromise in dispute—Appeal lies.*

Roy, J.—Where the dispute is over the nature of a compromise, the appellant has a right in appeal to show what the compromise was.

[P 609 C 2]

(b) *Civil P. C., Sch. 2, Para. 1*—*Forms and steps prescribed in Sch. 2 must be complied with.*

The Code of Civil Procedure uses words "arbitration" and "reference to arbitration" as used in common parlance but lays down certain

forms and steps, for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed it is, idle to appeal to the provisions of the schedule of the Civil Procedure Code. [P 110 C 1]

Where the petition of compromise does not contemplate that any award was to be made by the arbitrator and that it should be embodied in the judgment of the Court, provisions of Sch. 2, do not apply. [P 110 C 1]

(c) *Civil P. C., O. 23, R. 3*—*Parties agreeing to withdraw their respective pleas after having privately adjusted their claims—Private adjustment not taking place—There is no compromise within O. 23, R. 3.*

In a suit all the parties did not join and all that the petition said was that there will be a partition done by a certain person and on his doing so, the suit would be withdrawn and the imputation against the plaintiff deleted. The person named declined to make the partition with the result that the compromise was hung up.

Held : that the compromise so far as the suit was concerned must be, in the circumstances of case, taken to have fallen through and the only course for the trial Court was to proceed with the trial of the suit. [P 110 C 2]

Braro Lal Chakravarti, Gunada Chakran Sen, Kali Kinkar Chakravarti, Somnath Chakravarty and Jotindra Nath Khasnabis—for Appellant

Jogesh Chandra Roy and Krishna Komal Moitra—for Respondents

Roy, J.—This appeal is directed against the decree passed by the Sub-Judge, 2nd Court, Mymensingh, amending the decree passed by his predecessor in the suit brought by the plaintiff. We learn that the plaintiff commenced this action in the Munsif's Court but the valuation of the suit was found to be over Rs 5,000 and it came eventually before the Sub-Judge. It is said that defendants 4 and 5 were owners of some parcels of land in villages Gangatiya and Saidpur lying within Kharija taluk No 1760/28 of the Mymensingh Collectorate and that they were in exclusive possession of some of the plots and were in possession of some shares in the other plots with the other defendants 1 and 3 who owned the remaining shares. The plaintiff alleged that defendants 4 and 5 sold half of what they had in these plots to the plaintiff by a kobala dated 26th June 1915, but the said defendants subsequently colluded with defendants 1 and 3 and allowed the latter to take possession of these lands.

The plaintiff thereupon brought the present suit (from which this appeal arises) and he sought to establish his

title to the lands he purchased and asked for partition and for khas possession of his share in these lands. Defendants 1 and 3 disputed plaintiff's title and that of his vendors and the vendors denied the sale. Issues were drawn up and after protracted proceedings a commission was taken out to examine the plaintiff who resides in Calcutta. Before the commissioner the parties entered into a compromise and this was embodied in a petition dated 16th March 1925.

The decision of the case turns on the terms of this petition of compromise. The plaintiff gave up his claim based on his alleged purchase. It was settled that the lands in these villages Gangatiya and Saidpur appertaining to Taluk 1760/98 were to be divided between the plaintiff and his cosharers on one side and defendants 1, 2 and 3 on the other, proportionately to the admitted shares they had therein, on reference to the last settlement survey. The plaintiff and his cosharers and defendants, 1, 2, and 3 appointed Babu Sarat Chandra Bhattacharjee a pleader to be the arbitrator. The arbitration was to equalize possession as far as possible and it was agreed that after the said arbitrator had made the proposed division the plaintiff would withdraw from the suit and the defendants would withdraw the allegations they had made with respect to the plaintiff's purchase. Babu Sarat Chandra declined to arbitrate. Efforts were made to have a joint petition filed agreeing on a partition by some other person or persons but these efforts were unsuccessful. The learned Sub-Judge thereafter on plaintiff's petition, purporting to act under S. 5 (3), Sch 2 Civil P C, called on defendants 1 and 3 to appoint an arbitrator. The defendants objected and protested that there was no reference to arbitration as understood under Sch. 2, Civil P. C, that the petition of compromise dated 16th March 1925, was not signed by all the parties and that the compromise did not relate to the subject-matter of the suit and so on, but the learned Sub-Judge refused to listen to any objection and being of opinion that the defendants were trying to back out of the compromise they had entered into "on flimsy technicalities" he appointed a pleader Babu Satyaranjan Guha as an arbitrator in place of Babu Sarat Chandra Bhattacharjee and asked him to complete the division.

This gentleman filed a so-called award though the defendants objected and protested all throughout that the proceedings were illegal and ultra vires. The award was returned by the learned Sub Judge for consideration on a particular point. The pleader re-filed his award and thereafter the learned Sub-Judge made a decree in conformity with the said award, the defendants objecting and protesting throughout these proceedings. The defendants 1, 2 and 3, then filed an application for amendment of the decree to bring it in conformity with the judgment of the Sub-Judge. It came for hearing before his successor and he had no hesitation in deleting the so-called award from the decree. The decree as it stands now, merely states that the claim of the plaintiff is treated as withdrawn without liberty to bring a fresh suit and the allegations made by the defendants in their written statements in the kobala of the plaintiff are deleted.

The plaintiff has appealed and the learned vakil appearing for the plaintiff seeks to restore the previous decree which was achieved and which proposed to embody the arbitrator's so-called award. The appeal to say the least, is audacious.

Certain preliminary objections were taken by the learned vakil for the respondents. They are not serious; one was that no appeal lay from a decree which is based on a compromise. The contention of the plaintiff is that the whole compromise has been struck out. The dispute is over the nature of the compromise and the plaintiff has a right in appeal to show what the compromise was. The second ground is that the period of limitation should be counted from the date of the original decree and that counted from that time the appeal is barred. The plaintiff was not aggrieved, however, until the amended decree was passed and he is within time from that point of time allowance being made for time taken in obtaining a copy. The third ground is that the stamp fee of Rs 20 is insufficient and ad valorem fees should have been paid. The answer of the plaintiff that so far as the present dispute is concerned it is in respect of partition and that at any rate the relief claimed is not capable of being valued, seems sufficient.

Returning to the merits of the case it may be mentioned that the words 'arbitration' and 'reference to arbitration' are

used in common parlance. The Civil Procedure Code uses the same expressions but lays down certain forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, and unless these forms and steps are followed it is idle to appeal to R. 5 of the Sch. 2, Civil P. C. by which the learned Sub-Judge purported to have appointed Babu Satyaranjan Guha as arbitrator in place of Babu Sarat Chandra Bhattacharjee who refused to act. S. 1, Sch. 2, Civil P. C. says that where all the parties to a suit agree that any matter in difference between them shall be referred to arbitration, they may before judgment is pronounced, apply to the Court for an order of reference. Clearly there was no such application before the Court nor did the Court make an order of reference as contemplated by S. 3. Finally the Court has to pronounce judgment according to the award of the arbitrator. The petition of compromise does not contemplate that any award was to be made by the arbitrator and that it should be embodied in the judgment of the Court. The learned Sub-Judge seems to have realized this for in his judgment he states :

a petition of compromise is more appropriate in describing it rather than a petition of reference to arbitration. For there is no prayer in this petition that the suit would be disposed of in terms of the award filed by the Salis (arbitrator) or that the award would be incorporated into a decree

In spite of this conclusion he, however, fell back on R. 5, Sch. 2 and holding that this rule has a wide application and he could act on it, disposed of the matter by saying that he appointed another gentleman to effect the partition according to the original wishes of the parties. He says this gentleman

has filed his report. Call it an award or anything else. The partition has been effected and as the parties are bound by their petition of 16th March 1925, the suit will be disposed of in its terms.

On the face of it this was very arbitrary and the learned Sub-Judge who succeeded could hardly maintain the so-called award of this kind. He held that his predecessor had treated the petition of 16th March 1925 as a petition of compromise and he thought that so much of the compromise that the plaintiff would withdraw from suit without liberty to bring a fresh suit and that the defendants would withdraw their imputa-

tions against the purchase, could be maintained and he thereupon deleted the award and amended the decree

The learned vakil appearing for the plaintiff has referred to O. 23, R. 3 and he seeks to justify the action taken by the trial Judge thereunder. All the parties did not join and all that the petition said was that there will be a partition done by pleader Sarat Babu and on his doing so the suit would be withdrawn and the imputations against the plaintiff deleted. Sarat Babu declined to make the partition with the result that the compromise was hung up. If it be argued as the trial Judge did, that there was a valid compromise between the parties, viz., that the lands would be divided according to their respective shares it is not clear how the trial Judge could insist on carrying it through in the manner he did. The plaintiff may have his remedy elsewhere, but it could not be done in this suit. The plaintiff gave up his claim based on a purchase and the compromise was in respect of something else. The compromise did not relate to the subject matter of the suit. New parties were again brought in, viz., the principal co-sharers. The compromise, so far as the suit before us is concerned must be in the circumstances of the case taken to have fallen through and the only order in my opinion which the Subordinate Judge could have passed on 3rd April 1925 was that he should proceed with the trial of the suit.

The amended decree cannot be maintained for the simple reason that the compromise was not completed. The suit was to be withdrawn and the imputations made by the defendants also withdrawn on the happening of a certain event, viz., the division of the lands by pleader Sarat Babu. That contingency did not happen and the petition of compromise cannot be acted upon ; for obviously the two parts are connected and it would not be right to pass a decree on a portion of the compromise ignoring the first part. We do not know of course what the plaintiff wishes to do, viz., to continue the suit from the point the compromise could not be effected or seek his remedy on the settlement that the lands are to be divided according to the admitted shares of the parties. In the present suit we must leave out the compromise. In case the plaintiff wishes to continue the suit he

should be given the chance. As the amended decree stands he cannot and a future suit by him may also be barred as it happened in the case of *Gulkandi Lal v. Manni Lal* (1).

The original decree has been superseded. It cannot be restored. The amended decree shall also be set aside. The appeal, therefore, is allowed in part. The parties are relegated to the position they stood on 3rd April 1925. The learned Judge will now allow the plaintiff to continue his suit from that day and thereafter dispose of it according to law. The contesting respondents will get their costs, the hearing-fee being assessed at three gold mohurs. The plaintiff-appellant had an application in revision as an alternative on which a Rule was issued. The Rule is discharged.

Mukerji, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I agree in his conclusions and the order which he has proposed to pass, and I desire to add a few words.

The true character of the petition dated the 16th March 1925 appears to have been very much misconceived by the Court below. Obviously it is not and cannot be regarded as an application to file in Court an agreement to refer to arbitration such as is contemplated by Cl 17, Sch 2, or as an application to file in Court an award made in an arbitration held without the intervention of the Court, as provided for by Cl. 20, Sch. 2. Could it be treated as an application to the Court for an order of reference within the meaning of Cl. 1, Sch. 2? The Court below treated it as such an application, and made an order under Cl. 3 stating that the arbitrator was to do the work mentioned in the petition within two weeks (vide O. 74, dated 31st March 1925), an order appointing a new arbitrator under Cl. 5, (vide Orders. 74 D/- 3rd April 1925, No. 80, D/-18th April 1925, and No. 81, dated 29th May 1925, orders extending the time for filing the award under Cl. 8, vide Order 83, dated 30th May 1925, and No. 84, dated 15th June 1925) and also an order remitting the award under Cl 14 (vide O 87, dated 29th June 1925). There are several weighty reasons why the petition cannot be regarded as one made for an order for reference in a pending suit such as Cl 1 con-

templates. In the first place the petition does not contain any prayer for such reference, and it does not appear anywhere that it was in the contemplation of the parties that there should be a judgment according to the award. Secondly, the foundation of the jurisdiction of the Court is an agreement between all parties interested. As pointed out by the Judicial Committee in *Ghulam Khan v. Muhammad Hossein* (2), in dealing with Ch 37 of the Code of 1882 in which the words were "where in any suit all the parties agree," the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of the Court, and that large powers are given to the Court with the view of making the award in such case complete, operative and final. The word 'interested' was added by the Code of 1908 to give effect to the decision in *Pitam Mal v. Sadiq Ali* (3), which laid down that the words "all the parties to a suit" would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit.

In the present case defendants 4 and 5 were not parties to the agreement. They no doubt denied having any interest in the subject matter of the suit, but plaintiff claimed relief as against them, and, therefore, it cannot be said that they are not parties interested. Moreover the agreement affected the shares of the plaintiff and his co sharers, but it is not known who these cosharers are and what their shares are. Thirdly, the expression "any matter in difference" must mean matter in difference arising in the suit. This is clear from the context, as well as the form prescribed for an order of reference, Form No. 2 of the Appendix. That this is so has been explained by the Judicial Committee in the case of *Ram Protap Chamria v. Durga Prosad Chamria* (4). In the present case what the arbitrator had to do was wholly outside the scope of the pleadings in the suit. The Subordinate Judge, therefore, was

(2) [1901] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=8 Sar. 154 (P. C.).

(3) [1902] 24 All. 229=(1902) A. W. N. 19.

(4) A. I. R. 1925 P. C. 293=53 Cal. 258=53 I. A. 1 (P. C.).

(1). [1901] 24 All. 219=(1901) A. W. N. 66.

clearly wrong in proceeding on the supposition that the petition of the 16th March 1925 was one which gave him jurisdiction to proceed under paras. 1 to 16, of Sch. 2.

The intention of the parties appears clearly from the wording of the petition itself. It stated:

The arbitrator shall within 14 days from this day, or as soon as possible, make the division in the aforesaid manner. After the aforesaid arbitrator files his report in Court after effecting the division in the aforesaid manner, the plaintiff shall withdraw the aforesaid suit No. 269 of 1922 of the Court of the Subordinate Judge of Mymensingh, without permission to institute a fresh suit, and after the plaintiff withdraws the aforesaid suit, the defendants shall withdraw the allegations made in their written statement against the truth of the plaintiff's purchase.

It was an adjustment by a lawful agreement or compromise which the petition purported to notify to the Court as contemplated by O. 23, R. 3, and if the terms were carried out, as intended, by the arbitrator appointed by the parties, it could have been recorded and the suit allowed to be withdrawn and dismissed, and the objectionable passages in the written statement could have been deleted. If the adjustment had taken place, that is to say if the said arbitrator had not refused to act but had done what was expected, and the compromise or agreement would then have been recited in the decree, though the decree would have been confined in its operation to so much of the subject-matter of the suit as was dealt with by the agreement [*Hemanta Kumari Debi v. Midnapur Zemindary Co* (5)], the result of the proceedings before the arbitrator and his award could not have been enforced under O. 23, R. 3 : *Delari Tea Co., Ltd. v. India General Steam Navigation Co., Ltd.* (6), *Amar Chand v. Banwari Lal Rakshit* (7) The agreement, however, fell through as the arbitrator appointed did not act.

N D.

Case remanded.

A. I. R. 1928 Calcutta 112

B. B. GHOSE, AND ROY, JJ.

Saroj Bandhu Simlai—Plaintiff—Appellant.

v.

Mati Lal Ghose and others—Defendants—Respondents.

Appeal No 920 of 1925, Decided on 19th July 1927, from the appellate decree of the Addl. Dist. Judge, 31d Court, 24 Parganas, D/- 28th March 1925.

Landlord and tenant—Rent payable in kind — Money to be paid in lieu of kind fixed — Tenant can choose between payment of rent in money or kind—Landlord cannot insist on the payment of market value of grain payable as rent.

Where a sum is fixed as payable by the tenant in lieu of paddy to be delivered by him as rent, unless there is a strong indication that this money value was placed for some other purpose than that of giving the tenant a choice either to pay money or deliver the paddy, it must be taken that the tenant has the choice either to pay money or to deliver paddy as stipulated. It cannot generally be asked by the landlord that the tenant is bound to pay the present market value of the paddy if he does not deliver the paddy as rent in kind. [P 112, C 2]

Bijan Kumar Mukerjee and Sanat Kumar Chatterjee—for Appellant.

Rupendra Kumar Mitter, Sarasija Kanta Palit and Mon Mohan Banerjee—for Respondents.

B. B. Ghose, J. — In this case the learned Additional District Judge has held that, having regard to the terms of the kabuliyat, the money that has been put down in the kabuliyat as payable in lieu of 13 aris of paddy is payable by the tenant if he does not deliver the paddy. Where a sum is fixed as payable by the tenant in lieu of paddy which is to be delivered by him as rent, unless there is a strong indication that this money value was placed for some other purpose than that of giving the tenant a choice either to pay money or to deliver the paddy, it must be taken that the tenant has the choice either to pay money or to deliver paddy as stipulated. It cannot generally be asked by the landlord that the tenant is bound to pay the present market value of the paddy if he does not deliver the paddy as rent in kind. In that view, this appeal fails and is dismissed with costs.

Roy, J.—I agree.

S D.

Appeal dismissed.

(5) A. I. R. 1919 P. C. 79=47 Cal. 485=46 I. A. 240 (P. C.).

(6) A. I. R. 1921 Cal. 238.

(7) A. I. R. 1922 Cal. 404=49 Cal. 608.

A. I. R. 1928 Calcutta 113

B. B. GHOSE AND ROY, JJ.

Gohur Shaikh and others—Defendants 1, 2 and 6—Appellants.

v.

Shaikh Ahmed Ali and others—Plaintiff and Defendants—Respondents

Appeal No 389 of 1925, Decided on 15 h July, 1927, from appellate decree of Sub-Judge, Khulna, D/- 27th September 1924.

Bengal Tenancy Act, S. 155 (b)—*Landlord and tenant*—*Tenant precluded from transferring the land in any way*—*Condition that if any such transfer was effected the landlord would have a right of re-entry*—*Landlord or a person claiming under him can eject the transferee from the tenant*—*Landlord need not give notice under S. 155 (b)*.

Where a tenant, holding land under a kabuliyat which precludes him from transferring it in any way, either by sale or gift or any other manner, and gives the landlord right of re-entry if any such transfer is effected, transfers the land and holds a portion of it under a sub-lease from the transferee, both the purchaser from the tenant and the tenant holding land under the sub-lease from the transferee are liable for ejectment by the landlord or a person claiming under him, even without a notice under S. 155(b) of the Act : *A. I. R. 1921 Cal. 100, not foll.* ; 21 C. W. N. 117, *rel. on* [P 113 C 2 ; P 114 C 1]

Jadu Nath Kanjilal, Purna Chandra and Subodh Chandra Dutta—for Appellants

Sarat Chandra Roy Chaudhury, Santi Kumar Roy Chaudhuri and Ramesh Chandra Pal—for Respondents.

B. B. Ghose, J—This is an appeal by defendants 1, 2 and 6 against the decision of the Subordinate Judge of Khulna. The suit out of which this appeal arises was one for ejectment of the defendants with regard to a small area of land of 2½ bighas which defendant 2 held under the superior landlords of the plaintiff, defendants 7 and 8, by a kabuliyat dated 4th of Magh 1309 B S. This land with other lands constituted a holding which previously was held by the husband of defendant 2. The pro-forma defendants 7 and 8, who were the landlords, brought the holding to sale in execution of their rent-decree and purchased it themselves. They re-settled the disputed land with defendant 2 by accepting the kabuliyat I have already mentioned. Subsequently the pro-forma defendants 7 and 8 created an intermediate interest in favour of the plaintiff by granting him a sub-lease. The plaintiff's case is that by this tran-

saction, he became the immediate landlord of defendant 2. Defendant 2 sold this disputed property to defendant 1, by a kobala dated the 3rd Falgoun 1327 B S corresponding to 15th February 1921, and thereby, according to the plaintiff, she forfeited her tenancy. Defendant 6 claimed as under tenure-holder under a permanent lease granted to him by defendant 2. The plaintiff based his claim on two grounds : firstly, that the interest of defendant 2 was that of an occupancy raiyat and that by reason of the transfer there had been an abandonment of the holding on account of which he was entitled to khas possession.

The second branch, and which is more important in our view, is that under the terms of the lease of 1309 B S under which defendant held that land, she was precluded from transferring the property in any way, either by sale or gift or in any other manner. It was also stipulated in the kabuliyat that in the case of any of the acts of transfer done by the tenant, the landlord would have the right of re-entry and take khas possession of the property. The Munsif dismissed the suit on the ground that defendant 2 was in possession of a certain area of the land in question by taking a settlement from her transferee, defendant 1. The plaintiff appealed against that decision and the Subordinate Judge has decreed the suit basing his judgment upon two grounds. The Subordinate Judge has held that the right of defendant 2 was only that of an occupancy raiyat whose right was not transferable without the sanction of the landlord. Having purchased this property the purchaser had taken no interest and they were liable to ejectment ; and defendant 6 having taken a permanent under-lease in violation of the provisions of S 85 could not resist the landlord's claim. The Subordinate Judge also held that the plaintiff was entitled to evict defendant 2, under the general law on the ground of transfer in breach of the condition in the kabuliyat. This view of law does not appear to have been properly developed in the Subordinate Judge's judgment and this question appears to have been dealt with only perfunctorily.

In the appeal, on behalf of the defendants-appellants, the learned advocate admitted that he has no case with regard to defendants 1 and 6. But he argues with great deal of force that defendant 2, not

having abandoned the possession of the holding, is not liable to be ejected, and that, therefore, the judgment of the Subordinate Judge should be reversed at least to the extent of the land which is actually in the possession of that defendant. There has been a number of cases which have given rise to a conflict of opinion on the question of the liability of a tenant to be ejected, if he transfers the holding but remains in possession of the whole or a part of it by taking a sub-lease from the transferee and if there is no repudiation of the liability for the payment of rent with regard to the holding.

In my view which I have expressed in various cases, it is unfortunate that this Court in several reported decisions has held that there can be an abandonment of a holding apart from the provisions of S. 87, Bengal Tenancy Act. If this Court had from the very commencement of the Bengal Tenancy Act adopted the view that unless there was an abandonment as defined under S. 87, Bengal Tenancy Act, the landlord would not be entitled to khas possession on the ground of a mere transfer by a raiyat having an occupancy right, a good deal of litigation would have been saved. But unfortunately a different view has been taken in a large number of cases which has caused a good deal of misery as well as waste of money. The last of the cases on the question has set forth a view which, I think, might have been accepted from the very commencement. I mean the case of *Ramesh Chandra v. Daiba Charan* (1).

If the present appeal had merely rested upon the question as to the transfer being made by an occupancy raiyat, I should have gladly followed the above case. But in the present case there is a quite different aspect and it arises from its special terms of the covenant by which the lease was granted to defendant 2. There is no dispute that defendant 2 transferred the interest she had acquired by the kabuliyat of 1309 B. S. to defendant 1 by describing her interest as a permanent mokarari middleman's interest. This act of transfer inter vivos gives the landlord the right to bring an action in ejectment on the ground of forfeiture, as there is a right of re-entry expressly reserved in the lease of which he has taken advantage. In reply the learned advocate for the appellant states that in spite of this breach the

tenant, defendant 2, was entitled to a notice under S. 155, sub-S. 1 (b), Bengal Tenancy Act. The difficulty in accepting this contention, is whether defendant 2 was a tenant after the forfeiture incurred by her, and the landlord indicated his desire to take advantage of the forfeiture. This question was raised and decided in the case of *Dwarika Nath v. Mathura Nath* (2). Sir Lancelot Sanderson, the late Chief Justice, and the late Mr Justice Mukerjee have dealt with this question in their different judgments in extenso. The reasonings in those judgments may very well be accepted. This appeal must, therefore, fail and is dismissed with costs.

Roy, J.—I agree

S. J.

Appeal dismissed

(2) [1916] 21 C. W. N. 117=34 I. C. 893=24 C. L. J. 40.

A. I. R. 1928 Calcutta 114

B. B. GHOSE AND MALLIK, JJ.

Mati Lal Lyall—Petitioner

v.

Premi Lyall—Opposite Party

Civil Rule No. 214 of 1927, Decided on 21st March 1927, against the order of Dist. Judge, Alipur, D. 21st January 1927.

Civil P. C., S. 115.—An interlocutory order is not to be interfered with—Divorce Act (4 of 1869), S. 11.

High Court will not interfere in revision with an order refusing an application for addition of a party as a co-respondent in a suit under the Indian Divorce Act. [P 114 C 2]

Suresh Chandra Talukdar—for Petitioner

Judgment—This is a rule against an order refusing an application for addition of a party as a co-respondent in a suit under the Indian Divorce Act. The application was rejected by the Court below. The plaintiff obtained a rule against that order. As it is not the usual practice of this Court to interfere in revision with an order made by the lower Court in an interlocutory matter this application is rejected. If the petitioner has any real grievance on account of the adverse order by the Court below he has a right of appeal against the final order, and upon the appeal this Court will be able to pass the proper order.

The rule is, therefore, discharged. No order is made as to costs as there is no appearance on behalf of the opposite party.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 115

RANKIN, C. J., AND MITTER, J.

Nripendra Nath Mukerji and another—
Appellants.

v

Dharendra Narayan Nandi and others
—Respondents.

Letters Patent Appeal No. 12 of 1927,
Decided on 22nd July 1927, against
decision of Majumdar, J, D/- 7th March
1927, in appeal from appellate decree
No 2103 of 1924.

*Bengal Land Registration Act (7 of 1876),
S. 78—Rent suit for—Land in possession of
tenants comprised in a number of estates—Co-
sharer proprietor's interest in respect of one
estate partially registered in the collectorate—
Rent proportionate to his entire estate realized
by him for over 30 years without any objection
— Inference.*

Section 78 has no application to cases where
the land in possession of the tenant is comprised
in more than one estate. The proprietor men-
tioned in the section is the proprietor of one
estate within the ambit of which the lands in
possession of the tenants are comprised : 15 C.
L. J. 308, *Foll.* [P 116 C 1]

The section is enacted to compel people or to
give them an adequate notice to obey the provi-
sions which require registration to be made of
these interests in land. It is a section in aid of
S. 38. It gives a certain sanction inducing peo-
ple to make sure to register their interests.

[P 116 C 1]

Where a tenancy extended to entire land of
four touzis in which the plaintiffs had 4 annas
12 gandas share and the defendants held all the
lands of the said four touzis at a consolidated
rent of Rs. 179-2-8 gandas and had been pay-
ing Rs. 49 odd to the plaintiffs as their share of
rent and with reference to the last touzis the
plaintiff's name was registered only with refer-
ence to 19-1/4 gandas.

Held that the plaintiff would not be debarred
by S. 78 from realizing rent at the rate claimed
by them. Further held that the inference in such
a case would be that the rent which the defend-
ants have been in the habit of paying for many
years is really due as between the plaintiff on
the one hand and the defendants on the other.

[P 116 C 1, 2]

*Sarat Chandra Roy Choudhury and
Indu Bhusan Roy—*for Appellants

*Nanda Gopal Banerjee—*for Respondents.

Rankin, C. J.—This is the defendant's
appeal from the judgment and decree of
my learned brother Mr. Justice Majum-
dar affirming a decision of the lower ap-
pellate Court.

The plaintiff is one of several co-owners
of four revenue-paying estates with sepa-
rate touzi numbers. It appears that the

whole of the area of these four touzis
has been settled in talukdari right with
the defendants for a consolidated jama of
Rs. 179-2-8 gandas. In my judgment,
the circumstance that the tenure is co-
extensive with the whole area of the four
touzis is of no importance for the pres-
ent purpose, but it is a fact, as I under-
stand, that the whole of the land com-
prised in the four touzis is comprised in
this tenure at the consolidated rent of
Rs 179-2-8 gandas

The facts are these: that the plaintiff is
registered in the collectorate as having in
three of the touzis a share of 4 annas
8 gandas and in one of the touzis as
having a share of 19-1/4 gandas not quite
one anna. The suit was brought on the
footing that the plaintiff had an equal
share in all the four, that being put as
4 annas 12 gandas. In point of fact
the share of the plaintiff is now admitted
to have been wrongly stated in the plaint
and the facts are as I have given. Upon
that footing the plaintiff bringing his suit
for rent is met with the provisions of
S. 78, Land Registration Act (VII B C of
1876). It is said that it is wrong to give
judgment for the amount claimed by the
plaintiff because under that section a
tenant is entitled to say that he will pay
no greater share of the rent to a co-sharer
landlord than the landlord is registered in
the collectorate as having.

Mr Justice Majumdar has disagreed
with the figure found by the learned Mun-
siff and has criticized his calculation in a
way which seems to me to be sound, that
is to say, he has shown that the Munsiff's
calculation is based upon an assumption
that one can treat each of the touzis as of
equal value for the purpose of apportion-
ing rent. On the question whether S. 78
applies to a case like this Mr. Justice
Majumdar has followed the decision of
Mr Justice Mookerjee and Justice Teunon
in *Rakhal Das Adhyay v. Prodyot Kumar
Tagore* (1). He has held that it is not right
to apply S. 78 to any case except the case
of a holding under one single estate or re-
venue-free property. The case before
Mr. Justice Mookerjee was a case where
the plaintiff was a co-sharer landlord, the
tenancy lands comprised lands in more
than one touzi and the plaintiff was in-
terested as cosharer in one or more touzis
but not in all. The Court disposing of
that case gives as its opinion that a close
(1) [1910] 15 C. L. J. 308=6 I. C. 121.

examination of the section makes it reasonably plain that it has no application to cases where the land in possession of the tenant is comprised in more than one estate; and again that the proprietor mentioned in the section is the proprietor of one estate within the ambit of which the lands in possession of the tenants are comprised. It has been pointed out to us that that reasoning goes further than was necessary for the decision of that case because, on the facts of that case, it was found to be one where the lands in occupation of the tenants were comprised, in a number of estates in one or more of which alone the plaintiff was interested. In my judgment, the present case, where the plaintiff is interested in all the touzis but not to the same extent in each, is just as strong a case on the facts for the purpose of excluding S. 78 as the case before Mr Justice Mookerjee. In both cases S. 78 is inapplicable because it cannot be applied. It is not possible in this case to say, without assuming that each of those touzis is of the same value for purposes of apportioning rent, what is the share that these tenants are bound to pay; and, in my judgment, therefore, whether that case went beyond what was necessary or not, the present case is just as strong as that in favour of the landlord. I think, however, that the proposition that S. 78 has no application to cases where the land in possession of the tenant is comprised in more than one estate is a sound proposition, particularly as regards the second part of S. 78. It is quite true that S. 78 is enacted to compel people or to give them an adequate motive to obey the provisions which require registration to be made of these interests in land. S. 78 is controlled by S. 81 which contains a saving for the conditions of any written contract, but it is a section in aid of S. 38.

It is quite true that one might be disposed to argue that for that reason S. 78 must apply to all cases, a revenue-paying estate or revenue-free property and that as nothing is intended to be left uncovered under S. 38 so nothing is left to be uncovered or out of the reach of S. 78. That, however, is not, I think, a valid argument. S. 78 gives a certain sanction inducing people to make sure to register their interests, but it may well be that the legislature has thought it sufficient sanction if in all cases where there are tenancies confined to one revenue-paying estate

the proprietor is apt to lose what he does not register. From the nature of the case it could not well go further without creating difficulties. It does not follow that the sanction will hit every case because the intention is to require a complete registration.

In my judgment, in this case the learned Judge has rightly decided that S. 78 was of no avail to the defendants. Had it been, I think the result of the case would have been different, because no estoppel would prevail against the statute. But, in my judgment, the estoppel by the statute not being shown, there is in the rest of the case no difficulty in holding that the rent which the defendants have been in the habit of paying for many years is really due as between the plaintiff on the one hand and the defendants on the other. I think, therefore, that the appeal should be dismissed with costs.

Mitter, J—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 116

RANKIN, C. J., AND MITTER, J.

Bhodaī Sheikh—Defendant—Appellant.

v.

Barada Kanta Dutta—Plaintiff—Respondent.

Appeal No. 722 of 1925, Decided on 20th July 1927, from appellate decree of Dist. Judge, Murshidabad, D/- 10th February 1925.

Transfer of Property Act, S. 74—Purchaser under puisne mortgagee's decree entering into possession, but dispossessed by purchaser under prior mortgagee's decree—Suit by former for possession—Defendant should be allowed to be redeemed in the same suit.

Where the purchaser under puisne mortgagee's decree brought a suit for possession, against the purchaser under the first mortgagee's decree,

Held: that the rights of the plaintiff and defendant should be determined in the same suit, and plaintiff allowed to redeem the defendant: *A. I. R. 1927 Cal. 259* and *A. I. R. 1921 Cal. 157, Appl.* [P 117 C 1 & 2]

Jadu Nath Kanjilal, Subodh Chandra Dutt and Tridib Nath Roy—for Appellant.

Gopendra Nath Das—for Respondent.

Mitter, J.—This is an appeal from a decision of the District Judge of Murshidabad, dated 10th February 1925, which affirmed a decision of the Munsif of Jangipur, dated 18th December 1923.

The appeal arises out of a suit commenced by the plaintiff to recover possession of a plot of 2 bighas 6 cottas odd in area. The case of the plaintiff is that this land originally belonged to one Jhabu Sheikh who mortgaged this plot along with three other plots to one Bogdad Biswas in the year 1900. In 1908 Jhabu mortgaged plot 1 with the plaintiff. The plaintiff instituted a suit on his mortgage and obtained a decree in the year 1915, and in execution of that decree he purchased plot 1 on 19th August 1916. Some time in 1920 Bogdad obtained a decree on his mortgage with reference to the four plots mortgaged to him and in execution of that decree he purchased the mortgaged property namely, the four plots. On 9th December 1920 he sold this property to the present defendant. The plaintiff alleges that he was dispossessed by Bogdad, the first mortgagee. There was a proceeding under O. 21, R. 100, Civil P. C., at the instance of the plaintiff in which he succeeded. On 7th March 1921 the plaintiff recovered possession, but he was again dispossessed in June 1921. He brought a suit under S. 9, Specific Relief Act, in which he failed. Consequently he commenced the present suit for possession of the property now in suit.

Both the Courts below have decreed the plaintiff's suit and granted him possession in respect of the disputed land.

In this second appeal it has been contended by the learned advocate for the defendant that the plaintiff can only obtain possession conditional on his redeeming the first mortgage in which Bogdad, the original mortgagee, was interested and whose right has now passed to the defendant by his purchase. The question which we have to determine is whether the plaintiff is entitled to a decree for possession without any condition, or whether he can only succeed on his redeeming the first mortgage or the defendant who now stands in the shoes of the first mortgagee. Both the lower Courts seem to think that this relief cannot be given to the defendant in the present suit. I think that the Courts

below are clearly wrong. It is not necessary to have another suit in which the right between the plaintiff and the defendant as purchasers in execution of the two mortgage decrees respectively should be determined. The matter can be determined in the present litigation, and to avoid multiplicity of suits it is desirable that the matter should be determined in the present suit.

In these circumstances, I think that the decree of the trial Court, as affirmed by that of the lower appellate Court, should be varied by an order that the plaintiff would be entitled to recover possession conditional on his redeeming the first mortgage within a certain time to be fixed by the trial Court. The case, therefore, is remitted to the Court of first instance for the purpose of fixing the time during which the plaintiff would be allowed to redeem the first mortgage of the year 1900 and also for determining upon what terms he would be allowed to redeem.

Rankin, C. J.—I agree. I should like to say that in my opinion, the true law in this matter is laid down in the case of *Kalu Sharip v. Abhoy Charan* (1) and in the case of *Bhagaban Chandra v. Tarak Chandra* (2). As regards the point about the order under O. 21, R. 100, Civil P. C., the plaintiff at that time was in possession and the order under that rule was made originally in his favour because he could not have been ejected by the first mortgagee. There was no need to bring a suit to set aside that order which was perfectly right. Since then the plaintiff got out of possession and he failed under S. 9, Specific Relief Act, and, therefore, he has come before the Court not merely on the basis of his own possession which is gone, but on the merits of the claim, which makes all difference. That makes applicable the two cases to which I have referred.

In this case the Munsif's order giving the plaintiff the costs of the trial must be varied and the order for costs before the Munsif will be that each party will bear his own costs. But the plaintiff must pay the costs of the two appeals and those costs will be added to the sum due on the mortgage. So that the plaintiff would have to pay those as a condi-

(1) A. I. R. 1921 Cal. 157.

(2) A. I. R. 1927 Cal. 259.

tion of redeeming. If the plaintiff, however, in the end fails to redeem, then he must pay the costs in all Courts

D.D. Appeal allowed.

A. I. R. 1928 Calcutta 118

RANKIN, C J, SUHRAWARDY AND
MAJUMDAR, JJ.

Gopal Chandra Maiti and others—
Plaintiffs—Appellants.

v.

Sm. Monmohini Dasi and others—
Defendants—Respondents

Letters Patent Appeal No 2 of 1926,
Decided on 6th April 1927, against the
decree of Cuming, J

(a) *Limitation Act, Art. 142—Plaintiff must prove that he was in possession within 12 years—When land is incapable of possession plaintiff must prove his title as well and show that no one else was in possession.*

In an action for ejectment under Art. 142 the plaintiff has always to show that he was in possession within 12 years of suit. But in the case of land which cannot be availed of at all, such as jungle land, the plaintiff may show that he was in possession before 12 years and make a case by showing as an additional fact either that the land in question was incapable of possession by anyone or that in fact no one was interfering with his right during the 12 years before suit. It is possession, not user, that has to be shown. *A. I. R. 1924 Cal 855 and A. I. R. 1922 Cal 551, Ref [P 121 C 2, P 122 C 1]*

(b) *Practice—New plea—Suit for ejectment on actual possession and dispossession—Whether plaintiff can subsequently put forward a case of constructive possession depends on circumstances—Court has discretion—Limitation Act, Art. 142*

Whether it is open to the plaintiff, where he puts forward a definite case of actual possession and dispossession, when that case fails, to turn round and put forward a case of constructive possession depends upon the circumstances, upon the points at issue and the way in which he has pleaded. It is a matter in the Court's discretion. [P 122 C 2]

*S. C. Bose, Sitaram Banerji, Harendra Kumar Mukerji and Bejoy Prosad Sinha Roy—*for Appellants

*S. C. Maiti and Apurba Charan Mukherji—*for Respondents

The judgments appealed from were as follows:

Cuming, J.—The facts of the case out of which this appeal arises are as follows. There is a tract of land in the Sunderbuns of which defendant 1 took a lease from the Government and in 1901 the plaintiff's vendor obtained a lease of

some 100 bighas of this land from defendant 1. In 1906 the lease which had been granted to the plaintiff's vendor's lessor was cancelled by the Government and a fresh lease was granted on the 16th August 1907. The plaintiff purchased the lease of Kalachand in the year 1910. It was his case in the first Court that he was in possession of his land by cutting wood and exercising other acts of possession till he was dispossessed by defendants 2 and 3 in 1914. Defendants 4 and 5, the purchasers of the interests of defendants 2 and 3, contested the suit. Their main ground was that the suit was barred by limitation both general and special and that the plaintiff had acquired no title to the land in suit by his purchase which was not a genuine transaction, that even if the alleged purchase was a genuine one, the identity of the land in suit could not be established in the locale and that the plaintiff's vendor's title was extinguished when the lease to defendant 1 was cancelled in 1906.

A number of issues were framed and the first Court decided the case in favour of the plaintiff and decreed the suit with costs. On appeal to the District Court the learned District Judge held that the plaintiff's case was barred by limitation, and hence he allowed the appeal and dismissed the suit.

The plaintiff has appealed to this Court. He has contended that the suit was not barred by limitation. The case which he now seeks to make to avoid the bar of limitation is that the dispossession took place in 1908 when defendant 1 granted a lease to defendants 2 and 3. Up to that time he was in constructive possession, because he had title to the land and the land was virgin jungle and no one else was in possession. As there were no acts of possession exercised on the land possession is to be considered as following the title.

The main difficulty that I have in accepting this contention of the learned advocate for the appellant is that this was not the case which the appellant made in his plaint. His case in his plaint was that both he and his vendor were in actual possession. No case of constructive possession was suggested by him in his plaint and the defendants had not to meet any case of constructive possession. The case which they had to meet, was that of actual possession and dispossession. The plaintiff was suing in eject-

ment and therefore he must prove his possession within 12 years of the date of the suit. As I have pointed out the case he made in his plaint was that he had been dispossessed in the year 1914. Having made in his plaint a definite case that he was in actual possession and that his vendor was also in actual possession of the land in suit, it is not open to him now in second appeal to turn round and to avoid the bar of limitation put forward an entirely different case based on constructive possession. To succeed in the case which he now puts forward he would have to prove that no one else exercised any act of possession over the land and that hence the possession must be held to follow the title: the defendants in that case would have this definite case to meet and their evidence would have been directed towards the meeting of such a case. As I have already said that was not the case made in the Court of first instance. As Mr. Justice Chatterjea points out in the case of *Rakhal Chandra Ghose v. Durgadas Samanta* (1) such a course is not open to the plaintiff where he puts forward a definite case of actual possession and dispossession: it is not open to him, when that case fails, to turn round and put forward a case of constructive possession which obviously depends upon entirely different facts which, if the defendants had to meet, they would, doubtless, have brought forward entirely different evidence. I have therefore no reason to differ from the finding of the learned District Judge that the plaintiff's case is barred by limitation. I would therefore dismiss the appeal with costs. My learned brother is for allowing the appeal. The result is this appeal is dismissed with costs under S. 98, Civil P. C.

B. B. Ghose, J.—I regret that I have to differ from my learned brother. The findings of fact arrived at by the Court of appeal below are these: defendant 1 obtained from the Government a lease of some land in the Sunderbuns. He gave a permanent lease of some 100 bighas out of this land to one Kalachand in 1901. This land has been found to have been virgin jungle. Subsequently there was an order by the Government for resumption of this land for non-performance of certain terms of the lease granted to defendant 1. The land was not actually resumed, but a renewed lease was granted

to defendant 1 in 1907. The effect of this has been held by the Subordinate Judge not to have interfered with the rights of Kalachand under the permanent lease granted to him by defendant 1. This has not been controverted by the District Judge on appeal. The position, therefore, appears to be this: that Kalachand continued to remain a lessee under the permanent lease granted to him by defendant 1. Then in 1908 defendant 1 granted a lease to defendants 2 and 3 of a certain area of land which is said to have comprised the lands which had previously been demised to Kalachand. This piece of land was also described as virgin jungle. It has been found that defendants 2 and 3 cleared the jungle and brought the land under cultivation and then sold their interest to defendants 4 and 5. The plaintiff claims under a purchase from Kalachand in 1910 and sues for possession.

The plaintiff alleged that he had been dispossessed in 1914. The question is whether his title has been lost by dispossession in discontinuance of possession on the date of the suit, as the finding is that he has not proved dispossession in 1914 as alleged.

The suit was originally filed in the Court of the Munsif at Diamond Harbour on 10th June 1918, and the plaint was returned for presentation to the proper Court on a finding that the value of the property was in excess of the jurisdiction of the Munsif on 30th July 1919. The plaint was filed again in the Court of the Subordinate Judge on 6th August 1919. The important point, therefore, is whether the plaintiff has been dispossessed for more than 12 years prior to the date of the suit. On the finding, as I understand the decision of the learned Judge, the land was admittedly virgin forest at any rate up to 1908. Before 1908 nobody had claimed any title to the land in suit except the plaintiff's vendor Kalachand, and as it was virgin jungle up to 1908 when it was leased out to defendants 2 and 3 it cannot be said that the plaintiff's vendor was dispossessed by any person. Unless a person comes into possession of a piece of land holding adversely to the true owner it cannot be said that the true owner has been dispossessed. This principle seems to me to be obvious and may be deduced from the well-known case of *Trustees, Executors and Agency Co., Ltd.*

(1) A. I. R. 1922 Cal. 557=26 C.W. N. 724;

v *Short* (2), which has been followed in the case of *Secretary of State v. Krishna-manu Gupta* (3) and in other cases in this Court. This proposition may also find support in the cases of *Kuthali Moothawar v. Peringati Kunharankutty* (4) and *Kumar Basant Roy v. Secretary of State* (5). In my opinion, therefore, the plaintiffs were in the eye of law in the possession of the land in dispute and had not been dispossessed at any time prior to 1908 when the lease was granted by defendant 1 to defendants 2 and 3. The case of *Rakhal Chandra Ghose v. Durgadas Samanta* (1) in no way goes against that view. In that case evidence was given by both parties as regards actual acts of possession. What was observed at p. 736 of the report is this :

Now, where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste or uncultivated lands and in that of cultivated lands. But whereas in the case of cultivated lands the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste land, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If, however, the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption.

Here there is no question of any such presumption upon which the plaintiff has to rely. The question depends upon the facts found that there was no person before 1908 who exercised any act of possession on the land in dispute as against the plaintiff. When there was no one who intruded on the land before 1908, plaintiff's vendor's possession cannot be said to have been disturbed. I am therefore of opinion that the decision of the learned Judge should be reversed and the appeal allowed. But I would order that the case should be sent back for the purpose of a local investigation in order to ascertain exactly the land which falls within the lease of the plaintiff. An application was made by the plaintiff before the Subordinate Judge for holding a local investigation. But that was disallowed on

what seems to be insufficient grounds as he held that the land could be ascertained upon oral evidence. On appeal the learned Judge was of opinion that the land could not be ascertained on oral evidence. The only course he then ought to have taken was either to order a local investigation himself or to direct the lower Court to make a local investigation and send him the result of such investigation in order to arrive at a decision on the question whether the land in the possession of defendants 1 and 2 fell within the lease of the plaintiff.

If the case had to be sent back I would also direct an enquiry, if the plaintiff succeeds in establishing the identity of the land in suit, as to the terms on which the plaintiff would be allowed a decree for possession having regard to the fact that apparently the defendants spent a considerable sum of money in order to improve the land. That matter has not been investigated in either of the Courts below. It is alleged that the question of compensation was not argued before the trial Court, because the defendants alleged that they would have their compensation from their landlord. This is also one of the questions which the Court would have to go into if the case went back for trial according to my view. On behalf of the respondents a question was raised that the document on which the plaintiff relies was not legally registered. But that question does not appear to have been debated in the lower appellate Court. I need not discuss these questions as the appeal will be dismissed in accordance with the opinion of my learned brother.

Judgment

Rankin, C. J.—This is an appeal under S. 15, Letters Patent, arising from a difference of opinion between my learned brothers Mr. Justice Cuming and Mr. Justice B. B. Ghose.

The suit was brought in August 1919 and the question before us is a question of limitation under Art. 142, Sch. 1, Limitation Act. The facts upon which the matter depends have reference to the grant of a reclamation lease of certain land held under Government in the Sunderbuns. It appears that defendant 1 obtained from Government a head lease on 26th July 1900. By the terms of that lease he was under obligation to see that steps were taken to bring part of the

(2) [1888] 13 A. C. 793=58 L. J. P. C. 4=5 L. T. 677=37 W. R. 433=53 J. P. 132.

(3) [1902] 29 Cal. 518=29 I. A. 104=3 C. W. N. 617=8 Sar. 260 (P. C.).

(4) A. I. R. 1922 P. C. 181=44 Mad. 883=48 I. A. 395 (P. C.).

(5) A. I. R. 1917 P. C. 18=44 Cal. 858=44 I. A. 104 (P. C.).

jungle land comprised therein into cultivation upon certain terms and conditions which I need not now specifically refer to. Defendant 1 gave a permanent lease of 100 bighas out of his land to one Kalachand in 1901. Kalachand, it appears, took no steps at all to reclaim the land, but it is matter which the Court of first instance decided and on which, in my judgment, there is no contrary finding by the District Judge, that that lease given to Kalachand was a reality, that is to say it was not a transaction which the parties thereto never intended to have any effect. It was not entered into merely for the purpose of some convenient or fraudulent design, but was a reality in the sense that one party paid his money and the other party intended to part with his rights under the lease. Kalachand having got his lease took no steps to reclaim the 100 bighas of jungle which he had in that way acquired and in that sense it may be said that the matter got no further than the paper transaction by which he took a title to the 100 bighas.

The next point is this that the Government being dissatisfied with the progress as regards reclamation took steps by which they called upon defendant 1 to give up the land or at least to take a new lease on more stringent conditions. In point of fact a new lease on more stringent conditions was granted to defendant 1, the actual land itself not being resumed or interfered with. This was in 1907.

The first question which arises is whether the cancellation of the original head lease and grant of the new lease put an end altogether to Kalachand's title. If that be so, it is an end of the suit. As Mr Justice B. B. Ghose said :

The effect of this has been held by the Subordinate Judge not to have interfered with the rights of Kalachand under the permanent lease granted to him by defendant 1. This has not been controverted by the District Judge on appeal.

In my judgment it is necessary to take it for the purpose of the present case that the under-lease granted to Kalachand did not come to an end by reason of the transaction between defendant 1 and the Government in 1907.

Kalachand having taken no steps to comply with the requirements either under the under-lease or the head lease, defendant 1 gave leases to defendants 2 and 3 on 18th November 1908. On 2nd

November 1917 defendant 3 and later on defendant 2 parted with their interest to defendants 4 and 5, but it was in 1908 that the title under which the defendants claim came first into existence. In 1911 Kalachand sold his interest to the plaintiff and the plaintiff brought his suit in August 1919.

Now, the questions upon which the learned Judges have differed are really two. The first question is whether or not it is open to the plaintiff to say that he has shown in this case, first that he has a title to this land, and, secondly, that prior to 1908 no one had interfered with it by any acts of possession contrary to his right.

The second question is whether that contention, if the plaintiff makes it good, will enable him to escape the effect of Art. 142, Sch. 1, Limitation Act. Mr. Justice Cuming took the view that as the plaintiff had come into Court with an allegation that Kalachand and his people had possession in the fullest sense of the word actively, clearing the land living on it, the plaintiff ought not to be allowed to make a case that up to 1908, when defendants 2 and 3 came on the land no one was in actual possession at all. He was also of opinion that that case would not be a good case under Art. 142.

The main question is whether that contention if proved is a good answer to Art. 142. In my opinion it is. In my opinion if the plaintiff shows that at a time when the right to possession of the land was with him it was jungle land, and no one else was in possession of it or interfering with it in any way contrary to his right, then he has done what is necessary to show that he was in the eye of the law in possession at the time. There is only one rule of law, but in its application there is some difference between land which is ready for use or cultivation, land which is under water and incapable of any use, and land such as jungle land. The plaintiff has always to show that he was in possession within 12 years of suit and it will not do for him to show that within 13 or 14 years before suit he was in possession of the land. But in the case of land which cannot be availed of at all, it is clear law that the plaintiff may show that he was in possession 14 years before suit, that the land was flooded over with water, was in-

capable of any further use, and that his possession accordingly remained down to within 12 years of the suit because no disturbance of his possession can in these circumstances be supposed. So too with jungle land such as this. It is in my judgment quite true to say that it is not enough for the plaintiff to prove his title. It is quite true to say that it is not enough for him to show that 13 or 14 years before suit he was in possession. But he can make a case by showing as an additional fact either that the land in question was incapable of possession by anyone or that in fact no one was interfering with his right. It is possession not user, that has to be shown.

In this case the defendants' case is that when they took the land in November 1908, it was an unreclaimed jungle; that Kalachand was not in possession and no one was in possession. If it be true that the plaintiff's predecessor-in-title, Kalachand, had a real interest which was still subsisting, and with which no one was purporting to interfere, then it seems to me that for the period before 1908 the plaintiff has shown that Kalachand was in possession. I am of opinion that the contention which found favour with Mr. Justice B. B. Ghose is correct, and that the cases cited in his judgment establish the proposition which he affirms. Another authority is the case of *Suresh Chandra Mukherji v. Shri Kanta Banerji* (6). Both in the judgment of Mr. Justice Woodroffe and in the judgment of Mr. Justice B. B. Ghose the law is so laid down and it appears to be consistent with first principles laid down by the highest authority.

The next question is whether in the circumstances of this case the plaintiff ought to be allowed to say that this land before 1908 was in the actual occupation of no one. I may observe here that there is no case of abandonment raised or proved to the satisfaction of either of the Courts below. I need hardly say that for the purpose of inferring abandonment the nature and character of the land are extremely important. What is said is that as the plaintiff came to Court with a case that Kalachand was clearing and living on this jungle before 1908, he ought not to be allowed now to fall back upon the proposition that nobody was living on the land at all. The chief authority for

that contention on the part of the respondents is the decision in the case of *Rakhai Chandra Ghose v. Durgadas Samanta* (1). Now, whether the plaintiff should be allowed to change his case or to fall back upon an alternative case depends upon the circumstances, upon the points at issue and the way in which he has pleaded. This is not one of those cases where it is perfectly certain that either the plaintiff or the defendant was in active possession. If you get land on the border of two estates it may be perfectly certain that one or other of the two proprietors used it sometimes. If the plaintiff adduces evidence that he was in the habit of using it, and defendants adduce evidence that it was always used by them and the plaintiff's evidence is disbelieved, it may be a strange thing to allow the plaintiff to fall back upon the supposition that nobody was using it at all contrary to the case of both the parties. But here the defendants' own admissions have to be looked to and the surrounding circumstances have to be looked to. In allowing the plaintiff to proceed upon the basis that no one was in active possession of this land in 1908 one is doing no more than giving the plaintiff the benefit of the case which the defendants from the first made. I think that this is a matter in the Court's discretion, and that it would be wrong to shut the plaintiff out from putting his case on the established facts. It has been contended that the defendants might have proved that Government actually resumed the land in 1907, but if they had any such evidence it would have been adduced to disprove the plaintiff's title.

For these reasons it appears to me that this appeal should be allowed. I am entirely in agreement with the judgment of Mr. Justice B. B. Ghose in regard to two further matters. One is that the case should be sent back in order that proper steps may be taken to have a local enquiry made to show whether this land can be identified or not. If it turns out that the plaintiff cannot succeed in proving that the defendants are in occupation of his land then no doubt the plaintiff's suit will fail. If, however, he succeeds in identifying the lands with those in possession of defendants, then there should be an enquiry as to the terms upon which the plaintiff should be given a decree for possession. He bought

(6) A. I. R. 1924 Cal. 855,

this property in 1911, when the defendants were spending money on it. In considering this matter it is not necessary for us to lay down in advance any general propositions for the Court below, but it will be for that Court to consider whether the defendants are not entitled to compensation amounting to a full indemnity for the money which has been expended in improving the land and perhaps even in respect of interest thereon. The case must go back to the trial Court on these points. I think this appeal should be allowed with costs and that the appellant should have the costs of the second appeal in this Court. There should be no costs of the appeal before the District Judge. As regards the trial Court the costs of the whole suit will be dealt with by that Court after dealing with the case upon this remand. The decree of the trial Court is set aside and the case remanded as above mentioned.

Suhrawardi and Mujumdar, JJ — concurred.

G B

Appeal allowed

A I R. 1928 Calcutta 123

C. C. GHOSE AND BUCKLAND, JJ

Shyam Sundar Chakravarty—Defendant—Appellant

v.

Titaghar Paper Mills Co., Ltd.—Plaintiffs—Respondents

Appeal No 11 of 1927 Decided on 8th November 1927, from original decree of Pearson, J., D/- 6th December 1926, in O. S. No 1844 of 1926

(a) *Civil P. C., O 37, R. 3—No triable issue dependent on facts—Leave to defend in the ordinary way should be refused.*

Where in a suit on a pro-note there is no triable issue dependent on facts, which is to be investigated, but simply a question of law, no leave should be given to the defendant to put in a defence in the ordinary way. [P 124 C 1]

(b) *Civil P. C., S. 100—Pro-note—Question as to personal liability is one of law.*

The question as to whether, having regard to the terms of a promissory-note, any personal liability has been undertaken by the executant is a pure question of law to be decided with reference to the terms of promissory-note. [P 124 C 1]

(c) *Promissory Note—Liability—Executor's description as Managing Director does not exclude his personal liability.*

An executor's description as Managing Director in the body of the promissory-note has not the effect of excluding his personal liability. [P 124 C 2]

Where the executor, when he put his signature on the promissory-note, signed his name with-

out any qualification whatsoever and did not take any steps whatsoever to indicate that he was signing the document not in his personal capacity but for and on behalf of the Company and as their Managing Director,

Held, that he was personally liable for the amount of the promissory-note. 1. I. R. 1927 Cal. 612 and *Elliot v. Bux Ironside*, (1925) 2 K. J. 301, *Reff.* [P 124 C 2]

S C Roy—for Appellant

S M Bose—for Respondents.

C. C. Ghose, J—This is in an appeal from an order made by my learned brother Mr Justice Pearson on 6th December 1926 on an application made by the plaintiff Company under Ch 13A of the Rules of this Court for summary judgment

The facts, shortly stated, are as follows. The defendant Shyam Sundar Chakravarty, who is the appellant before us, was on all material dates the Editor of the "Servant" newspaper and Managing Director of the defendant Company, namely, the Servant Publishing Company Limited. It appears that the plaintiff Company supplied paper from time to time for the use of the defendant Company and as and when the goods were delivered, the appellant Shyam Sundar Chakravarty executed certain promissory-notes for the value thereof. The promissory-notes were eight in number. The plaintiff Company made attempts to realize the moneys due but did not succeed. There was on the date of the application a sum of Rs. 8,910-2-6 due to the plaintiff Company for principal and a sum of Rs. 463-4-4 on account of interest. The promissory-notes were all alike and one of them, which is printed at p 1 of the paper-book, may be quoted herein as a sample :

On demand I, Shyam Sundar Chakravarty Esq., Editor and Managing Director, "The Servant," promise to pay the Titaghar Paper Mills Co. Ltd., or order the sum of rupees nine hundred and twenty-two and annas four only together with interest thereon at the rate of twelve per cent per annum from the tenth February 1925, being the value of one hundred and thirty-six reams of paper sold and delivered to me from their go own as per their delivery order No. 1-188."

The appellant filed an affidavit in answer to the application of the plaintiff Company in which he contended that he did not sign the said promissory-notes in his personal capacity in consideration of the paper being supplied to the defendant Company and that, under the circumstances, the Servant Publishing Company Ltd. were alone liable for the price of the paper supplied and that there wa

no personal liability undertaken by the appellant. The matter came on before my learned brother, Mr Justice Pearson, on 6th December 1926, when he made an order in terms of the plaintiff Company's summons for summary judgment. He held that, having regard to the terms of the promissory-notes, it could not be contended that the appellant had not undertaken any personal liability in respect of the sums mentioned in the said promissory-notes.

On appeal it is argued on behalf of the appellant by Mr. S C Roy, firstly, that there was a triable issue raised by the appellant and that no summary judgment should have been passed; and, in the second place, that on the construction of the promissory-notes themselves there was no personal liability undertaken by the appellant and that, therefore, no decree should have been made against him.

As regards the first point: it is sufficient to observe that, on the materials before us, it is clear that there was no triable issue dependent on facts which were to be investigated, but there was a question of law raised by the appellant, namely, whether, having regard to the terms of the promissory notes any personal liability had been undertaken by the appellant. That question did not in my opinion involve the taking of evidence. It was a pure question of law and had to be decided with reference to the terms of the promissory-notes. On the decision of that question depended as to whether there should be a summary judgment in favour of the plaintiff Company or whether leave to defend the suit should be given to the appellant. Mr Justice Pearson held on the construction of the promissory-notes that the appellant had undertaken a personal liability and passed summary judgment in favour of the plaintiff Company. That amounted to saying that, in the circumstances disclosed no leave should be given to the defendant to put in a defence in the ordinary way. That disposes of the first point raised by Mr Roy.

As regards the second point: it is sufficient to observe that, having regard to the cases, some of which are referred to in my judgment *In the matter of Jagodia Cotton Mills Ltd.* (1), it cannot be contended on the documents in this case that the appellant had not undertaken and did not undertake any personal liability. The

appellant's description as Managing Director in the body of the promissory-notes had not the effect of excluding his personal liability. It is noteworthy that the appellant, when he put his signature on the promissory-notes, signed his name without any qualification whatsoever and did not take any steps whatsoever to indicate that he was signing the document not in his personal capacity, but for and on behalf of the Servant Publishing Company Ltd, and as their Managing Director. Under these circumstances, there could only have been one answer to the question raised by the appellant, and in my opinion Mr. Justice Pearson rightly negatived the contention raised by the appellant.

Mr Roy has drawn our attention to the case of *Elliott v Bax-Ironside* (2). That case, as I read it, is entirely against Mr Roy's contention. What happened in that case is this: The action was against two defendants as indorsers of a bill of exchange. Those defendants were the Directors of a Company called the Fashions Fair Exhibitions Ltd, and one of the defendants was a person named Mason who was the Managing Director. The Company accepted two bills of exchange for £1000 each, but inasmuch as the capital of the Company was not more than £400 it was suggested that the two bills of exchange should be indorsed by the two Directors, namely Sir Henry Bax-Ironside and Mr R A Mason. They accordingly indorsed the two bills of exchange, and the contention that was sought to be canvassed on their behalf before the Judge in the Court of first instance and in the Court of appeal was that they had not accepted any personal liability. It was held that having regard to the facts that, although they had described themselves as Directors, they were really guaranteeing a debt due by the Fashions Fair Exhibitions Ltd, and that they accordingly could not avoid liability as guarantors. But on law and on facts, this case, as I read it, is against the contention put forward before us by Mr Roy.

On all these grounds I am of opinion that this appeal should stand dismissed with costs.

Buckland, J.—I agree.

N K.

Appeal dismissed

(1) A. I. R. 1927 Cal. 612.

(2) [1925] 2 K. B. 301.

A. I. R. 1928 Calcutta 125

B. B. GHOSE AND ROY, JJ.

Gulzar Mondal and others—Plaintiffs—Appellants.

v.

Trailakyanath Shah and others—Defendants—Respondents

Appeal No. 101 of 1925, Decided on 14th July 1927, from original decree of Sub-Judge, Maldah, D/- 8th August 1924.

Contract Act, S. 45—Joint mortgagees—Payment to managing co-mortgagee operates a valid discharge.

The principle that payment to one of several joint creditors does not operate as a discharge of the debts in so far as the other creditors are concerned is not applicable to a case where the payment is to a joint mortgagee who was the manager and agent of the others. 22 C. W. N. 1021 and A. I. R. 1927 Cal. 425, Dist.

[P 126 C 1]

Sarat Chandra Mukerjee and Indu Bhuvan Mukerjee—for Appellants*Jatindra Mohan Choudhuri, Sarat Chandra Roy Choudhuri and Gopendra Krishna Banerjee*—for Respondents.

Roy, J.—This appeal arises out of a mortgage suit dismissed by the Subordinate Judge of Maldah. The plaintiff Gulzar Mondal (who died subsequently) and his cousins Sabektulla (the predecessors-in-interest of defendants 4, 5 and 6) and Sariatulla (the predecessor of defendants 7, 8, 9 and 10) lived in joint mess and had joint properties including a money-lending business which was carried on at several places. According to the plaint Sariat was the sole karta or manager till his death which happened in Baisakh 1315 B. E. After his death his son, defendant 4, was selected as the karta "as he was smart and intelligent." It appears that he was the karta at Rahanpur. The principal defendants 1 and 2 used to borrow money from the Mondal family. In 1313 B. E. they executed a mortgage-deed called a karbarnama in favour of Sariat as security for the loans up to a certain amount. After Sariat's death defendants 1 and 2 executed on 5th Magh 1315, corresponding to 14th January 1909, a fresh karbarnama in favour of Gulzar (who was in charge of the money-lending business at Biswanathpur, the family seat) and defendant 4. They were to borrow to the limit of Rs. 5,000 and pay interest at 1½ per cent. per mensem with annual rests. The actual transactions were to

be entered in a dastabij and the stipulation was that no transaction not entered therein would be taken into consideration. It appears that immediately before Sariat's death, when he was ill, the business at Rahanpur was placed in charge of a relative, Sahinaddi Munshi.

Defendant 4 thought he was making misappropriation and dismissed him. Dissensions started among the family and there were civil and criminal cases in which different members seem to have taken different sides. It is not clear when the business at Rahanpur came to an end. On the last day of limitation Gulzar commenced this action for his share of the mortgage-debt, viz., one-third. It was stated that the karbarnama and other papers were in the custody of defendant 4. Gulzar claimed his share of the mortgage-debt from defendants 1 and 2 and there was an alternative prayer that if they had paid up and there was a valid discharge, a decree might be passed against defendant 4. Defendants 3 and 3-A were joined as being purchasers of a portion of the mortgaged properties. The heirs of Sabektulla and Sariatulla were also joined and an option was given to them to join Gulzar as co-plaintiffs. The daughters of Sabektulla and Sariatulla, viz., defendants 6, 7 and 8, on their prayer, were transferred to the category of the plaintiffs and apparently accepted the statements in the plaint. Defendants 1 and 2, i.e., the principal defendants and defendant 4, the manager at Rahanpur, resisted the suit and their defence in short was that there had been an adjustment of accounts and the debt was paid up by defendants 1 and 2, who got back the karbarnama from defendant 4 and also a receipt from him. The dastabij which was to be a record of the transactions between the Mondals and the principal defendants is not forthcoming. The case for the plaintiffs was that it was with defendant 4; the defence was that it was sent to the Biswanathpur along with other papers and received by Gulzar. In the absence of the dastabij the plaintiffs relied on the money advanced in 1906 in the time of Sariat and a hisab said to have been made up on 10th Magh, 1315 B. E. and a subsequent letter of acknowledgment. The question as to how much was actually advanced lost its importance.

on the plea set up. The learned Subordinate Judge held that defendants 1 and 2 had got a valid discharge from defendant 4 and that the latter could not be made liable without bringing a suit for accounts and in this view of the case he dismissed the suit. The plaintiffs have appealed.

The learned vakil appearing for the plaintiffs-appellants grounds his claim on the argument that one joint mortgagee cannot give a full discharge when there are joint mortgagees. The case of *Abdul Hakim v. Adyata Chandra Das* (1) was quoted for the principle, that payment to one of several joint creditors does not necessarily operate as a discharge of the debts in so far as the other creditors are concerned. The principle was affirmed in the case of *Satindra Nath Choudhury v. Jatindra Nath Choudhury* (2). The principle is not applicable to the facts of the present case. The payment here was to a joint mortgagee, but he was also a person who was the manager and agent of all the Mondals. The question really is whether he could take the money on behalf of all the cosharers. Defendants 1 and 2 had a running account. They were to take loans which were to be entered in a dastabij kept by defendant 4 and he was to receive the payments. Defendant 4 is described as the manager and agent of the Mondals at Rahanpur in the plaint and the statement is repeated in the plaint more than once. It was urged that defendant 4 worked under Gulzar's control and for this argument reliance is placed on the written statement of defendant 4, that when the debt was paid up a remission was made with the consent of Gulzar. Defendant 4 made this statement to show that Gulzar was aware of the payment of the debt. It is quite conceivable that Gulzar was consulted. It would be natural for defendant 4 to do this, but the argument that defendant 4 acted under Gulzar and had no authority beyond a certain point is against the plaint.

The learned vakil contended that there was collusion between the contesting defendants. He referred to the evidence given by defendant 1 in a criminal case, on 8th April 1910, wherein he said he had paid up Sariat's loan, but he also as-

serted that he had taken a fresh loan and he admitted the agreement or karbarnama. The learned vakil then referred to a letter from one of the defendants which goes to show that the contesting defendants consulted together before filing the respective defence. It appears that the Court below allowed the defendants about a year to file their written statements. It is to be regretted that the Court was so lax in this matter, but people may consult each other when they happen to be in the same box. During the stress of arguments the learned vakil advanced the theory that no payment had been made and that the endorsement of payment was made on the karbarnama after the suit was filed. The suit, as I have said, was filed on the last day of limitation. It is inconceivable why Masinaddin (defendant 4) should not realize anything from defendants 1 and 2 during the 12 years. In the Court below, it would appear that the suggestion was, that the payment was made not in 1317, but in 1318 B. E. and that was done by defendants 1 and 2 transferring certain properties to defendant 4. The allegation that there was collusion does not rise beyond mere suspicion. Even if there was any collusion defendants 1 and 2 cannot be held liable. They have paid up to the manager and agent and they have got back their mortgage-deed fully satisfied. They have obtained a valid discharge.

It was argued that there was litigation between the different members of the Mondal family and that if defendants 1 and 2 paid up at that time to one member they did so at their peril. It appears that Sariat's daughters thought that they were being deprived of their share in the business and they started litigation. Gulzar at that time was on the side of defendant 4. It appears that the police came and locked up the Rahanpur gaddi, but this was only for a brief period. The police returned the keys and the business was resumed. Gulzar himself filed an affidavit so late as 17th July 1911, and said so, though he alleged that they had started a fresh business after the dismissal of Sahimaddin. Defendant 4 remained the manager at Rahanpur and nothing was done to remove him from the position of manager which was originally assigned to him. In this connexion it may be men-

(1) [1929] 22 C. W. N. 1021=49 I. C. 63.

(2) A. I. R. 1927 Cal. 425.

tioned that Sariat's daughters subsequently filed an account suit (viz on 24th April 1911) against both defendant 4 and Gulzar for accounts from Baisakh 1315 B. E. to Aswin 1316 B. E. and the decree, Ex. I, was obtained only against defendant 4. The debt under discussion does not seem to have formed the subject-matter of that suit. Sariat's daughters may not have been aware of it. They did not challenge the position of defendant 4, but wanted accounts from him. Defendant 4 continued to be the manager till July 1911 and for some time after. Evidence was given by a son-in-law of Khatija (one of the daughters of Sariat) that he warned the principal defendants not to pay to one co-sharer, but, as the learned Subordinate Judge points out, it cannot be believed that he would give a warning in 1316 B. E. when he did not marry into the family till two years after. The finding of the learned Subordinate Judge that defendants 1 and 2 got a valid discharge appears to be unassailable.

There remains the question whether there can be a decree against defendant 4 in this suit. The learned Subordinate Judge says, and we think very properly, that the plaintiffs should have brought an account suit. The learned vakil states that the time has gone and he refers to the fact that defendant 4 and Gulzar have realized their shares by bringing suits on certain bonds. The decrees have been filed, but we are not in a position to know under what circumstances the decrees were achieved. It seems difficult to believe that the parties never discussed among themselves the present debt. It is the fault of the plaintiffs that they have delayed so long in bringing this action and other remedies are barred. The position being that defendant 4 was the manager and karta of the Rahanpur gaddi, and it being common ground that money passed between Rahanpur and the principal gaddi, the plaintiffs cannot succeed except by an adjustment of accounts in properly framed account suit. We, therefore, agree with the conclusions arrived at by the Court below. The appeal is dismissed with costs. There will be two sets of costs, one set for defendants 1 and 2 and another for defendant 4.

B. B. Ghose, J.—I agree.

N.K. , , *Appeal dismissed*

A. I. R. 1928 Calcutta 127

SUHRAWARDY AND MALLIK, JJ

Magnamoyi Rai—Plaintiff—Appellant
v

Brojendra Lal Das Chowdhury and others—Defendants—Respondents.

Appeals Nos. 84 and 85 of 1925, Decided on 22nd July 1927, from appellate decrees of 2nd Sub-Judge, Sylhet, D/-23rd May 1924

Provincial Small Cause Courts Act, Sec. 2, Art. 29—Suit by a partner after the dissolution of the partnership must be for general account—Maintainability of a suit between partners without taking accounts depends upon circumstances of each case.

The general rule of law is that a suit by a partner after the dissolution of the partnership must be for a general account unless special circumstances exist which entitle one partner to bring a suit against another or others for a particular item. But if the suit relates to the loss and profits of the partnership business or to the stock-in-trade or capital employed in the business in respect of which all partners have equal rights, it must be one for a general account of the partnership business. The maintainability of a suit between partners without taking a general account of all the partnership dealings of transaction must depend upon circumstances of each case and upon whether justice can really be done without taking such account. [P 128 C 2]

A person cannot bring a suit for a specific sum without a general suit for accounts for the purpose of ascertaining if he is entitled to a share in the assets of the firm.

A dispute between partners whose business has come to an end regarding the division of the assets can only be finally settled in a proper suit for adjustment of accounts, and it is not proper that each of the parties should proceed by separate suits in order to recover from the others any sums due to the partnership business which they may have realized.

A suit for specific sum of money cannot be converted into a suit for accounts.

A suit for recovery of specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. 26 Cal. 254; 27 C.L.J. 96 and 28 Mad. 331, *Foll.*. 17 C.W. N. 351 and 32 Mad. 76, *Dist.* [P 129 C 1, 2]

Birendra Kumar Dey and Nikunja Behary Ray—for Appellant.

Gopal Chandra Das, Satyendra Kishore Ghose and Nirode Bandhu Ray—for Respondents.

Judgment—The plaintiff and defendants 6 to 8 in the first suit, who are defendants 2 to 4 in the second suit, were partners in a business. They fell out and the present suits were brought by the plaintiff. The first suit which we will

call the money suit was for recovery of a sum of money, being one-third share of the plaintiff in certain ornaments and cash which were in the iron safe of the firm and were wrongly taken away by the defendants. Her case against defendant 1 was that he, in collusion with the partners, misappropriated the ornaments and cash taken out of the iron safe. There were four more defendants, the neighbouring shop-keepers, who were said to have helped the other defendants in the taking out of the money and articles. The defence was that the plaintiff's brother Bama Charan was at one time acting as the manager of the firm and he was dismissed because of his defalcations, and defendant 1 was requested by the other partners to help them in the payment of creditors and for that purpose money was taken out of the safe and applied in the payment of the debts of the firm. As regards the ornaments: the defendants were willing to produce them in Court and to abide by the order of the Court with regard to their disposal. The Munsif who tried the case found that the defendant's version of the story was true and the suit for money was dismissed and it was decreed in respect of the one-third share of the plaintiff in the ornaments. The lower appellate Court upheld the decree of the trial Court and hence this appeal by the plaintiff. At the hearing the suit was withdrawn as against defendants 6 to 8 (partners) who were dismissed from the suit. On the findings of the trial Court which were endorsed by the lower appellate Court we do not think that there is any question in this case which entitles us to interfere with the decree. The finding is that defendant 1 who is a highly respectable man under the authority of the other partners took out the money and paid the debts of the firm with great advantage to the firm, the debts being paid off at 55 per cent. That there was no misappropriation by defendant 1 and that the present suit was instituted apparently at the instigation of Bama Charan, the brother of the plaintiff. On these findings no question of law arises and the suit was rightly dismissed. Appeal No. 84 is dismissed with costs.

The other suit which may be called the title suit was brought by the plaintiff for recovery of one-third share in the sale proceeds of the stock-in-trade. Defendant 1 is Brojendra Lal Das Chowdhury, who

was defendant 1 in the other suit, and his defence is that he acted bona fide under instructions from the other partners. On the findings there can be no question that the suit was rightly dismissed against him.

As regards the claim against the partners the Munsif found that the amount of debt paid off by the other partners far exceeded the value of the stock-in-trade as put by the plaintiff. He also held that the suit was not maintainable without a general suit for accounts as between partners. In this view the suit was dismissed. The Subordinate Judge in appeal did not discuss the merits of the case, but dismissed the appeal on the ground that the suit in the form against the partners was not maintainable. The learned vakil for the appellant argues that the view of the lower appellate Court on law is wrong as the suit was maintainable. There can be no question that the general rule of law is that a suit by a partner after the dissolution of the partnership must be for a general account unless special circumstances exist which entitle one partner to bring a suit against another or others for a particular item. But if the suit relates to the loss and profits of the partnership business or to the stock-in-trade or capital employed in the business in respect of which all partners have equal rights, it must be one for a general account of the partnership business. But maintains the learned vakil for the appellant that an action for a specific sum, as for the price of the plaintiff's share in the sale proceeds of the stock-in-trade, is maintainable without a suit for accounts. He also contends that if in order to give proper relief it, is necessary to take accounts from the defendants the Court should take such accounts.

With reference to the second branch of the argument it may be said that the first Court did go into the question and found that the other partners used the proceeds of the sale of the stock-in-trade in paying off the debts and they will not, therefore, be liable. As to the first contention our attention has been drawn to the decision in the case of *Durga Prosonno Bose v. Raghu Nath Dass* (1). In that case one partner under arrangement amongst the partners borrowed a sum of money and put it into the partnership till. Subsequently the creditor by a suit against

(1) [1898] 26 Cal. 254=3 C. W. N. 299.

that partner realized the amount. Thereupon the partner sued his other partners for contribution of the money which he had to pay under the decree of his creditor. The learned Judges held that such a suit was maintainable without a general suit for accounts on the ground that the money secured by the promissory note for which the suit was brought against the plaintiff did not become an item of the partnership accounts. On the facts of that particular case the decision seems to be perfectly justifiable. One partner had to contribute to the capital of the firm out of which profit was received by all the partners in equal shares, and if that partner had to pay the money which he had so employed in the partnership business, there does not seem to be any reason why he could not recover by way of contribution the share of the debt payable by the other partners. The suit had nothing to do with the partnership business or with reference to the assets of the partnership. The learned Judges in that case went thoroughly into the law as to the rights of partners amongst themselves. But on the facts of that particular case it was evident that the general rule, that a suit between partners relating to the partnership business must be a suit for general accounts of the dissolution, did not apply. Moreover, the rule has been stated in Lindley on Partnership, 9th edition, p 663 in answer to a question formulated by the learned author:

When can an action be maintained between partners without taking a general account, of all the partnership dealings and transactions;

This question, according to the learned author, can only be answered generally by saying that each case must depend upon its own circumstances and upon whether justice can really be done without taking such account.

In the present case it must be admitted that the plaintiff cannot sue for a specific sum without calling upon the other partners to show how the price of the stock-in-trade was applied by them, in other words, she cannot bring a suit for a specific sum without a general suit for accounts for the purpose of ascertaining if she is entitled to a share in the assets of the firm. In *Ram Chandra Pal v. Krishna Lal Pal* (2), a suit was brought in the Small Causes Court by one of the partners for a sum of money alleged to be due by the other partners. The question before

the Court was whether the suit was maintainable in the Court of Small Causes. The learned Judges held that a dispute between partners, whose business has come to an end regarding the division of the assets, can only be finally settled in a proper suit for adjustment of accounts; and it is not proper that each of the parties should proceed by separate suits in order to recover from the others any sum due to the partnership business which they may have realized. We have also been referred to the case of *K Venkata Reddi v. K. Narasayya* (3), but we do not see what bearing that case has on the facts of the present case. There, under the terms of the contracts between the partners, the working partner was to make over all the cheques and moneys received by him to the capitalist partner. He had omitted to do so and a suit was brought by the partner supplying the capital for the recovery of the cheques. It was held that a suit did lie. There is no special contract in this case and in our opinion the general law must prevail, namely, that the plaintiff cannot maintain a suit for her share in the assets of the partnership without bringing a suit for a general account.

We further do not think that in the present case it was the duty of the Court to take accounts from the defendants and give proper relief to the plaintiff. As has been held in *Kshetranath Banerjee v. Kalidas Das* (4), a suit for recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. Though the question before the Court then was whether the suit was maintainable in the Small Causes Court the general principle that a suit for a specific sum of money cannot be converted into a suit for accounts is sound. To the same effect is the case of *K. Runga Reddi v. Subbiah Setty* (5) in which it is stated that a suit for an account is a special form of suit in which a special process is required for the purpose of taking accounts and that every case in which accounts have to be looked into to ascertain the amount due to the

(3) [1909] 32 Mad. 76=1 I. C. 384=19 M.L.J. 10.

(4) [1917] 27 C. L. J. 96=41 I. C. 929=21 C. W. N. 784.

(5) [1904] 28 Mad. 394.

(2) [1912] 17 C. W. N. 351=17 I. C. 600.

plaintiff cannot be said to be a suit for accounts. In our judgment the suit, as brought by the plaintiff, is not maintainable and the plaintiff is entitled to no relief. It would not have been necessary, on the findings of fact arrived at by the trial Court, to go into the question of law but for the extremely unsatisfactory judgment of the lower appellate Court which gave sufficient indication that the learned Subordinate Judge did not fulfil his function as presiding over the appellate Court. This appeal is accordingly dismissed with separate costs to respondent 1 and to respondents 2 to 4.

N K.

Appeals dismissed.

* A. I. R. 1928 Calcutta 130

B. B GHOSE AND ROY, JJ.

Mt. Rukeya Banu and others—Defendants—Appellants.

v.

Mt. Nazira Banu and others—Plaintiff and Defendants—Respondents.

Appeals Nos. 175 and 261 of 1925, Decided on 28th June 1927, from original decrees of Sub Judge, First Court, Sylhet, D/- 11th June 1925.

(a) *Mahomedan Law — Wakf made prior to 1913 — Illusory bequest to charity—Real object to benefit settlor's family — Wakf is not valid nor is made void by Mussalman Wakf Validating Act (6 of 1913).*

In order to perpetuate the names of his ancestors, and to keep the properties intact for ever, a Mahomedan made wakf in 1869 of all his properties for the benefit of his children, etc., howsoever; and in their absence, of the poor kinsmen and relatives, mendicants, people destitute of all means, widows and orphans for all time. Out of the income of Rs. 10,000 the settler had set apart Rs. 456 per year for charities. Some of the descendants sued for partition of the properties in 1922.

Held: that the provisions for the benefit of the settler's family were invalid as constituting wakf under the Mahomedan law and they could not be validated by the Mussalman Wakf Validating Act, 1913, which is not retrospective, and that the gift to charity was so small in comparison with the income of the property that the gift for charities might very well be considered to be quite illusory: 17 Cal. 498 (P. C.); 7 Bom. 1 (P. C.); 22 Cal. 619 (P. C.); 23 All. 33 (P. C.); 27 All. 320 (P. C.); A. I. R. 1922 P. C. 107, *Rel. on.* [P 132 C 1]

(b) *Adverse possession—Wakf—Mutwalli in possession—Wakf turning out to be void—Mutwalli can not claim to have been in adverse possession.*

If a person takes possession of certain pro-

perty as a mutwalli and holds possession of it on that basis, he cannot afterwards turn round and say that the wakf being void, he was in possession in his own right and claim the property as his own as against the beneficiaries. Having come into possession under one title, he cannot improve his position by asserting that that title was non-existent, but he held under some adverse right which extinguished the title of the beneficiaries under the deed by virtue of which he entered into possession.

(c) *Mahomedan Law — Wakf—Mutwalli.*

The mutwalli has no legal estate in the property: A. I. R. 1922 P. C. 123; A. I. R. 1923 P. C. 44, *Foll.* [P 135 C 1]

(d) *Assam Land and Revenue Regulation (1 of 1886)—S. 154 (1)—Right of the civil Court is not ousted by the section.*

Although, under S. 154(1) (e) read with S. 96 of the Act, partition, whether perfect or imperfect, of revenue-paying properties must be made by the revenue authorities, the jurisdiction of the civil Court to determine the right of the parties to the property in dispute, as well as the shares to which they are entitled, has not been taken away by S. 154 (1). [P 135 C 2]

* (e) *Civil P. C., S. 11—Res judicata.*

The judgment against a creditor who sought to attach the property cannot operate as res judicata as against the judgment-debtor in a suit brought by him against the claimant. 11 Bom. 114, *Dist.* [P 134 C 1]

* (f) *Evidence Act, S. 115 — Admission of wakf by mutwalli does not estop him from claiming a share in it as heir, if wakf is void.*

Where the mutwalli was in possession and was distributing the income to the beneficiaries he is not estopped from saying later on to the beneficiaries. "Now I discover that the settlement in wakf is void. I have no right to hold the property as mutwalli, you are really the owners of the property and I am only entitled to hold a share as the heir of the grantor. So you may get your shares if you like and I am willing to part with the possession of the properties as mutwalli in your favour." [P 134 C 2]

(g) *Document—Construction — Intention of maker must be found from expressions used—If two constructions possible, one making deed valid should be accepted.*

The true rule of construction of deeds is to find out the intention of the testator or settlor from the expressions used in the document itself, and then to apply the law as to whether the intention so expressed is valid or not. If, however, it so happens that it is possible to construe a document in two different ways the Court may accept the construction which would make it valid. [P 132 C 2]

Brojo Lal Chakravarty and Paresh Lal Shome—for Appellants.

Sarat Chandra Basak and Syed Nasim Ali, Birendra Kumar De and Benoyendra Nath Palit—for Respondents.

B. B Ghose, J.—These two appeals arise out of a single suit for partition

which has been dismissed by the learned Subordinate Judge Appeal 175 of 1923 is by defendants 4 and 14 to 17. The contesting respondents are defendants 1, 8, 11, 18, 34 and 66. The representatives of defendants 13 and 27, as well as defendant 26, appear in this Court by their guardian ad litem, the Deputy Registrar. These respondents support the appeal made by the appellants. Appeal 261 of 1925 is by the plaintiff. Defendant 1, who appears as one of the respondents, resists this appeal. There is one common ground between the two appeals, and there are certain different grounds in the appeal preferred by the plaintiff which will be dealt with separately. The property in question originally belonged to the ancestor of the parties, a gentleman named Syed Bakht Majumdar. He created a wakf of some of his properties by a deed, dated the 28th August 1867.

The plaintiff asked for partition of the properties comprised in that document in her plaint, and the defendants, who are appellants in appeal 175 of 1925, and the other defendants who also support the plaintiff's suit for partition, also asked for partition of those properties. In the appeal, however, the claim for partition with regard to those properties is given up by both sets of appellants, and it is conceded that a valid wakf was created by that deed with regard to the properties included in it. The dispute now is with regard to the question whether the other properties included in the plaint, both moveable and immovable, are capable of being partitioned. The Subordinate Judge has dismissed the suit mainly upon the ground that the immovable properties were constituted a valid wakf by Syed Bakht Majumdar, by a deed, dated the 6th April 1869, which is Ex 5 in the suit. That being so, these properties are not liable to be partitioned. The Subordinate Judge further found that the claim of the plaintiff was barred by the rule of *res judicata* and the plaintiff was also estopped from questioning the validity of the wakf on account of certain transactions which will be stated later on. The Subordinate Judge, however, did not give any reason for dismissing the claim for partition of the moveables. Two other points were raised before us on behalf of the contesting respondents which were not decided by the Subordinate Judge. The first point was that the suit of the

plaintiff was barred by limitation and the second was that the Court had no jurisdiction to direct the partition having regard to S 154 (1) (e), Assam Land and Revenue Regulation.

I shall first deal with Appeal 175 preferred by the defendants. Their case is that they are entitled to certain shares in the properties as the heirs of the original owner, Syed Bakht Majumdar. The dismissal of the plaintiff's suit has affected their right to partition and so they are entitled to present the appeal against the judgment of the Subordinate Judge and to have it declared that the property is liable to be partitioned and to have their shares ascertained. The most important question in this case is with regard to the validity of the wakfnama, dated the 6th April 1869, Ex. 5. I do not think it is necessary to recite the contents of the document in detail. I think it will be quite sufficient to give the important provisions of the deed. These are as follows :

In order to perpetuate the names of my ancestors and to keep the properties intact for ever, I, with full reliance on God, do hereby make wakf of all my properties, etc. for the benefit of my children, etc. how low so ever, and in their absence, of the poor kinsmen and relatives, mendicants people destitute of all means, widows and orphans for all time to come etc. etc.

Para. 3.—That so long as I shall be alive, the family expenses and the allowances, etc., of the beneficiaries shall be what I have mentioned to-day in the list which I have made over to the mutwalli, and the amounts mentioned therein shall remain fixed, or the same may be varied in future, if I think fit.

It is then provided that, after defraying all these expenses, the surplus income shall be deposited in the *tahabil* of the wakf; and it is further provided that with that surplus income other properties should be purchased.

Para. 7.—That properties would be purchased for all the beneficiaries under the wakf out of the money which would remain as surplus after paying the monthly allowance, etc. . . . if no property be purchased, then two-thirds of the said surplus money should be divided amongst the beneficiaries under the wakf at the end of the year. . .

Para. 9.—That should a male mutwalli die, his children would get the allowance due to him; and as regards my daughters, the mutwalli shall have power to vary the allowance fixed for them at present and to pay or withhold payment of the allowance due to them to their children after their death; and should any of the beneficiaries under the wakf die childless and unmarried, his monthly allowance should form part of the *tahabil* of the

trust and should be distributed amongst the other beneficiaries under the wakf or amongst some of them at the discretion of the mutwalli.

Then there are certain other paragraphs which provide for charitable uses if the descendants of the settler become extinct

Para. 18.—That be it mentioned that I am not indebted to any persons till now, and I make this wakf for the benefit of my lineal descendants and in their absence for the performance of my religious duties and for spending money for pious purposes.

It would appear on a mere perusal of this document that the provisions for the benefit of the settler's family are invalid as constituting a wakf under the Mahomedan law, and it is settled that they are not validated by the Mussalman Wakf Validating Act, 1913, which is not retrospective. This has been decided by a series of cases which I need only mention: see the cases of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), *Abdul Gafur v. Nizamuddin* (2), *Abul Fata Mahomed Ishak v. Rasamaya Dhur Chowdhry* (3), (a case coming from the same district as this, and the document in that case bears a strong resemblance with the document we are dealing with in this case), *Mujib-un-nissa v. Abdur Rahim* (4), *Sayid Muhammad Munawwar v. Razia Bibi* (5) and *Solehman Quadir v. Salimullah Bahadur* (6).

It has, however, been argued on behalf of the respondent that, upon a true and proper construction of this document, it should be held that it has created a valid wakf. Reference is made to the fact that under para 9 it is stated that only the children of the beneficiaries would be entitled to the allowance under the wakf, and it is urged that the intention of the testator was that, after the death of all the children of the beneficiaries, the whole of the properties should be distributed for charitable purposes. This was sought to be supported by a rule of construction enunciated by the learned advocate for the respondent. It is stated

to be this: that the first endeavour of the Court should be to find how a settlement made in a document may be held to be valid in law and then to put such meaning to the words as would make the settlement valid. The proposition seems to me to be somewhat novel. I should have thought that the true rule of construction is to find out the intention of the testator or settler from the expressions used in the document itself, and then to apply the law as to whether the intention so expressed is valid or not. If, however, it so happens that it is possible to construe a document in two different ways the Court may accept the construction which would make it valid. It seems to me that in this case there cannot be any doubt whatsoever that the settler intended, as he distinctly said, to perpetuate the names of his ancestors and to keep the property intact for ever, and he has repeated in clear terms:

It is for the benefit of my children, etc., how low soever, and in their absence for charitable purposes.

I do not think it necessary to say anything further upon the point as it seems to me that this deed of wakf falls within the decision of those cases I have referred to and is invalid.

The Subordinate Judge has held that there was a good valid dedication, because, in the schedule to the document, certain charitable purposes are mentioned. They may be detailed here—

	Rs.
Lighting costs of the Musjid	
Re 1-8-0 per month ...	18 per year.
Sadbrat, i. e., feeding of travellers, Rs. 10 per month...	120 do.
Charity on Fridays, Rs. 4 per month ...	48 do.
Expenses during Sobeharat, etc. ...	170 do.
Prices of clothes given to the poor during winter at the discretion of the mutwalli.	100 do.

These altogether amount to Rs. 456 per year. The income of the property is stated to be about Rs. 10,000 per year. This gift for charity seems to be so small in comparison with the income of the property that the gift for charities may very well be considered to be quite illusory. As was observed by their Lordships in the case of *Mahomed Ahsanulla Chowdhry v. Amarchand Kundu* (1), that there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan might find it becoming to spend it that way.

(1) [1890] 17 Cal. 493—17 I. A. 28—5 Sar. 476 (P. C.).

(2) [1892] 17 Bom. 1—19 I. A. 170—6 Sar. 238 (P. C.).

(3) [1895] 22 Cal. 619—22 I. A. 76—6 Sar. 572 (P. C.).

(4) [1901] 23 All. 233—28 I. A. 15—7 Sar. 829 (P. C.).

(5) [1905] 27 All. 320—32 I. A. 86—2 A. L. J. 513—3 Sar. 788 (P. C.).

(6) A. I. R. 1922 P. C. 107—49 Cal. 820—49 I. A. 153 (P. C.).

It is quite inconceivable that a person enjoying an income of Rs. 10,000 a year would not spend Rs. 456 a year in these small charities which even poorer families in this country, whether Mahomedan or Hindu, spend for charitable purposes. A gift, as has been laid down in several of the cases decided by the Privy Council, may be quite illusory if the amount to be spent in charity is very small in comparison with the income of the property. A lengthy and a persistent argument was addressed to us with the object of showing that this wakf is quite different from the wakfs dealt with by their Lordships of the Privy Council in the cases I have referred to. Long extracts from the various judgments were read out to us in order to show that the wording in the document is different, or that the income of the property was different, and the amount which in the various cases was directed to be spent in charities was different from the amount stated in this particular case. In my opinion, this is not the proper way in which the validity or otherwise of the document in question should be decided with reference to the cases.

If I am right in my view, that the document we have been dealing with does not constitute a true and bona fide gift for the benefit of the poor, but was created for the benefit of the family of the settler, then these minor differences in the language, or in the amount of money to be spent, would not take the case out of the decisions of their Lordships of the Judicial Committee. In my view, therefore, the wakf is invalid under the Mahomedan law, and this being secular property is liable to be partitioned amongst the descendants of the so-called settler Syed Bakht Majumdar, who have inherited their shares according to law.

The next question that I have to deal with is the question of *res judicata*. Shortly stated, the point arises in this way, one Hamid held the office of mutwalli of the property at a certain time Majid, an ancestor of the plaintiffs, had contracted certain debts. The creditor attached some of the properties included in the deed of wakf in question in order to recover his dues from Majid on the allegation that Majid has a certain share in the properties. The then mutwalli, Hamid, preferred, a

claim. The claim of the mutwalli was disallowed by the trial Court on the ground that the wakf was invalid. A rule was obtained by the mutwalli and this Court set aside the judgment of the trial Court on the ground that in the matter of the claim it was necessary to see whether the claimant was in possession and, if so, whether he is in possession on behalf of the judgment-debtor or not; and as it was found that the claimant was in possession, but not on behalf of the judgment-debtor, the rule was made absolute and the properties were released from attachment. Then that creditor, Baktar Chand Mahata, brought a suit against the claimant as well as Majid, and this suit was dismissed. An appeal was preferred to the High Court, which was not proceeded with, and that was dismissed for default. The question of *res judicata* arises upon these proceedings.

It is contended by the learned advocate for the respondents that the judgment-debtor was bound by that decree by the principle of *res judicata*. His argument is this: that the judgment-creditor brought the suit both against the claimant as well as the judgment-debtor with the object of having it declared that the property belonged to the judgment-debtor and not to the claimant. The question of the right of the creditor could not be decided in that case without deciding the respective rights as between the judgment-debtor and the claimant, and as that question was decided in favour of the claimant, the judgment-debtor was as much bound as the judgment-creditor by that decision. It seems to me that that proposition cannot be supported on principle. On behalf of the appellants reliance has been placed on the case of *Shivappa v. Dod Nagaya* (7), in support of the contention that the judgment is not *res judicata*. The learned advocate for the respondent points out that the judgment-debtor not having been a party to the suit brought by the judgment-creditor against the claimant, that judgment was held to be not binding as *res judicata* as against the judgment-debtor. It is not quite clear from the report whether the judgment-debtor was a party defendant in the suit brought by the judgment-creditor. But in order to see whether the proposition put forward on behalf of the respondent is substantial the ques-

(7) [1887] 11 Bom. 114.

tion may be tested in another way. Suppose the judgment-creditor loses in the suit brought by him for the purpose of establishment of his right to attach the property as against the judgment-debtor, does the decision have the effect of establishing that the property belongs to the claimant absolutely, so that if another judgment-creditor attaches the same property on the ground that it belongs to the same judgment-debtor, would he be defeated by the previous judgment having the force of *res judicata*? The learned advocate conceded that it is difficult for him to contend that it would be so. But if the judgment-debtor is forever debarred from advancing his claim to the property as against the claimant by the previous judgment, it seems to me that the result would follow, that anybody claiming the property through him would also be similarly barred. As this seems to me to reduce the proposition to an absurdity, in my opinion, the judgment against the creditor who sought to attach the property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by him against the claimant.

The next question is one of estoppel which arises in this way. Majid, the ancestor of the plaintiff, held the office of mutwalli under the document for some time. During the period he made a petition for being adjudicated an insolvent, and in opposition to the claim of a creditor he stated that the properties attached by the creditor were wakf properties and he was in possession of these properties as the mutwalli of an endowment. Upon that, the District Judge held that the properties were held by the insolvent not in his own right, but as mutwalli, and he directed that the properties should be released from attachment. How this can operate as an estoppel, it is difficult for me to understand. There was nothing done by Majid to alter the position of the contesting defendants or their ancestors. By his act he rather saved the property from being taken possession of by the receiver. The learned advocate for the respondent relied on the case of *Mahomed Ibrahim v. Abdul Latif* (8) in support of his contention, that Majid would have himself been estopped from asserting that he was not the mutwalli. The question

has been elaborately discussed in the case of *Alamgir Khan v. Kamrunnessa Khanum* (9). The principle seems to me to be this. If a person takes possession of certain property as a mutwalli and holds possession of it on that basis, he cannot afterwards turn round and say that the wakf being void, he was in possession in his own right and claim the property as his own as against the beneficiaries. Having come into possession under one title, he cannot improve his position by asserting that that title was non-existent, but he held under some adverse right which extinguished the title of the beneficiaries under the deed by virtue of which he entered into possession. This is not the position here. Here the mutwalli was in possession and was distributing the income to the beneficiaries. Could he not say to the beneficiaries:

Now I discover that the settlement in wakf is void, I have no right to hold the property as mutwalli; you are really the owners of the property and I am only entitled to hold a share as the heir of the grantor. So you may get your shares if you like and I am willing to part with the possession of the properties as mutwalli in your favour?

It seems to me that there cannot be any estoppel as regards that position being taken by the mutwalli. This finishes the points on which the Subordinate Judge held that the suit of the plaintiff was liable to be dismissed.

The two points with regard to *res judicata* and estoppel do not affect the appeal of the defendants (in appeal No 175) except defendant 4. The other defendants, 14—17, would, in any event, be entitled to ask for partition of the properties if the wakf is a void document. That being so, I do not see any ground upon which it can be held that the suit should fail on any of the grounds which affects plaintiff or defendant 4 individually.

Next, I shall deal with the two points raised by the learned advocate, which were not dealt with by the learned Subordinate Judge, because he dismissed the suit on the other grounds. The first is the question of limitation. The contention on behalf of the respondent is that the mutwallis having been in possession from the date of the wakf in 1869 down to the date of the suit in 1922, they had acquired a title by adverse possession and the present mutwalli, defendant 1, is entitled to resist the claim

(8) [1912] 37 Bom. 447=17 I. C. 689=14 Bom. L. R. 987.

(9) [1906] 4 C. L. J. 442.

of the plaintiff as well as the appealing defendants on the ground of adverse possession. In support of the contention, the cases of *Churcher v. Martin* (10), *Kherodemoney Dossee v Doorgamoney Dossee* (11) and *Mahomed Ibrahim v. Abdul Latif* (8) were cited. I do not think it necessary to recite the facts of these cases. It seems to me that these cases simply lay down the rule that where trustees take possession of any property under a trust which is not valid under the law, their possession is as much adverse to the lawful title as the possession of any other trespasser, and if the possession of those so-called trustees is for a sufficient period, the rightful owner may very well be met with a plea of limitation under the statute. The question here seems to me to be quite different.

The learned advocate for the respondent has argued that here the mutwalli was a trustee and he has acquired the title as trustee by his adverse possession. The mutwalli, however, has no legal estate in the property. This has been well settled: see the case of *Vidya Varuthi Thirthaswamigal v. Balusami Ayyar* (12), followed in *Abdur Rahim v Narayandas Aurora* (13). But it is argued by the learned advocate for the respondent that the successive mutwallis were in possession on behalf of the Supreme Being and, therefore, he may assert the title on behalf of his principal as against the plaintiff and the appealing defendants. But the fact is not so. If the dedication had been to the Supreme Being, then no question of adverse possession would arise, but the plaintiff would fall, on the ground that he and his cosharers have no title to the property. It was only a fictitious gift to God. The real object was to tie up the property for the benefit of the descendants of the settler and the descendants were getting the benefit out of the property all along and not the Supreme Being. Under such circumstances, it is very difficult to see how the question of limitation arises. Moreover, it is pointed out on behalf of the appellant that the evidence shows that the

several cosharers were in actual possession of the properties by collection of rents; and there is one document on the record which shows that the contesting defendant, even after the suit, has taken a patni in the name of his son from defendants 4 and 14 to 17, that is, the appellants in appeal No. 175. It is urged on behalf of the respondents that this was after the date of the suit and ought not to have been used as evidence in the case. But it seems to have been admitted without any objection. Whatever that may be, there is no reasonable ground for holding that the possession of the preceding mutwalli was ever adverse to the descendants of the original settler. The plea of limitation must, therefore, fail.

Lastly, the question of jurisdiction under the Assam Land and Revenue Regulation may be dealt with. It is quite true that under S 154 (1) (e), read with S. 96 of the Act, partition, whether perfect or imperfect, of revenue-paying properties, must be made by the revenue authorities. But the jurisdiction of the civil Court to determine the right of the parties to the property in dispute, as well as the shares to which they are entitled, has not been taken away by the regulation in question and the civil Court must also decide whether the property is liable to partition or not, as in this case, whether there is a valid wakf which prevents the parties from seeking a partition of the property. The plaintiff, as well as the appealing defendants, are entitled to obtain a declaration from the civil Court, that they have got the right to obtain from the revenue authorities a separation and allotment of their shares in the estate according to their proportionate rights. It is further pointed out by the appellants that all the properties in suit are not revenue-paying properties. These must be partitioned by the civil Court. It is also alleged that the parties are in possession of separate parcels of lands, being only shares in certain revenue-paying estates. These do not fall within the provisions of the Assam regulation. The moveable properties should also be partitioned and the Court should also give an opportunity to the plaintiff for finding out whether there are any other properties which are capable of being partitioned. The actual partition of revenue-paying estates must

(10) [1889] 42 Ch. D. 12=53 L. J. Ch. 56=37 W. R. 682=61 L. T. 113.

(11) [1879] 4 Cal. 475=3 C. L. R. 315.

(12) A. I. R. 1922 P. C. 123=44 Mad. 831=48 I. A. 302 (P. C.).

(13) A. I. R. 1923 P. C. 44=10 Cal. 329=50 I. A. 84 (P. C.).

necessarily be made according to the provisions of the Assam Land and Revenue Regulation,

The appeals are, therefore, allowed and the case sent back to the trial Court for a decision as to the properties which are liable to be partitioned by the civil Court, and to make a partition according to the shares of the parties. If it is found by the Court that revenue-paying properties have to be partitioned among the parties, the Court may declare the share of each of the parties and leave them to go to the revenue authorities for making the necessary partition.

The appellants are entitled to their costs in Appeal No 175 of 1925 against defendant 1 and defendants 8, 11, 18, 34, and 66. The appellant in Appeal No. 261 of 1925 is entitled to her costs against respondent-defendant 1. The hearing-fee in each case is fixed at 20 gold mohurs. The plaintiff will get her costs of the lower Court from defendant 1 and defendants 8, 11, 18, 34 and 66. Further costs of the lower Court will abide the final result.

Roy, J.—I agree

N K.

Appeals allowed.

A I R 1928 Calcutta 136

RANKIN C J, AND MITTER, J.

Sailendra Nath Mahata — Plaintiff—Appellant

v,

Satish Chandra Bhattacharjee and another—Defendants—Respondents.

Appeal No 686 of 1926, Decided on 25th July 1927, from appellate decree of Sub-Judge, Murshidabad, D/- 9th January 1925

(a) *Civil P. C., S. 100 — Agreement by both sides to proceed on the evidence before the Court and also before the Commissioner—Its violation is a defect calling for interference in second appeal.*

Where, both sides having agreed to proceed not only on the evidence taken before the Munsif but before the commissioner also, the plaintiff appellant was told in the lower appellate Court that the case should proceed after discarding the evidence that was taken before the commissioner.

Held: that there was a defect of procedure in the trial of the appeal before the lower appellate Court, and the defect affected the merits of the case, and therefore calls for interference in second appeal. [P 137 C 1]

(b) *Landlord and tenant—Suit for rent—Tenant pleading dispossession must prove it.*

Where the tenant raises the plea of dispossession, it is essential for him to establish the plea to defeat the landlord's suit for rent which was justly due to him. [P 137 C 1]

D. N Bagehi, Mohini Mohan Bhattacharyya and Nirod Bandhu Ray — for Appellant

Sarat Chandra Bose, Apurba Charan Mookerjee and Ramani Mohan Banerjee — for Respondents.

Mitter, J.—This is an appeal from a judgment and decree of the Subordinate Judge of Murshidabad, dated the 9th January 1925, which reversed a judgment and decree of the Munsif of Berhampore, dated the 30th April 1923.

The appeal arises out of a suit commenced by the plaintiff for rent for the last kist of 1325 and for the years 1326 to 1328 B. S., in respect of a tenure which was held by the defendant respondent under the plaintiff-appellant. Defendant's plea was that he was dispossessed from a portion of the land which he purchased at a rent sale in February 1920 and of which he got possession in May 1920. His case is that, after he had purchased the disputed tenure at a sale held at the instance of the plaintiff, he was dispossessed from plots 1 and 5 of the sale certificate 1921. The rent was a consolidated rent.

A local investigation was directed at the instance of the defendant for the purpose of determining as to whether the land from which he alleged he had been dispossessed by the landlord was really covered by the sale certificate. The local investigation proceeded to some extent. Evidence of certain witnesses was recorded on both sides. The costs payable to the commissioners fell short and the defendant was directed to pay the balance of the costs of the commissioner in order to enable him to complete his report. The defendant failed to pay that sum. The Munsif then directed the commissioner to return all the papers. Subsequently, at the instance of the plaintiff, the commissioner completed the map of the lands measured by him for which he was paid by the plaintiff and he submitted a letter forwarding the map and the evidence to the Munsif.

Upon the result of the local investigation, such as it was, and upon the other evidence in the case, the Munsif came to the conclusion that the defendant had failed to establish his defence, and he

granted a modified decree to the plaintiff for the amounts claimed for the years 1326 to 1328 B. S. with damages thereon at 25 per cent and proportionate costs

An appeal was taken by the defendant to the Court of the Subordinate Judge of Murshidabad and the learned Subordinate Judge discarded the report of the commissioner, such as it was, and the evidence which was taken before him, and after discarding the evidence which was taken by the commissioner he proceeded to deal with the appeal on the other evidence in the case and came to the conclusion that the defendant had been dispossessed from plots 1 and 5 of the plaint, and, as it was a tenancy in which the rent was a lump rent, he held that the entire rent should be suspended. He accordingly allowed the appeal and dismissed the suit of the plaintiff.

A second appeal has been taken to this Court by plaintiff 1, and it is contended on his behalf that the lower appellate Court was clearly in error in discarding the proceedings before the commissioner and the evidence taken before him, as the lower appellate Court seems erroneously to think that there was no report of the commissioner. We have looked into the report and we find that there was a letter, which was filed along with the map, and the evidence taken before the commissioner. As to whether there was a report, as is required strictly under O 26, R 10 Civil P C, it appears that in this case both sides proceeded in the trial Court to rely on the evidence of witnesses taken before the commissioner. As will appear from some of the observations made by the Munsif in the trial before him, the defendant-respondent relied on the evidence of one Jadu Pramanik who was examined before the commissioner as the strongest piece of evidence in his favour. Both sides having agreed to proceed not only on the evidence taken before the Munsif, but before the commissioner also, it seems a little hard that the plaintiff-appellant was told in the lower appellate Court that the case should proceed after discarding the evidence that was taken before the commissioner.

There has been a defect of procedure in the trial of the appeal before the lower appellate Court, such as calls for our interference under S. 100, Civil P C., and I think that the defect has affected the merits of the case. The defendant raised

the plea of dispossession and it was essential for him to establish the plea to defeat the plaintiff's suit for rent which was justly due to him

In these circumstances I think that the judgment and decree of the lower appellate Court dismissing the suit should be set aside and the case should be sent back to that Court for a retrial of the appeal on the evidence which was taken before the Munsif and also on the evidence which was taken before the commissioner. Costs will abide the result.

Rankin, C. J—I agree

N K

Case remanded.

A I R 1928 Calcutta 137

B B GHOSE AND ROY, JJ.

Midnapore Zemindari Co Ltd. — Plaintiff—Appellant.

v

Shib Narayan Dutta and others—Defendants—Respondents.

Appeal No. 270 of 1925, Decided on 14th July 1927, from appellate decree of Sub-Judge, Krishnagarh, D/- 23rd September 1924

Landlord and Tenant—Abatement of Rent.

A tenant paying rent for the entire land demised when he was in possession of only a part of it cannot ask for abatement of rent after the lapse of 60 years as he must be deemed to have lost his right by acquiescence and laches. 2 C. L. R. 5, *Foll.* [P 138 C 1]

Probodh Kumar Das and Syamadas Bhattacharjee—for Appellant

Surendra Nath Basu, Panchanon Ghose, Durga Das Roy and Radhika Ranjan Guha—for Respondents

Judgment—This appeal arises out of a suit for rent brought for a sepatni mehal called Monoharpur. The plea of the defendants was that the entire rent should be suspended on account of the plaintiffs having failed to deliver possession of certain portions of the lands demised. This plea found favour with the Munsif who dismissed the entire suit. The plaintiffs appealed against that decree and the Subordinate Judge has made a partial decree in favour of the plaintiffs by allowing an apportionment of the rent of the lease hold properties in proportion to the lands found in possession of the defendants. This case is a rather peculiar one. It appears that the predecessors-in-interest of the plaintiffs created the sepatni lease in

question of the mouzah called Monoharpur in the year 1857. The sepatnidars gave an ijara of the properties to their landlords in 1866. The ijara was to last for 15 years. In 1867 the original sepatnidars sold their interest to the defendant's predecessors. From 1867 the predecessors of the defendants, and after them the defendants, have been in possession of the sepatni mehal by paying the rent reserved in the lease till the arrears claimed in the suit. The plaintiffs purchased the interest of the patnidars and dar patnidar in the mehal in the year 1918 and they have brought this suit for rent in February 1921. What the plaintiffs alleged in answer to the defence of the defendants was that the lands which, the defendants say, appertained to mouzah Monoharpur really appertained to their mouzah called Nishchindipur. That has been found against them by the Subordinate Judge and this finding must be accepted by us as a finding of fact. The question, however, that remains to be decided is whether the defendants are entitled to any abatement of rent for the lands which the lower appellate Court has found to be within their mouzah but of which they are not shown to have ever been in possession. Although the defendants have never been in possession of the lands, they have been paying the entire rent reserved in the kabuliyat for more than 60 years before suit. Under what circumstances the lands continued to remain in the possession of the landlords it is very difficult to find out. The inference from this long submission of the defendants to be kept out of possession of these lands while they were paying the full rent would lead to an inference that these lands were never meant to be given to the defendant's predecessors.

However that may be, as was observed in the case of *Iam Narain v. Poolin Behari* (1), we must hold that the right of the defendants to ask for abatement of rent after the lapse of 60 years must be considered to have been lost by acquiescence and laches. Whether the defendants are entitled to the lands in question as appertaining to their leasehold, or whether they have any substantive right which they can enforce by suit as against the landlords for re-

covery of possession of these lands by reason of successive acknowledgments of the title of the defendants by the plaintiffs-landlords, are questions which do not arise for consideration in this case. If the defendants have such a right they must enforce it by taking proper steps. It is sufficient for us to say in this case that the right to claim abatement must, under the circumstances of the case, be considered to have been lost by defendant's laches and long acquiescence.

In this view, this appeal must be allowed and the plaintiffs' suit decreed with costs in all the Courts.

The cross-objection has not been pressed and it is dismissed without costs.

S J

Appeal allowed.

* A. I. R 1928 Calcutta 138

MUKERJI AND D. N MITTER, JJ.

Arunadoya Chakrabarty and others—
Plaintiffs—Appellants.

v.

*Mahammad Ali and others—*Defendants—Respondents.

Appeal No. 2200 of 1924, Decided on 8th August 1927, from appellate decree of Sub-Judge, Mymensingh, D/- 28th June 1924.

* (a) *Tort—Suit for damages can lie against some only of the wrongdoers.*

An action for damages against one or some of the several joint wrongdoers is maintainable, but such an action is entirely distinct from an action in ejectment. In the former the cause of action is the injury sustained, while in the other the detention of the property. *Thomas v. Wild* (1840) 11 Ad. & E. 453. [P 140 C 2; P 141 C 1]

(b) *Ejectment—Suit for—All persons in possession should be joined as defendants.*

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two: first, if any of the persons in possession is left out, he remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree. [P 141 C 2]

In a case where the plaintiff has alleged in the plaint that a person is in possession, and there is no question of any particular share of

which he may be in possession it is obvious that it is not possible to apply the principle embodied in the first part of this rule.

[P 141 C 2]

If the name of any tenant in possession be omitted as a defendant, those parts of the premises which are in his occupation cannot be recovered in that action *Deo d Williamson v. Roe* 10 Moore 493; *Deo d. Lord Darlington v. Cock* (1825) 4 B. and C. 259; *Deo d Turner v. Gee* (1841) 9 Dowl. 612, *Glen v. Herring* (1907) 1 K. B. 152; and *Minet v. Johnson* (1890) 63 L. T. 597; *Expl.* [P 141 C 2]

(c) *Ejectment*—All persons in actual possession are necessary parties.

The rule that all persons in actual possession should be joined as parties has been firmly established and the principle that a suit will not be entertained where no effective decree can be passed in it is well recognized. 31 *Bom.* 250, 62 *I. C.* 714, *A. I. R.* 1923 *Cal.* 289; *A. I. R.* 1927 *Cal.* 238; and *A. I. R.* 1921 *Cal.* 622, *Rel. on.* [P 141 C 2]

Urukram Das Chakravarti—for Appellants.

Surja Kumar Guha—for Respondents.

Judgment.—This appeal arises out of a suit which was instituted by the plaintiffs to recover khas possession of certain lands on declaration of the plaintiffs' maliki right thereto. The plaintiffs' case was that one Rahamat Sheikh held an ordinary jote, that he abandoned the same and went away from the village without making any arrangements for payments of rent of the jote and that the plaintiffs wanted to take possession of the lands but were resisted by the defendants. Of the defendants against whom the suit was instituted only one, viz defendant 5, filed a written statement and contested the suit. The substantial defence of defendant 5 was that Sheikh Rahamat's sons sold a portion of the lands to defendant 5 and his brothers (one of whom was defendant 6) in 1316, that since the said sale defendant 5 and his brothers have been in possession of the lands which they had purchased, and the heirs of Sheikh Rahamat were in possession of the remaining lands of the jote. The defence thus put forward was that there was no abandonment but only a transfer of a part of the holding.

The trial Court found that there was a complete abandonment of the holding and decreed the suit except as against defendant 6 who died during the pendency of the suit. He found that defendant 6 had left a mother who was alive, and though the latter was not brought on the record as the heir of defendant 6 the suit would not fail. Defendant 5 ap-

pealed from this decision. The Sub-Judge framed three questions for determination: 1st, Is the suit maintainable against the other defendants without making the legal representative of the deceased defendant 6 parties to the suit; second, Was there any abandonment of the holding held by Rahamat and his successors; and third, Are plaintiffs entitled to khas possession. He did not determine the second and the third questions as his answer to the first question was in the negative. The suit was therefore dismissed. The plaintiffs have then appealed to this Court.

The suit, as framed in the plaint, was against the heirs of Rahamat Sheikh who were defendants 1 to 3, the purchasers who were defendants 4 to 6, and the subtenants defendants 7 and 8. It was, as has been already stated, a suit for khas possession.

The maintainability of the suit in the absence of the heirs of defendant 6 has been sought to be justified on the footing of the liability of joint wrongdoers, it being urged that it is a joint and several liability. In actions for damages joint wrongdoers may be sued jointly or severally. The principles relating to these actions are well settled. In Pollock on the Law of Torts, 10th edition, p 206, they are stated thus:

Where more than one person is concerned in the commission of a wrong the person wronged has his remedy against all or any of them at his choice. Every wrongdoer is liable for the whole damage, and it does not matter whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong he cannot sue the others for the same matter, even if the judgment in the first action remains unsatisfied. By that judgment the cause of action "transit in rem judicatum" and is no longer available. The reason of the rule is stated that otherwise a vexatious multiplicity of actions would be encouraged.

As regards joint torts it is said in Addison's Law of Torts, 8th edition, p 44:

All who aid or counsel, direct or join in, the commission of a tort are joint tortfeasors. "If divers do a trespass it is joint and several at the will of him to whom the wrong is done" that is to say, he can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants.

In *Thurman Wild* (1) and other cases it was settled that an accord and satis-

(1) [1840] 11 Ap. & E. 453=3 P. & D. 289.

faction by one wrongdoer for the whole injury done discharges all the wrongdoers. A release, therefore, given of the whole cause of action to one discharges the others, the reason being that the cause of action being one and indivisible, some having been released, all persons otherwise liable thereto are consequently released: *Cozke v Jennor* (2). But a covenant or agreement not to sue one of them is no defence to an action against others. *Hutton v Eyre* (3). If, therefore, while purporting to release one tortfeasor it reserves rights against another, it will be construed as a covenant not to sue, and not a release: *Duck v Mayen* (4), *Rice v Reed* (5). The rule for construing such a document was laid down in the case of *Price v Barker* (6), where it was held that in determining, whether a document be a release or a covenant not to sue, the intention of the parties was to be carried out, and if it were clear that the right against a joint debtor was intended to be preserved inasmuch as such a right would not be preserved, if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue and not a release. In *King v. Hoare* (7) Parke, B., authoritatively laid down:

These considerations lead us, quite satisfactorily to our minds, to the conclusion that, where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party. see also *Buckland v. Johnson* (8), *Brinsmead v. Harrison* (9) and *Kendall v. Hamilton* (10).

Brinsmead v. Harrison (9) settled the point that, after recovering judgment against one wrongdoer, a plaintiff cannot sue the other for the same matter, even if the first action remains unsatisfied, a proposition which was doubted before them. Though S 43,

Indian Contract Act, is not perhaps quite clear whether a complete adaptation of the English rule is intended, yet *King v. Hoare* (7) has been held to apply in this country both in respect of joint debtors and of joint wrongdoers. A fortiori then, an action for damages against one or some of several joint wrongdoers is maintainable.

Such an action, however, is entirely distinct from an action in ejectment. At common law there were only two kinds of redress from 'actionable wrong. One was to take the law into one's own hands of which it has been said thus :

It is only when the party's lawful act restores to him something which he ought to have, or puts an end to a state of things whereby he is wronged, or at least puts pressure on the wrongdoer to do him right, that self-help is a true remedy...The acts of this nature, which we meet with in the law of torts, are expulsion of a trespasser, re-taking of goods by the rightful possessor, distress damage feasant, and abatements of nuisances. Peaceable re-entry upon land where there has been a wrongful change of possession is possible, but hardly occurs in modern experience. Pollock on the Law of Torts, 10th edition, p. 189.

Possession could be recovered from an early time, but in an action which was one of trespass in form only and in reality was a sort of a real action. Before the passing of the Common Law Procedure Act, 1852 (15 & 16 Vict. C. 76) actions of ejectment were in point of form pure fictions, and of these actions it is thus said in *Cole on Ejectment*, p. 2:

The whole proceeding was an ingenious fiction, dexterously contrived so as to raise in every case the only real question, viz., the claimant's title or right of possession, and to exclude every other, and whereby the delay and expense of special pleadings and the danger of variances by an incorrect statement of the claimant's title or estate were avoided. But it was objectionable, on the ground that fictions and unintelligible forms should not be used in Courts of justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form. This has been attempted with considerable success in the Common Law Procedure Act, 1852.

15 and 16 Vic. C. 76 S. 168, directed that:

Instead of the present proceeding by ejectment a writ shall be issued, directed to all the persons in possession by name and to all persons, entitled to defend the possession of the property claimed, which property shall be described in the writ with reasonable certainty.

The Act of 1852 practically retained the old form of action, divested of the fictions on which it depended. As regards the parties to be made defendants in an

(2) [1601] 1 Hob. 66.

(3) [1815] 6 Taunt 289 = 1 Marsh 633.

(4) [1892] 2 Q. B. 511 = 32 L. J. Q. B. 69 = 41 W. R. 56 = 57 J. P. 23 = 37 L. T. 547 = 41 R. 38.

(5) [1 00] 1 Q. B. 54 = 69 L. J. Q. B. 33 = 31 L. T. 410.

(6) [18 5] 4 E. & B. 760 = 3 C. L. R. 927 = 1 Jur. (N. S.) 775 = 24 L. J. Q. B. 130.

(7) [1844] 13 M. & W. 491 = 2 D. & H. 382 = 14 L. J. Ex. 29.

(8) [1854] 15 C. B. 145 = 23 L. J. C. P. 204 = 2 C. L. R. 704 = 18 Jur. 775 = 2 W. R. 565.

(9) [1871] 7 C. P. 547 = 41 L. J. C. P. 190 = 27 L. T. 99 = 20 W. R. 784.

(10) [1879] 4 A. C. 501 = 48 L. J. Q. B. 705 = 41 L. T. 418 = 28 W. R. 97.

action of ejectment the following is what is said in Dicey's Parties to an Action, pp. 494 and 497.

The persons to be made defendants in an action of ejectment, i. e., to be named in the writ, are all the tenants in possession of the land etc., sought to be recovered The persons to be named in the writ are, therefore, all the tenants in possession, i. e., every person who occupies as tenant or under-tenant (or as owner) any part of the property All the persons in actual occupation of the land claimed must, as already pointed out, be named in the writ and made defendants.

In Cole on Ejectment, p. 75, it is said:

The general rule on the subject is, that the action should be brought against all the tenants in possession, i. e., every person who occupies, as a tenant or under-tenant, any part of the property: *Doe d. Smith v. Roe* (11), *Doe d. Williamson v. Roe* (12); *Doe d. Lord Darlington v. Cock* (13); *Doe d. Turner v. Lee* (14).

In every case, however, regard must be had to the circumstances, e. g., where the real intention of the action is to turn out the tenant and not the sub-tenants and the sub-tenants are numerous the latter need not be joined: *Glen v. Herring* (15). If a person in possession but not claiming through the defendant is not sued but ejected, he may have the judgment set aside on being added as a party: *Minet v. Johnson* (16).

The cause of action in an action for damages is the injury sustained, while in that of action for ejectment is the detention of the property. The two causes of action are essentially distinct, and the principles applicable are radically different.

In Halsbury's Laws of England, Vol 23, p. 102 the principles are summarized thus:

Para. 179.—The proper defendant in an action of tort is the wrongdoer or the person who is liable for the acts of the wrongdoer or to whom the liability for the injury has passed. If several persons jointly commit tort they may all be sued jointly for such tort, or any one or more of them may be sued separately, and if one of several wrongdoers is thus sued the plaintiff cannot be obliged to join any of the others as co-defendants.

Para. 180.—In an action brought for the recovery of land, all the persons who are in possession should in general be joined as defendants.

The principles governing the rule of joinder of defendants in an action for ejectment are mainly two: first, if any of the persons in possession is left out, he

remains in possession as not being affected by the decree, and the decree as one in ejectment and for possession becomes infructuous because the persons ejected as being bound by the decree can always come in under the person who remains in possession; and second, there is a certain amount of risk involved in not making the persons in actual possession defendants, for in execution of the decree persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree.

It may, however, happen that the existence of a person in possession is not known to the plaintiff and so he is omitted, or one who is not in possession is wrongly impleaded, in the action. In cases such as these, as observed in Cole on Ejectment, pp. 84-85

. . . . If the name of any tenant in possession be omitted as a defendant those parts of the premises which are in his occupation cannot be recovered in that action. On the other hand, if the name of any person be inserted as a defendant, who is not actually a tenant in possession of any part of the property claimed, it will probably be necessary to obtain a Judge's order to amend the writ by striking out his name and to amend the writ accordingly.

In a case where the plaintiff has alleged in the plaint that a person is in possession, and there is no question of any particular share of which he may be in possession, it is obvious that it is not possible to apply the principle embodied in the first part of this rule.

For the application of the rule, that in an action in ejectment all persons in possession should be impleaded as defendants, there is no distinction in principle between the cases of trespassers and of tenants who claim to hold under a title, because all actions in ejectment proceed on the assumption that the plaintiff has title and hence the right to possession, and that the defendant has none. The rule that all persons in actual possession should be joined as parties has been recognized in this country upon good authority: *Banuti v. Narsingrao* (17) *Kali Narayan Roy v. Haran Chandro Ghose* (18); *Sarat Kamini Dasi v. Chaitanya Charan* (19); *Siddik Ahmed Keran v. Azizur Rahaman Khan* (20). The principle that a suit will not be entertained where no effective decree can be

(11) [1836] 5 Dowl. 254.

(12) 10 Moore 493.

(13) [1825] 4 B. & C. 259.

(14) [1841] 9 Dowl. 612.

(15) [1905] 1 K. B. 152.

(16) [1899] 63 L. T. 507.

(17) [1906] 31 Bom. 250—9 Bom. L. R. 91.

(18) [1920] 64 I. C. 714.

(19) A. I. R. 1923 Cal. 289.

(20) A. I. R. 1927 Cal. 238.

passed in it is well recognized: *Haran Sheikh v. Romesh Chandra* (21).

The result then is that the appellant's contention, that the suit was maintainable in the absence of the heirs of defendant 6, must fail. There has, however, been no investigation on the question as to whether the mother of defendant 6 is in possession, and if so, whether she is not in possession of any specific plot out of the land in suit. In view of the exceptional nature of the case in which the said defendant has left only a mother surviving him, we think the plaintiff should be given an opportunity of establishing that the said widow may very well be left out on an investigation held on the lines indicated in the judgment of this Court in *Sarat Kamini Das v. Chaitanya Charan Prohoray* (19).

We accordingly set aside the decree of the lower appellate Court and send back the case to that Court so that the plaintiff may be given such an opportunity, and that on giving the defendants also a chance of producing any materials in rebuttal, that they may desire to dispose of the appeal in accordance with law.

The appeal is thus allowed and the case remanded to the lower appellate Court. Costs of this appeal will abide the result

N K.

*Appeal allowed :
Case remanded.*

(21) A. I. R. 1921 Cal. 622.

A. I. R. 1928 Calcutta 142

B. B. GHOSE AND ROY, JJ.

Jatindra Nath Choudhuri and others
—Plaintiffs—Appellants

v

Trailakaya Nath Das — Defendant —
Respondent.

Appeal No 459 of 1925, Decided on 18th July 1927, from appellate decree of Addl. Dist. Judge, 24-Pargannas, D/-20th November 1924.

Landlord and Tenant—Tenant encroaching on land of a stranger contiguous to his—Landlord is not entitled to get rent for the land so encroached on.

A tenant who has agreed to pay to the landlord rent only in respect of the area actually under cultivation is not liable for the payment of rent to the landlord for the land of a stranger contiguous to that of his own and which was encroached upon by him.

[P 143 C 1]

Brojo Lal Chakravarti, Surendra Nath Basu and Anilendra Nath Roy Choudhuri
—for Appellants.

Sarat Chandra Bose and Satchouripati Roy—for Respondent.

Judgment.—This appeal by the plaintiffs arises out of a suit for rent with regard to a portion of the decree made by the Additional District Judge of Alipore affirming the decision of the Subordinate Judge. The plaintiffs let out a large tract of land to the defendant in 1315. The land was jungle and the lease was a reclamation lease stipulating that the tenant was to pay rent at the rate of twelve annas per bigha for the lands under cultivation. It was stated in the lease that the area demised was about 1,000 bighas. The suit was for arrears of rent from 1323 to 1326. The dispute was as regards the area actually under cultivation. It was found that the defendant had encroached upon a certain area of jungle lands within the khas mahal of the Government contiguous to the land of the plaintiffs which was demised to the defendant. The plaintiffs claim rent with regard to those lands also which actually belong to Government. The answer of the defendant is that he is not liable to pay rent to the plaintiffs for those lands. It is contended on behalf of the appellants that when a tenant encroaches upon the contiguous waste land either of the landlord or of a neighbouring proprietor, such encroachment enures for the benefit of the landlord, and the encroached land becomes a part of the tenure. That being so, according to the law in England as well as in this country, the plaintiffs, as the landlords of the defendant, are entitled to recover rent on account of the lands encroached upon. The rule in England is that, so long as the tenant is in possession of the encroached land, he holds it as a part of the demised premises and, after the end of the term, the landlord is entitled to get possession of that land. There is no question under the English law of getting an increased rent for the increased area. Babu Brojo Lal, however, contends, on the strength of the principle that a tenant making an encroachment on the neighbouring land holds it as a part of the tenure, he is liable to pay increased rent for increased area to his landlord with regard to the

contiguous land encroached upon although it belongs to a third party. There is no authority for this proposition, and the difficulty in accepting this contention is that, if it is correct, the position of the tenant who encroaches upon such land would be to place him under two opposing fires. The true owner of the land encroached upon may either sue to eject him and ask for damages or he may sue for fair and equitable rent according to the practice prevailing in this country where a squatter takes possession of waste or jungle land. In such a case, if the true owner sues the tenant for rent, according to the proposition enunciated by Babu Brojo Lal, he would be liable to pay rent both to his landlord with regard to the demised premises and to the owner of the encroached land. This difficulty is sought to be met by Babu Brojo Lal, by the answer that if the true owners sue his tenant, then his client would not certainly be entitled to recover any rent on account of the encroached land. But, so long as the true owner does not come, Babu Brojo Lal's contention, is that he is entitled to claim rent from his tenant. That proposition if properly tested, would lead to curious results. Let us assume that Babu Brojo Lal's client sues the tenant for one year's rent and recovers a decree for the lands the tenant had encroached upon. After he has obtained his decree and realized the money, the true owner sues the tenant for rent or damages for use and occupation. The true owner would naturally succeed in his suit. What would be the position of the tenant then? He cannot recover from his landlord the money paid in execution of a decree passed by a Court and, therefore, he would be liable both to his own landlord as well as to the true owner whose land he has encroached upon for a single act of trespass. The proposition, therefore, put forward by the appellants, does not appear to be a correct one. The appeal must accordingly be dismissed with costs.

S J.

Appeal dismissed.

*** A. I. R. 1928 Calcutta 143**

SUHRWARDY AND S. C MALLIK, JJ.

Tarapada Ghose — Plaintiff — Applicant.

v.

Bagala Sundari Basu and another — Defendants — Opposite Party.

Civil Revn. No 608 of 1927, Decided on 12th July 1927, from decision of 3rd Sub-Judge, Alipore, D/- 12th April 1927.

* (a) Civil P. C., O. 1, R. 11—"Person," meaning of.

The word "person" in O. 1, R. 11, means a party to the suit and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of that rule. *Peck v. Roy* (1891), 3 Ch. 282 and 40 M. J. J. 208, Dist. [P 146 C 1]

* (b) Civil P. C., O. 1, R. 11—*Permission to conduct a suit on behalf of absent party without special authorization cannot be granted.*

Where the wife of the defendant applied for permission to conduct the case on behalf of her husband on the ground that her husband was either murdered or was being kept in solitary confinement at the plaintiff's instance.

Held: that O. 1, R. 11, does not authorize the Court to allow a third party to conduct a suit on behalf of an absent party without special authorization. [P 146 C 2]

Provas Chandra Mitter, Bimala Charan Deb and Indu Prokash Chatterjee — for Applicant

Ganada Charan Sen and Ramendra Chandra Roy — for Opposite Party.

Suhrawardy, J—This rule has been obtained by the plaintiff against an order of the Subordinate Judge of 24 Parganas, dated 12th April 1927, permitting the wife of the defendant to conduct the defence on his behalf under the following circumstances: The defendant Protap Chandra Basu was the cashier and collecting agent for a number of years working under the plaintiff. The plaintiff's case is that on one morning he found the defendant absconding with the key of the iron safe in his charge. A criminal case was brought against him, but he is still absconding. The present suit has been instituted for accounts against Protap Chandra Basu and the plaintiff also applied for attachment before judgment of certain sums of money. Thereafter the opposite party No. 2, Bagala Sundari Dasi, applied for permission to conduct the case on behalf of her husband on the ground that her husband was either murdered by the plaintiff or was being kept in solitary confinement at the plaintiff's instance.

The learned Subordinate Judge has been unable to find whether the version of the plaintiff was true or the defendant's wife's version relating to the disappearance of the defendant was true, and permitted the wife to conduct the case on behalf of her absent husband. The order passed by the Subordinate Judge is based on two grounds. His interpretation of O 1, R. 11 gave him enough jurisdiction to entrust the defence to the wife though she was not a party to the suit. The other ground is that if O. 1, R. 11 does not apply the Civil Procedure Code is silent and there is no express provision to meet the contingency that has arisen in the present case and, therefore, in the exercise of inherent jurisdiction vested in the Court he can give the conduct of the suit to the opposite party No. 2.

It has been argued before us that O 1, R 11 does not authorize the Court to give the permission, as above stated, and that, as there is no provision in the Code for allowing a third party to conduct a suit on behalf of an absent party without special authorization the Court has no power to give such permission. As regards the first ground it is contended on behalf of the opposite party that the word "person" in O. 1, R 11 includes any person—he be a party to the suit or not—and the Court has jurisdiction to give such permission to the wife in the present case to conduct the defence on behalf of her husband. As this is a case of first impression and no authorities are available either for or against, I have given my very careful consideration to the contentions raised on both sides and I find myself unable to agree with the interpretation put upon the rule by the Court below and urgently pressed before us by the learned advocate appearing for the opposite party. The main argument upon which this view is supported is that O 1, R 11 reproduces the provision of the last paragraph of S. 32 of the Code of 1882, which was as follows: The Court may give the conduct of the suit to such plaintiff as it deems proper." The present Code has in O 1, R 11 reproduced all the words of the repealed section except that the word "plaintiff" has been changed into "person." It is accordingly argued that this change is instructive and gives an inkling into the mind of the legislature as to what was really meant by the change, and it is said that the legislature intended by the alteration of the words

to invest the Court with power to give the conduct of the suit to any person whom it deems proper, be such person a party to the suit or a stranger to it. I do not think that the idea with which this alteration was made was as has been suggested by the opposite party. The alteration has been made in order to assimilate the wording of the rule of the Code to the corresponding rule of the Supreme Court in England. Order 16, R. 39 of the rules of the Supreme Court is, so far as is relevant for our present purpose, in these words:

The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as he may think fit.

Under the English law the few cases which have been decided under this rule show that the Court has as much power to give the conduct of the suit to one of the plaintiffs as the conduct of the defence to one of the defendants: see the case of *Peek v Ray* (1). The further reason for the alteration seems to be that under the law, as it stood under the repealed Civil Procedure Code, the Court had power to entrust one of the plaintiffs with the prosecution of the suit. As it was deemed to be desirable that the power of the Court to put one of the parties in charge of the suit should be extended to the conduct of the defence, a general word was used to include both the plaintiff and the defendant. As I have said, there is no case in support of the view pressed by the opposite party or that which I feel disposed to adopt; but the commentators of the Civil Procedure Code have put an interpretation on this rule which accords with my reading of the law. I only refer to their opinion in support of the view which I take in this matter independently of what they have stated. Sir John Woodroffe, in his well-known edition of the Civil Procedure Code observes, commenting on O. 1, R. 11, as follows:

The word "suit" does not ordinarily include defence, but, according to the English practice, the conduct of the defence also is often given to one of the defendants Apparently with a view to adopt that practice, the "person" has been substituted for the "plaintiff."

This view has been accepted and adopted by another commentator, Mr. Nandlal in his useful edition of the Civil Procedure Code. There is a decision in the

(1) [1891] 3. Ch. 282=63 L. J. Ch. 647=7 R. 259=42 W. R. 498=70 L. T. 769.

Madras Court which shows how this rule has been understood. In *Saminatha Pillai. v. Rajagopal Mudaliar* (2) the learned Judges held that it was permissible under O 1, R. 11 to transpose a defendant as a plaintiff and give him the conduct of the suit. The order within which R 11 appears is described in the heading as relating to parties to suit, which lends strength to the view I have adopted. The word "person" has been used in several rules under that order. Though I do not think that the meaning which may be given to that word in any rule will necessarily govern the meaning of the word used in R. 11, a reference to the various rules in O. 1 may be made to show that the word "person" was not used in any particular sense by the legislature and that it should be interpreted according to context. R 1 says that all persons may be joined in one suit . . . if such persons brought separate suits, any common question of law or fact would arise R 3 says that all persons may be joined as defendants . . . where, if separate suits were brought against such persons, any common question of law or fact would arise There can be no doubt that the word "person" used in these rules means persons who are parties to the suits. R 6 empowers the plaintiff to join as parties to the same suit all or any of the persons severally or jointly and severally liable. R 7 says :

Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress he may join two or more defendants . . .

In these two rules the word "person" has been used to indicate a person who is or may be a party to the suit. Some stress has been laid upon the use of the word in R. 8. It says :

Where there are numerous persons having the same interest in a suit, one or more of such persons may . . . sue or be sued.

Clause 2 of the rule says :

Any person on whose behalf or for whose benefit a suit is instituted . . . may apply to the Court to be made a party to such suit

It is argued that the word "person" in this rule means a person who is not a party to the suit and the use of the two words "person" and "party" in Cl. 2 indicates that the legislature intended to mark some distinction between the two classes of persons described as "person" and "party." I do not think that there is much substance in this contention. The word "person" has been used

in the rule in the ordinary sense and it cannot be suggested that any other word could have been used. The rule deals with cases in which various persons are interested and it authorizes one of such persons to sue or defend on behalf of the others. As I have said the rule opens with the words "one or more of such persons may sue or be sued"; the word "persons" there must mean those who are virtually parties to the suit Cl. 2 makes no distinction between "person" and "party," but only says that any person may apply to be made a party. In R 10 the word "person" has been similarly used without bearing any special significance. The rule says :

Where a suit has been instituted in the name of the wrong person as plaintiff . . . the Court may order any other person to be substituted or added as plaintiff upon such terms as the Court thinks fit.

Here the word "person" has been used for the plaintiff on the record, as also for a person who may be substituted or added as plaintiff. In Cl (2) it is laid down that if a party is improperly joined or the name of any other person ought to have been joined, whether as plaintiff or defendant, the Court may pass order as authorized by the rule. Here the person who has been improperly joined has been described as a "party" because he is a party to the suit, and anyone whom the Court thinks should be added as a party to the suit has been described as a "person" because he was not a party at the stage. Cl. 3 of the rule says that no person shall be added as a plaintiff or as the next friend without his consent. The use of the word "person" does not give us much help in interpreting the word in R 12. It is contended on behalf of the opposite party that the word "person" in R. 11 must be taken in its ordinary sense meaning anyone including a person who is not a party to the suit. But one of the canons of construction of a statute is that reasonable interpretation should be given to each word. It seems unreasonable to hold that the legislature, by the use of the word in R 11, has intended that the Court may authorize anyone to appear on behalf of a party to the suit and have the conduct of the suit except under special provisions contained in the Code itself. The result of adopting the view which has been pressed upon us will be that no party to a suit may appear and the Court may give power to

any one to conduct the suit or defend it on behalf of a party. Of course, there is the safeguard that the Court will exercise judicial discretion, but the investing of the Court with such general authority seems to be unreasonable. A reference to R 12 may be made. There it is laid down that, where there are more plaintiffs or defendants than one, they may authorize one of them to conduct or defend the suit. If it was intended that anyone who is not a party to the suit may be entrusted with the conduct of the suit it was not necessary, under R. 12 that one of the parties should be empowered for the purpose. On all these considerations I am of opinion that the word "person" in O. 1, R 11 means a party to the suit, and that a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of that rule. In this view this rule is made absolute with costs, and the order of the lower Court, empowering the opposite party No. 2, Bagala Sundari Dasi to conduct the defence on behalf of the defendant Pratap Chandra Basu, is set aside. We assess the hearing-fee at four gold mohurs.

Mallik, J—I agree.

N.K.

Rule made absolute.

A. I. R. 1923 Calcutta 146

RANKIN, C. J., AND D. N. MITTER, J.

Siba Kumari Devi—Plaintiff—Appellant

v.

Doshi Ghosain — Defendant—Respondent.

Appeals Nos 1159 to 1161 of 1925, Decided on 26th July 1927, from appellate decrees of Dist Judge, Nadia, D/-15th December 1924.

(a) *Bengal Tenancy Act, S 109.1—Application covering matter other than that of settlement of rent—Second appeal lies.*

Where an application to the Settlement Officer for a settlement of fair and equitable rent does not cover only the matter of settlement of rent within the meaning of those words in S. 109A but some other points also: there is a right of second appeal. [P 146 C 2]

(b) *Bengal Tenancy Act, S. 105 (1)—Application for substitution even after two months from the final publication of Record-of-Rights is valid.*

When S. 105 (1), Beng. Ten. Act, speaks of an application, it is not necessary for the landlord

or the tenant making the application to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought, and therefore an application to bring on record the heir or transferee of the right of the tenant after two months from the final publication of the Record-of-Rights is perfectly good: *A. I. R. 1926 Cal. 1037, Foll.* [P 147 C 1]

(c) *Bengal Tenancy Act, S. 105—Application made only against one of the joint tenants—Landlord's remedy under S. 105 is exhausted.*

Where an application for settlement of rent against one of the co-tenants was made and the matter was fought out to a finish in the landlord's presence and ultimately the application was dismissed on the ground that such an application must be brought against all the joint tenants:

Held: that in such a case the landlord's remedy under S. 105 must be deemed to be exhausted and he must pursue his remedies in civil Court if any. [P 147 C 2]

Sarat Chandra Basak, Mritunjoy Chatterjee, Urukram Das Chakravarty and Rama Prosad Mookerjee—for Appellant.

Mahomed Syed Nasim Ali and Nirod Bandhu Ray—for Respondent.

Rankin, C. J.—These are three appeals from a decision of the District Judge of Nadia, sitting as a special Judge affirming a decision of the Assistant Settlement Officer of Krishnagar.

In each of these cases the landlord appellant made an application to the Settlement Officer for a settlement of fair and equitable rent. The application appears to be in a printed form, and it is somewhat difficult to make sure of the nature and exact scope of the claim intended to be conveyed by it. The body of the document appears to raise every possible claim including questions of excess area of lands. However, taking the document as a whole, we are not satisfied that the only matter dealt with by that application is settlement of rent within the meaning of those words in S 109A, and we are not prepared to say that in these cases there is no right of second appeal. Accordingly it becomes necessary to examine into the particular facts.

In S. A No 1159 it appears that an application was made within two months of the final publication of the Record-of-Rights. It would seem that the Record-of-Rights recorded the tenancy in the name of a lady, Bhussani. The Record-of-Rights was finally published in November 1922. On 14th April 1923, the defendant Doshi

Ghosain was added as a party. It then turned out that, while she was added as being the heiress of Bhussani, she was not the heiress of, but a purchaser from, Bhussani. In these circumstances she set up a defence to say that she purchased a jama bearing a rental of Rs. 9-12-9. The learned special Judge said that it was unnecessary to decide the question of fact whether the land appertained to the jama of Rs. 9-12-9. The Assistant Settlement Officer having found the point in favour of the defendants and the landlord being desirous of contesting it before the Court the learned special Judge proceeded upon the footing that as Doshi Ghosain was brought on the record on 14th April 1923, the proceedings against her were out of time because she was not impleaded until after two months from the final publication of the Record-of-Rights. It does not seem to me that that view is consistent with the decision of this Court in the case of *Bir Bikram Kishore v. Ambika Charan* (1). There three Judges of this Court laid it down that when S. 105 (1), Beng. Ten. Act, speaks of an application it is not necessary for the landlord or the tenant, in making the application to name any person. It is only necessary to indicate the holdings in the record in respect of which a settlement of fair and equitable rent is sought. Accordingly there was a perfectly good application in this matter brought within the two months and, on the doctrine of that case, it appears to me that this matter ought to go back to the learned special Judge, the preliminary objection as to time being overruled, in order that he may decide the case upon its merits. The appellant is entitled to her costs of this appeal.

The next appeal is No 1161, and in this case it seems that the original defendant or tenant recorded in the Record-of-Rights was Danej Mia. One Jogendra Nath Ghosal was brought on the record by a petition filed after two months from the date of the final publication, namely, on 16th April 1923. It turned out that Danej Mia's interest had been sold at auction, the sale certificate being in May 1922, and possession is said to have been taken in April 1923. In this case, however, it appears that, although Jogendra Nath Ghosal's name had been substituted

for Danej Mia on the application of the plaintiff, Jogendra was only one of several persons interested in the tenancy. Now, the matter was fought out to a finish in his presence and ultimately the application was dismissed on the ground that such an application must be brought against all the joint tenants. It does not seem to me to be right that in these circumstances this matter should be sent back in order that the other joint tenants should be impleaded. If the landlord went on against one only, then his advantage, such as it is, in being able to proceed under S 105, must come to an end. She must be left to take such steps by way of suit in civil Courts as she may be advised. In these circumstances, I think, this appeal must be dismissed with costs.

As regards appeal 1160: there, it appears, that the recorded tenant was one Nagendra Nath Mukerjee, but that by the time the final publication took place in November 1922, this man was dead for about two years. Then an application was made on 18th July 1923 to bring the present defendant on the record and that was refused because it was more than two months from the date of the final publication. The case seems to me to be governed by the decision of the case of *Bir Bikram Kishore v. Ambika Charan* (1), to which I have already referred. As regards this matter I think the appeal should be allowed, the decree of the lower appellate Court should be set aside and the case should be sent back to the Assistant Settlement Officer to proceed with the application against the proper parties. The appellant is entitled to her costs of this appeal.

We assess the hearing-fee in each case at one gold mohur.

Mitter, J.—I agree.

N.K. *Appeals 1159 and 1160 allowed: Appeal 1161 dismissed.*

(1) A. I. R. 1926 Cal. 1037.

A I. R. 1928 Calcutta 148

B. B. GHOSH AND ROY, JJ.

Brojo Lal Saha Banikya—Defendant
—Appellant.

v

Budh Nath-Pyari Lal Das—Plaintiffs
—Respondents.

Appeal No 1 of 1926, Decided on 13th July 1927, from original decrees of 1st Sub-Judge, Dacca, D/- 28th November 1925

(a) *Civil P. C., O. 30, R. 1*—*Suit by a firm on pro-note executed in favour of one partner—Suit is maintainable—Negotiable Instruments Act, S. 78.*A firm is not a person ; it is not an entity ; it is merely a collective name for the individuals who are members of the partnership. Therefore, a suit by a firm on a pro-note in favour of one of the partners is maintainable : *A. I. R. 1924 Cal. 74* and (*English cases*), *Rel. on.* [P 150 C 1](b) *Negotiable Instruments Act, S. 78—Holder and owner different persons—Owner is not prohibited from bringing a suit.*Section 78 does not prohibit any person other than the holder to bring a suit, if that person is the true owner. *A. I. R. 1918 P. C. 146 Dist. 30 Mad. 88 (F. B.), Dist. and Diss. from. : A. I. R. 1922 All. 70, not Foll.*(c) *Negotiable Instruments Act (1881)—Construction.*In order to construe the Negotiable Instruments Act, it would not be proper to find out what the Law Merchant was before the Act, was enacted : *23 Cal. 563 (P. C.), Rel. on.* [P 151 C 1]*Provash Chandra Mitter and Hira Lal Ganguli*—for Appellant.*H. D. Bose, M. L. Roy, Upendra Lal Roy and Suresh Chandra Das*—for Respondents.

B B Ghose, J—This appeal arises out of a suit brought against the defendant by the firm in the name and style of Budh Nath-Pyari Lal Das for recovery of Rs 21,562 2-0 alleged to have been lent to the defendant for which a promissory note was given by the defendant in favour of Pyari Lal Das, dated 21st January 1921. The defendant raised various pleas in his defence, but the question with which we are mainly concerned in this appeal is whether the suit has been properly brought by the plaintiff firm or, in other words, whether the plaintiff has the right to sue for the debt. Other defences were raised in the Court below, but Sir Provash, appearing for the defendant who is the appellant before us, has candidly stated to us that, upon the materials on the record, it would be difficult for him to attack the judgment of the Subordi-

nate Judge on the other facts found by him against the defendant. The Subordinate Judge made a decree in favour of the plaintiff mainly upon this ground :

The Negotiable Instruments Act nowhere lays down that the real owner of the money lent to a person on a promissory note cannot sue its maker and get any money from him if his name be disclosed to the maker ; it simply lays down that the holder of the document is entitled to get the money and give a discharge to the maker ; even a benamidar or trustee, if he be the holder, can sue and get a decree. The right of the real owner is not affected by this Act, if his name be disclosed to the maker of the instrument and if the maker does not make any payment to the holder and get a discharge from him.

The learned advocate for the appellant raises two points in his appeal : the first is that the plaintiff firm was incompetent to maintain the suit, having regard to the provisions of S. 78, Negotiable Instruments Act, 1881, read with S 8 of Act. Secondly, if the suit is considered to be based upon the consideration paid to the defendant, the suit is barred, having been brought more than three years after the time when the loan was advanced. Under the promissory note the loan was payable to Pyari Lal Das or to his order after thirty days from the date of its execution. The present suit was brought on the 16th February 1924. If the suit is considered to have been brought on the promissory note it is within time. But it is contended, on behalf of the appellant, that, if the suit is considered to have been brought for the original consideration, then it is barred by limitation. It is further urged on behalf of the appellant that, on a true reading of the plaint it must be held that the plaintiff did not bring the suit upon the original consideration, but based his claim only upon the promissory note. This last argument can hardly be advanced on appeal. It will appear that in the Court below issues were framed as regards the consideration. Issue 2 runs thus :

Did the plaintiff firm advance Rs 16,700 to defendant in the benami of Rai Pyari Lal Das Bahadur as alleged in the plaint ?

Issue 3 is this :

Can the plaintiff firm recover the amount in suit or any amount as alleged in the plaint ?

From these issues it seems to me that it is quite clear that both the parties understood that the suit was based on the promissory note as well as on the original consideration paid to the defendant. The learned counsel for the respondent, Mr. Bose

in answer to the first contention of the appellant that the suit is not maintainable because the holder of the promissory note has not sued, urges that, as a matter of fact, the holder of the note is one of the plaintiffs in the cause and the objection raised by the defendant is not maintainable. He also contends that the opinion of the Subordinate Judge, that the true owner of the money can also maintain the suit, is the correct view to take. Lastly, he urges that the suit upon the consideration is not barred by limitation.

The first point taken on behalf of the respondent by the learned counsel does not appear to have been dealt with in the Court below. But the point may be, shortly stated to be this. Although the plaintiff's name is described as the firm of Budh Nath Pyari Lal Das, as a matter of fact, all the members of the firm should be considered as plaintiffs in the cause. It is not disputed that Pyari Lal Das, the holder of the promissory note, is a member of the firm. As a matter of fact Pyari Lal Das has signed the plaint, on the allegation that he is a partner on behalf of the firm Budh Nath Pyari Lal Das and he has also verified the plaint himself. The question, therefore, resolves itself into this: Whether the plaintiff firm Budh Nath-Pyari Lal Das is a separate entity or a legal person different from Pyari Lal, or is it a comprehensive name for a number of persons, including Pyari Lal as a plaintiff. If the name of the firm is really the name of Pyari Lal with the addition of the names of certain other persons who are partners of the firm, then it is contended by the learned advocate that the holder of the promissory note is the plaintiff in the cause, and the fact that he has joined other persons with him in bringing the suit cannot defeat the suit. The only question would be, if we do not accept the second branch of his argument in support of the finding of the Subordinate Judge, that the decree requires to be slightly amended by making it only in favour of Pyari Lal Das. This argument requires to be properly examined. O 30, R. 1, sub-R. (1), Civil P. C., which is a new addition to the Code of 1908, runs thus:

Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm.

It is unnecessary for me to recite the other portions of the rule. From this provision it appears to me that, if several persons who carry on a business as partners want to sue, the short method of describing them has been provided under this order. So far as I am aware it has not been considered that a partnership entered into by two or more persons is considered to be a legal person. As far as I have been able to find, that has not been considered to be so even in England, although the rule seems to be different in Scotland. Our attention has been drawn by the learned advocate for the respondent to the observations made by Lord Justice Lindley in the case of *Western National Bank v. Perez* (1) which runs thus:

When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues 'partners' in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

Similar observations were made by Farwell, L. J., in the case of *Sadler v. Whiteman* (2), where the Lord Justice observes that when a firm is sued, all the members of the firm are to be considered as parties. Similar observations were also made in the case of *Heinemann v. Hale* (3). It is contended on behalf of appellant that the observations which were made in those cases were with reference to different enactments and should not be applied to the present case. It is, no doubt, true that those observations were made with reference to different Acts, but the sole question is whether the firm is a separate personality as such and, in my judgment, the observations of the learned Judges familiar with the laws of partnership are of great assistance in arriving at a conclusion on the question. Those observations were followed in this Court by my learned brother Mr. Justice Page in the case of *Seodoyal Khemka v. Joharmull Manmull* (4). At p. 558 the learned Judge observes:

A partnership under S. 239, Contract Act, is a relationship which subsists between persons; but a firm is not a person; it is not an entity; it is merely a collective name for the indi-

(1) [1891] 1 Q. B. 304=60 L. J. Q. B. 272=39 W. R. 245=34 L. T. 513.

(2) [1910] 1 K. B. 868=54 Sol. J. 375=102 L. T. 472=26 T. L. R. 372.

(3) [1891] 2 Q. B. 83=60 L. J. Q. B. 650=39 W. R. 485=64 L. T. 548.

(4) A. I. R. 1924 Cal. 74=50 Cal. 519.

duals who are members of the partnership. It is neither a legal entity, nor is it a person.

With this observation I entirely agree. Some of the authorities cited in support of this observation have been referred to by me already. That being so, assuming that the first contention raised on behalf of the appellant, that no suit is maintainable by any person other than the holder is sound, in my judgment the suit cannot be thrown out on the ground that the holder of the promissory note is not a plaintiff. As I have already stated, Pyari Lal Das is a partner, and along with him there are several other persons who are partners of the firm, and we may take this to be the fact that these persons were joined in their individual capacity in the suit along with Pyari Lal Das. Sir Provash, on behalf of the appellant, contends, that the firm is a separate entity in this particular case is a question of fact, because Pyari Lal Das in his evidence stated that he had got separate funds from his other partners. But this is not a question of fact. The names of the four persons who are partners of the firm may be taken to have been specifically stated in the plaint and all of them may be considered to have joined as plaintiffs.

This is sufficient for the purpose of deciding the case. But I think it is right that I should express my opinion with regard to the point which has been dealt with by the Subordinate Judge, as the question has been very elaborately argued by the learned advocates on both sides. It is contended, on behalf of the appellant, as I have already said, that S 78 read with S 8, Negotiable Instruments Act, bars any suit brought by a person other than the holder for the recovery of any money due on a promissory note. The learned advocate for the appellant has relied on certain cases. The first case which he refers to was *Firm of Sadasuk Janki Das v. Kishan Pershad* (5). That was a case in which the plaintiffs sued a person as defendant for recovery of a certain sum of money due on a promissory note on the allegation that the drawer was an agent for the defendant. That suit was held by their Lordships of the Privy Council as not maintainable. This is cited as an authority for the proposition that no person other than the one who appears as a party to

the instrument is entitled to sue for the money. It seems to me that it is asking us to hold that the converse of the proposition laid down by their Lordships is true. I am not prepared to hold that.

The principle which has obviously been laid down is that, when credit is given to one person by the plaintiff, he cannot say that the credit is really given to another. Some other cases which have been cited by the appellant do not require any examination because they are really not in point with regard to the question now before us. That case, on which great stress was laid by the appellant, is the case of *Subba Narayana Vathiyar v. Ramaswami Aiyar* (6). The actual decision of the case itself is not in point. The question in that case was whether a defendant was entitled to give evidence to show that a promissory note executed by him was not really executed in favour of the plaintiff although he was the payee named in the note, in support of the plea that the note had been discharged by payment to the person really interested.

The learned Judges held that he was not so entitled and that is quite within the provisions of S 78, Negotiable Instruments Act, as it is enacted there that the payment of the amount due on a promissory note must, in order to discharge the maker or the acceptor, be made to the holder of the instrument. But the difficulty has been increased by the fact that the learned Judges made some observations with regard to the right of a person to bring a suit, who is not named therein as the holder. These observations appear at p [91 of 30 M.] of the report. The obiter dicta are entitled to the greatest respect as the learned Judges who composed the Bench were English lawyers dealing principally with what is taken to be English law. But the difficulty arises when the learned Judges give their reasons for their dicta that negotiable instruments were governed in this country as in England by the Law Merchant. I should have been very glad to follow the dictum in that case although it was obiter, if I were not of the opinion that, where I am not bound by authority, I must decide a point according to my own judgment, and with very great respect, I feel that the dicta do not commend themselves to me. The first thing that I have to observe is

(5) A. I. R. 1918 P. C. 146=46 Cal. 663=46 I. A. 33 (P. C.).

(6) [1907] 30 Mad. 88=16 M. L. J. 508 (F. B.).

that the Law Merchant of England was never applied in the mofussil, while the Negotiable Instruments Act is s. applicable; and in order to construe the Negotiable Instruments Act it would be travelling too far if we go to see what the Law Merchant was. The preamble to the Negotiable Instruments Act states distinctly that it is an Act for the purpose of defining and amending the law relating to promissory notes, bills of exchange and cheques. Therefore, I do not think that in order to construe the Act it would be proper for us to find out what the Law Merchant was before this Act was enacted. Such a procedure was disapproved by the House of Lords in the case of *Bank of England v. Vagliano* (7) and by the Privy Council in the case of *Norendra Nath Sarcar v. Kamalbasini Dasi* (8). We must, therefore, construe the Act as it stands. In my judgment the effect of S. 78 of the Act is this that it is not open to the defendant to plead that the holder of the instrument is not entitled to recover the money. If any third person sues the maker or acceptor of the promissory note, it would be a very good defence for him to say that he has been discharged by the holder of the instrument. Further, it would also be a very good defence to say that, unless the plaintiff in the suit gets him a discharge from the holder of the instrument, he is not bound to pay. But it would be going too far to say that that section prohibits any person other than the holder to bring a suit, if that person is the true owner. If that were the intention of the legislature, it seems that it would have been quite simple to state that: no person, except the holder, would be entitled to institute any suit on the instrument.

No such thing has been stated in any portion of the Act. Speaking of the procedure in England it is quite true that there are passages in text-books here and there that no person who is not a party to the instrument can be sued or "bring a suit." But I have not been able to find any authoritative decision in support of the statement contained in the books, that no such person can sue. The learned advocate for the appellant has stated to us that, although he endeavoured to find a decision to that effect in the English

reports he has not been able to find any. But his argument is that it would appear from the text-books that that was the accepted view of law in England and, therefore, the draftsman of the Negotiable Instruments Act did not think it necessary to put the express prohibition in the Act itself. The surmise of the learned advocate may be true, but, whatever may be the law in England, I do not see any reason why we should construe the Act in the way proposed by the learned advocate and, as I have already stated, it will do no harm to any body, if the real owner is held to be entitled to sue if he is capable of giving a good discharge to the debtor from the holder of the instrument. In the present case, the holder of the instrument, Pyari Lal Das, has given evidence that the money belongs to all the members of the firm, and it has been found that the defendant was aware of it. He was willing to give a discharge to the defendant. It may be observed in this case that if Pyari Lal Das had taken the precaution of endorsing the instrument to the firm, there would have been no trouble. There is another case which I ought to refer to and which was cited on behalf of the appellant. It is the case of *Reoti Lal v. Manna Kunwar* (9). That case is directly in favour of the appellant's contention. In that case the real owner brought the suit on the allegation that the holder of the instrument was her benamidar who was dead at the time without leaving any heir. It was not possible for her to get any transfer from the holder. She brought the suit in her own name. The learned Judges held, reversing the decree of the lower Court, that the suit was not maintainable. The learned Judges professed to follow the observations in the case of *Subla Narayana Vathiyar v. Ramaswami Aiyar* (6), which I have already dealt with. No other reasons have been given except that S. 78, Negotiable Instruments Act, bars the suit. I have made my observation on the construction of the section, and, with great respect, I am unable to accept the conclusion of the learned Judges in that case. This contention on behalf of the appellant, therefore, fails.

Apart from what I have said with regard to the construction of S. 78 above, it may be observed that, where the suit is brought by the true owner and not by

(7) [1891] A. C. 107=60 L. J. Q. B. 145=55 J. P. 676=64 L. T. 353=39 W. R. 657.

(8) [1896] 23 Cal. 563=23 I. A. 18=6 Sar. 663 (P. C.).

(9) A. I. R. 1922 All. 70=44 All. 290.

the holder of the instrument, the special rules of evidence contained in Ch. 13, Negotiable Instruments Act, would not evidently apply; and in this case the defendant was allowed to raise various pleas as to no receipt of consideration and so forth in his defence.

Lastly, I have to deal with the question whether the suit may be said to have been based upon the consideration advanced to the defendant. The learned advocate for the appellant contends that the plaint is ambiguous, but, as I have already pointed out, issues were raised in the Court below, from which it appears that the question was raised whether plaintiffs were entitled to claim the money advanced apart from the promissory note.

Next arises the question of limitation for such a suit. Mr. Bose, for the respondent, contends that in the plaint it is stated that the agreement was to pay the money after 30 days of its being advanced. This averment in the plaint has not been challenged by the defendant and, therefore, it must be taken to be an uncontroverted fact. That being so, the article of the Limitation Act which applies to the case is Art 115. Sir Provash, for the appellant, however, answers that in the plaint it is only stated that the agreement to pay after 30 days was contained in the promissory note. If the promissory note is wiped out, then there is no evidence in support of the allegation that that was that contract and, therefore, the cause of action accrued from the date of payment. Having regard to the fact, in my opinion, that the suit was also based on the consideration, it may be taken that the plaint mentions the agreement to pay after 30 days as a fact apart from the promissory note. That being so, Art 115, Lim. Act, would be applicable and the cause of action would accrue from the date of the breach. That is how this article has been construed in the case of *Rameshwar Mandal v Ram Chand Roy* (10), which has been followed in other cases.

The appeal, therefore, fails on all the points that have been raised and must be dismissed with costs.

Roy, J.—I agree.

R. K.

Appeal dismissed.

A. I. R. 1928 Calcutta 152

B. B. GHOSE AND ROY, JJ.

Jatinra Nath Dalal—Plaintiff—Appellant.

v.

Narendra Nath Dalal and others—Defendants—Respondents.

Appeal No 89 of 1926, Decided on 15th July 1927, from original decree of Offg. Sub-J, 24 Parganas, D/- 29th April and 6th May 1927, respectively.

Civil P. C., O. 6, R. 17—An amendment to strike out the name of defendant 1, who died subsequent to filing the suit, should be allowed.

The plaintiff brought a suit for partition and accounts and other reliefs against several persons. Defendant 1 was alleged to be primarily liable. But the plaintiff stated that defendant 1 was at the time of the plaint lying ill at Benares, according to his information, and he did not know whether he was alive or dead at the time and, therefore, as an additional precaution, the plaintiff had joined his heirs as defendants in the suit. Soon after the filing of the plaint, one of the heirs informed the Court that defendant 1 had died the day previous to the day the plaint was filed. Thereupon, the plaintiff asked for an amendment of the plaint by striking out the name of defendant 1 from the list of defendants and for putting in the name of defendant 1 in the body of the plaint wherever the words "defendant 1" occurred, but the Court rejected the application for striking out the name of defendant 1.

Held: that amendment should be allowed. As heirs were impleaded, the suit could not be held to have been brought as against a dead person. [P 152 C 1]

Sarat Chandra Bose, Bijan Kumar Mukherjee, Radha Benode Pal, Bhupendra Kumar Bose and Jitendra Mohan Banerjee—for Appellant

Brojo Lal Chakravarti, Tarakeswar Pal Chaudhury and Satindra Nath Mukherjee—for Respondents.

B. B. Ghose, J.—This is one of the most curious judgments I have come across in the course of my experience. The plaintiff brought a suit for partition and accounts and other reliefs against several persons. Defendant 1 was alleged to be primarily liable. But the plaintiff stated that defendant 1 was at the time of the plaint lying ill at Benares, according to his information, and he did not know whether he was alive or dead at the time, and, therefore, as an additional precaution, the plaintiff had joined his heirs as defendants in the suit. Soon after the filing of the plaint, one of the heirs informed the Court that defendant 1 had died the day previous to the day the

plaint was filed Thereupon, the plaintiff asked for an amendment of the plaint by striking out the name of defendant 1 from the list of defendants and for putting in the name of defendant 1 in the body of the plaint wherever the words "defendant 1" occur. There were other prayers for amendment with which we are not concerned just now. The Subordinate Judge, by a curious method of reasoning, rejected the application for striking out the name of defendant 1 from the list of the names of defendants and putting in the full name of defendant 1 in the body of the plaint. His reasoning seems to have been that no suit can be brought against a dead person. This is quite true Defendants 2 to 6, however, were living persons against whom the suit had also been brought. Whether the suit was maintainable as against the heirs on the merits is a matter which requires decision. The Subordinate Judge did not want to decide it and threw away the case without hearing anything This procedure is regrettable The learned vakil for the respondents supports the order on the ground that the plaintiff wanted to make a new case by his petition for amendment. We are just now not concerned with what new case the plaintiff wanted to make We have only to deal with the order rejecting the plaint on the ground that the suit was brought against a dead person, while, as a matter of fact, it was not

We must, therefore, set aside the order of the Subordinate Judge and send back the case to the lower Court to be tried according to the provisions of the law. The cause title must be amended by striking out the name of Hari Mohan Dalal as defendant 1 and the plaint allowed to be amended by putting in the full name of Hari Mohan Dalal at every place where the words "defendant 1" occur, and such consequential amendments must also be allowed on account of this amendment being made; that is to say, instead of the relief claimed against Hari Mohan Dalal, the relief may be claimed against his heirs. Whether the heirs would be liable for any of the claims advanced in the plaint or not is a matter which is to be decided in the suit. He is wrong to say that the plaint should be rejected, because no cause of action is disclosed. The learned vakil for the respondents cannot say that there is no

cause of action, because, it being a suit for partition and accounts, a cause of action is disclosed. Whether the bar of limitation can be seriously pleaded or not is a question which seems to be merely academical, because the suit was filed on 27th July 1925 and the application for amendment made on 29th August 1925. Whether any other amendment of the plaint should be allowed or not is left to the discretion of the Court. But the manner in which that question has been decided by the Court is disapproved by us.

The appellant is entitled to his costs of this appeal. We assess the hearing-fee at 30 gold mohurs.

Roy, J.—I agree.

N.K.

Appeal allowed.

A I. R. 1928 Calcutta 153

MITTER, J.

Radha Ballabh Guha—Plaintiff—Petitioner.

v

Panchkari Sil and another—Defendants—Opposite Party.

Civil Revn No. 432 of 1927, Decided on 31st May 1927, from order of 4th Oifg. Sub-Judge, Dacca.

(a) *Small Cause Courts Act* (9 of 1887), Sch. 2, Art. 3: (1)—*A suit brought by the landlord for the price of the trees cut bona fide by the tenant is cognizable by the Small Cause Court.*

• A suit by landlord against his tenant for the price of trees cut and appropriated by the latter under a bonafide belief of his right to do so, though in fact he had no right, is cognizable by small cause Court. [P 154 C 2]

(b) *Provincial Small Cause Courts Act* (1887), S. 27—*Suit valued at less than Rs. 100 tried by Munsif in his ordinary jurisdiction—No appeal lies.*

Where a suit of a small cause nature and valued at less than Rs. 100 was tried by the Munsif who was vested with powers of a Small Cause Court Judge, to try cases up to the value of Rs. 100 under his ordinary jurisdiction.

Held: that no appeal lay from his decision: A. I. R. 1924 Cal. 487, Ref. [P 154 C 1]

Jatinlara Nath Sanyal — for Petitioner.

Bankim Chandra Banerji—for Opposite Party.

Judgment.—This rule was issued on the opposite party to show cause why the order of the Subordinate Judge of Dacca,

dated 17th February 1927, entertaining and allowing an appeal preferred by the opposite party from a decision of the Munsif of Dacca, dated 30th September 1926, should not be set aside.

It appears that the plaintiff, who is the petitioner before this Court, instituted a suit in the Court of the Munsif of Dacca for recovery of a certain sum as the price of trees which had been cut by the defendant. The defendant is plaintiff's tenant, and the plaint alleged that the defendant had, as such tenant, no right to cut away and misappropriate any tree without the permission of the plaintiff either under the local custom or under the law, and, as the defendant wrongfully and illegally cut away two hijal trees from the land, he was liable to pay compensation.

The Munsif decreed the plaintiff's suit and ordered that "the suit be decreed in part for Rs 5-2-6 with proportionate costs." The suit was valued at less than Rs. 100 and it is admitted that the Munsif who tried the suit was vested with powers of a Small Cause Court Judge to try cases up to the value of Rs. 100.

It is argued that the present suit was a suit of a Small Cause Court nature and, although the Munsif tried it under his ordinary jurisdiction, no appeal lay from the decision of the Munsif to the Subordinate Judge; and, in support of this contention, reliance is placed on a decision of the learned Chief Justice in the case of *Mohini Mohan Ray v. Ramdas Paramhans* (1). This position is not controverted by the learned vakil for the opposite party. The question, therefore, on which this rule turns is this: namely, whether on a true reading of the plaint it can be said that the suit was one which was exempted from the jurisdiction of the Court of Small Causes by reason of the provisions in Art. 35, Cl. (ii) Provincial Small Cause Courts Act, which excludes cases which fall under Ch. 17, I. P. C., from the cognizance of a Small Cause Court.

It appears to me, from the allegations in the plaint, that the allegations do not constitute mischief within the meaning of S. 426, which falls under Ch. 17, I. P. C. The dispute is between the landlord and a tenant, and the question as to whom the right to the trees, or the

right to the timber when the trees are felled, belongs, is often a question of considerable difficulty. The tenant, for aught one knows, might bona fide believe that he was entitled to cut the trees, and if, under such bona fide belief, he cut the trees the provisions of Ch 17, I. P. C., would not be applicable to his act. I think, therefore, that the suit was one which was not excluded from the cognizance of the Court of Small Causes. That being so, no appeal lay to the Subordinate Judge.

The result is that the order of the Subordinate Judge is set aside and the decree of the Munsif is restored, but, in the circumstances of the present case, as no objection was taken to the competency of the appeal before the Subordinate Judge by the petitioner, he is not entitled to costs in this Court.

N.K.

Rule made absolute.

* A I. R. 1928 Calcutta 154

B. B. GHOSE AND ROY, JJ.

Radha Mohun Dutt — Defendant 2 — Appellant.

v

Nripendra Nath Nandy and others — Plaintiffs and Defendant 1 — Respondents.

Appeal No 236 of 1925, Decided on 28th June 1927, from original decree of 1st. Sub-Judge, 24-Parganas, D/- 27th August 1925

* (a) *Transfer of Property Act, S. 59—Mortgagor's acknowledgment of the execution of a document before the Sub-Registrar, and the Sub-Registrar's endorsement thereon, amount to its proper attestation.*

Where the mortgagor acknowledges execution of the mortgage before the Sub-Registrar, and the endorsement of the Sub-Registrar shows that the execution was admitted by the mortgagor, then the document should be held to be properly attested under the Transfer of Property Amendment Act, 27 of 1926: 35 *Mad.* 607 (P.C.), *Dist.* [P 156 C 1]

(b) *Transfer of Property Amendment Act (27 of 1926)—Act is retrospective.*

The Act applies to all transactions, however, ancient, to which the Transfer of Property Act is itself applicable, and an appellate Court is bound to give effect to the legislative definition of the word "attestation" although the Act was passed after the decree of the trial Court. [P 156 C 2]

(c) *Evidence Act, S. 56—Judicial notice—Registration Act, S. 60.*

Judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. [P 156 C 2]

Sarat Chandra Bose, Gopendra Nath Das and Narayan Chandra Kar—for Appellant.

Narendra K. Basu, Rajendra Bhusan Bakshi and Gour Mohan Dutt—for Respondents.

Judgment.—This appeal by defendant 2 arises out of a suit brought by the sub-mortgagee against the sub-mortgagor and the original mortgagor. Defendant 2 was the original mortgagor. The mortgage-bond is dated 27th February 1920, and was executed in favour of defendant 1. Defendant 1 sub-mortgaged his right to the plaintiff by a deed dated the 18th January 1921. The Subordinate Judge passed a decree in favour of the plaintiff. Defendant 2, in his appeal, takes the ground that neither the original mortgage-bond nor the sub-mortgage-bond was properly attested. With regard to the bond executed by the original mortgagee, the contention of the learned vakil for the appellant is untenable, because there is the evidence of one witness that the other witnesses also attested the document, and there was no cross-examination on the point. The argument with regard to the original mortgage-bond has more substance. Of the two witnesses, whose names appear as attesting witnesses, one was examined, viz, Mr. Sambhu Nath Banerjea. This gentleman was a vakil of this Court at the time when he attested the bond. He is now an advocate and a barrister-at-law. This gentleman stated in his cross-examination that Mr. Susil Chandra Sen, the other attesting witness, was not present when the document was executed and that the signature of Mr. Susil Sen was not made in his presence. With regard to his own attestation: he said that he was present at the time of the mortgage-bond, that he saw Radha Mohun Dutt put his signature on the mortgage-bond and that he attested it. From his evidence it is quite clear that Susil Chandra Sen was not present at the time when the mortgagor put his signature on the bond.

According to the definition of "attestation," as interpreted by the Privy Council in the case of *Shambu Patter v. Abdul Kadir Rowthan* (1), the attesting witness, in order to prove legal attestation of a document, must have seen the exe-

cutant put his signature to the document and, in that view, it should have been held, as the appellant contends, that the document was not properly attested.

The learned Subordinate Judge, however, was of opinion that Mr. Sambhu Nath Banerjea, having given his evidence five years after the event, might not distinctly remember the details. That is quite possible. But the difficulty in supporting his judgment, on the ground the Subordinate Judge has stated, is that there is no other evidence on the record to prove proper attestation. The mortgagee even does not give his evidence that the other witness was present and had seen the execution. The Subordinate Judge further says that, when the mortgagor admits execution, the document should bind that person. The difficulty, again, in accepting this proposition is that the defendant 2, from the very outset, pleaded that the document was not properly attested. Under these circumstances the learned advocate for the original mortgagee, defendant 1, asked us to take the evidence of the other attesting witness, Mr. Susil Sen, who was then an attorney-at-law and acted on behalf of the mortgagee as a member of the firm of Messrs. Dutt and Sen. Mr. Susil Sen is also a vakil of this Court, and the learned advocate for defendant 1 requested us to examine this gentleman in furtherance of justice.

It was pointed out to us that that gentleman was present on several occasions in the Court below to give evidence, but, unfortunately, the Court had no time to take up this case on those dates which was adjourned from time to time. To the plaintiffs' misfortune, the case was taken up on a date when Susil Sen was unable to reach the Court. Apparently, because the presiding officer was in favour of the plaintiffs' contention, no application was made before the Judge to have an adjournment for the examination of Susil Sen. Under these circumstances, we felt inclined to examine this gentleman. But we are relieved from taking that course by reason of the new amendments of the Transfer of Property Act, which were pointed out to us by Babu Gour Mohun Dutt appearing on behalf of the plaintiff-respondent. These amendments are embodied in Acts 27 of 1926 and 10 of 1927. Act 27 of 1926 gives a new definition of the word "at-

(1) [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P. C.)

tested" by insertion of a clause in S 3, T P Act, after the definition of the word "instrument" Shortly stated, it is this : the word "attested" means

attested by two or more witnesses each of whom has seen the executant sign or has received from the executant a personal acknowledgment of his signature or mark , but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.

Babu Gour Mohun argues that this document was registered and the mortgagor acknowledged execution before the Sub-Registrar, and the endorsement of the Sub-Registrar to the document was to the effect that the execution was admitted by Radha Mohan Dutt who was identified by Sambhu Nath Banerjea, Vakil, High Court, Calcutta. Then follows the signatures of Radha Mohan Dutt, the mortgagor, and of Kripa Nath Dutt, District Registrar of Assurances. It is further argued by Babu Gour Mohun that this being the fact, we should hold, by reference to the cases cited on the question of proper attestation of wills, that the acknowledgment before the Sub-Registrar and the signature of the Sub-Registrar below the endorsement on the deed amount to sufficient attestation under the amended definition in Act 27 of 1926.

With regard to the question of wills : this has been held to be a proper attestation from a very early date : see the cases of *Hurro Sundari Datta v Chunder Kant Bhuttacharjee* (2) and *Amarendra Nath Chatterjee v Kasi Nath Chatterjee* (3). There was some difference of opinion between this Court and other High Courts as to whether this new Act 27 of 1926 applies to transactions which had taken place before the passing of the Act. A Division Bench of this Court seems to have been of opinion that it was not applicable to such transactions. A later Act, however, was passed, viz., Act 10 of 1927, which is described as an Act to amend certain enactments and to repeal certain other enactments. It has been enacted with regard to the Transfer of Property (Amendment) Act, 1926, that in S. 2 in the definition of the word "attested," after the word "means" the words "and shall be deemed always to have meant" shall be inserted. This leaves no

doubt in the construction of the Act, that it should be applied to all transactions, however ancient they may be, to which the Transfer of Property Act itself is applicable. In that view, the contention raised by Babu Gour Mohun Dutt must be given effect to.

One point was urged by the learned advocate for the appellants, that the Sub-Registrar should have been examined in order to prove the attestation made by him. But that is not at all necessary, because we must take judicial notice of the endorsement of the Sub-Registrar and his signature. The next point urged is that both these amendments of the Transfer of Property Act came into operation after the judgment of the Subordinate Judge and should not, therefore, be applied to this case. This argument does not appear to be of any substance, because, even if the Subordinate Judge had dismissed the suit on the ground that there was no proper attestation, we should have been bound to give effect to the legislative definition of the word "attestation" although the Act was passed after the decree. The arguments raised on behalf of the appellants having failed, this appeal must be dismissed with costs. Costs of the appeal will be added to the mortgage-money of the plaintiff. Defendant 1, the original mortgagee, will bear his own costs in this Court.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 156

CUMING AND ROY, JJ.

Jogendra Chandra Mukherji and another—Defendants 1 and 2—Appellants.
v.

Monmohini Debi and others—Plaintiffs
—Respondents

Appeal No. 524 of 1925, Decided on 22nd August 1927.

(a) *Bengal Tenancy Act, S. 85—Application.*
Section 85 does not apply to homestead lands.
[P 152 C 2]

(b) *Evidence Act, S. 115—Permanent lease by a person professing to have a higher status than that of a raiyat cannot plead that lease is contrary to Bengal Tenancy Act.*

When a lease, purporting to be of a permanent character, is granted by a person who, on the face of the document, confesses to have a higher status than that of a raiyat, the grantee may invoke the doctrine of estoppel against the grantor and the persons claiming through him.
[P 157 C 2]

(2) [1881] 6 Cal. 17=6 C. L. R. 303.

(3) [1900] 27 Cal. 169.

The question of invalidity of the lease may be raised by the landlord or a person claiming through him or by some one who has a permanent title, but not by the grantor or anyone claiming through him : *A. I. R. 1921 Cal. 451 (F. B.)*, *Foll.* ; *13 C. L. J. 649* and *17 C. W. N. 59, Ref.* [P 157 C 2]

Sarat Chandra Basak and Prokash Chandra Mazumdar—for Appellants

Gunada Charan Sen and Prasanta Bhushan Gupta—for Respondents.

Roy, J.—This appeal is by defendants 1 and 2 in the suit which has been decreed in the plaintiffs' favour by both the Courts below. The suit concerns a plot of homestead land belonging to defendant 6. The plaintiff obtained a nim howla patta from the latter, but on the next day the defendants took possession of the land and the plaintiff was obliged to bring this suit for khas possession and establishment of her title. The defendants resisted the suit on the ground that there was a prior contract of sale by virtue of which defendants 1—5 were put in possession. It appears that defendant 2 is also a mortgagee from the lessor. The lessor supported the defence. Both Courts came to the conclusion that the defence is untrue and decided the suit in the plaintiffs' favour. Defendants 1 and 2 have come up now on appeal to this Court. The learned vakil appearing for them contends, in the first place, that there being a subsisting mortgage no decree should have been passed without safeguarding the mortgagee's rights. There was no issue upon the mortgage and it does not appear that the mortgagee's rights are affected in any manner by this litigation.

The second ground taken turns upon the fact that in the settlement khatian the plot in dispute is recorded as half howla and half karsha. The contention is advanced that, in respect of a moiety share of the land, the plaintiff being an under-raiyat the lease given to her is invalid by reason of S 85, Ben. Ten. Act. The learned Subordinate Judge dealt with this contention very briefly. He said that the lease was granted in respect of homestead land and not agricultural land, and so this contention cannot prevail. It is argued that this view is wrong. Undoubtedly the land is homestead, and it does not appear that it is held as a part of any agricultural holding or that defendant 6 is even an agriculturist. If the statement in the judgment of the trial Court is

correct the land has been homestead from before the permanent settlement. The Bengal Tenancy Act has no operation as regards homestead lands and the reference to S 85, Ben Ten Act, does not seem to be pertinent.

It is argued, however, that the plot having been recorded karsha or occupancy raiyati in eight annas the legal effect must follow. Various authorities were quoted. It was urged that the case of *Manik Borai v Bani Charan Mondal* (1), where it was said that the question of invalidity of the lease could be raised only by the landlord, proceeded on the question of estoppel and that the true position of an under-raiyati lease for over nine years as being wholly void was laid down in *Jarip Khan v. Durfa Beva* (2), and that the defendants who are strangers can challenge the plaintiffs' title as being invalid. The matter has been set at rest now by the Full Bench case of *Chandra Kanta Nath v. Amjad Ali Hazi* (3). It was decided that when the lease, purporting to be of a permanent character, is granted by a person who, on the face of the document, confesses to have a higher status than that of a raiyat, the grantee may invoke the doctrine of estoppel. Here the plaintiff got a permanent lease. The grantor is estopped. The defendants claiming through the grantor are equally estopped. The question of invalidity of the lease may be raised by the landlord or a person claiming through him, or by some one who has a permanent title, but not by the grantor or anyone claiming through him. It was suggested that the defendants were strangers. They cannot have a better right than the raiyat himself. If the plaintiff can maintain the suit against the raiyat she has a right to the land and the defendants, who have no title whatever, cannot be allowed to remain on the land. It was contended on a reference to *Harendra Lal v Hari Das Debti* (4) that the parties committed a fraud on the registration office. That position was also discussed in the Full Bench case. If the parties knew all along the real character of the land, no question of estoppel would arise. That is not

(1) [1911] 13 C. L. J. 649—10 I. C. 469.

(2) [1913] 17 C. W. N. 59—15 I. C. 476—16 C. L. J. 141.

(3) *A. I. R. 1921 Cal. 451*=4; *Cal. 783 (F. B.)*.

(4) *A. I. R. 1914 P. C. 67*=11 *Cal. 972*=11 *I. A. 110 (P. C.)*.

the case here. As was observed by Mookerjee, A C J., the question of the true nature of the tenancy is often a matter involved in doubt and uncertainty.

Defendant 6 has treated the homestead as his howla. It appears that an officer of the landlord was actually examined in this case, and he deposed that there were several maliks and some said that defendant 6's right was howla and some karsha and that is how the settlement record came to be framed. There is no question of a conspiracy of false recitals. The plea, therefore, is without substance and must fail. The appeal is dismissed with costs.

Cuming, J.—I agree.

N K

Appeal dismissed.

A. I. R. 1928 Calcutta 158

B. B. GHOSE AND PAGE, J.

H. R. Chamaria & Co.—Defendants—Appellants.

v

Sonatan Pal and another—Plaintiffs—Respondents.

Appeal No 25 of 1926, Decided on 3rd May 1927.

Evidence Act, S 115—Equitable mortgagee entering into possession with consent of mortgagor—The former leasing the property to a third person—Auction-purchaser of the equity of redemption is bound by the mortgagor's consent and his suit for rent and damages against the third person is not maintainable.

C got into possession of property in suit as tenant at a monthly rent. He was let into possession by G, an equitable mortgagee from father of S, in his capacity as a guardian of S, and paid rent. After some time C entered into an infructuous rental contract with G to purchase the property, but C did not pay the money as G could not execute any valid deed of transfer, and it was settled and agreed that instead of rent reasonable interest upon the sum should be paid by C. P, a vendee from S, brought a suit for rent and mesne profits against C.

Held (per B. B. Ghose, J.): that as G was in possession as a mortgagee, C, having been brought on the mortgaged property by G, had no privity between himself and the mortgagor so as to be liable to the mortgagor for his occupation of the mortgaged property. P being bound by the consent, given by or on behalf of the owner of the equity of redemption before his purchase, to the taking of possession by G, he cannot, on that ground, maintain his suit against C for damages or rent. [P 162 C 1, 2]

Per Page, J.—That G could not legally enter into an agreement for a tenancy with C in the capacity either of guardian or of agent of the minor son of S, and therefore the suit, as framed, must fail for no privity of estate exists between the plaintiff and C. [P 163 C 1]

P. C. Mitter, Charu Chandra Biswas and Monindra Kumar Biswas—for Appellants.

Joges Chunder Roy, Rajendra Chandra Guha and Prokas Chandra Mazumdar—for Respondents.

B. B. Ghose, J.—This is an appeal on behalf of the principal defendant, H. R. Chamaria & Co, who may shortly be described as Chamaria, against a judgment and decree of the Subordinate Judge, 2nd Court, Dacca dated 21st December 1925. The suit, as framed, was on the ground that Chamaria was a tenant-at-will under one J. B Sukeas who was the owner of the property in question. The plaintiff had purchased the right, title and interest of the legal representative of J. B Sukeas in execution of a money-decree on 2nd May 1919. He was put into symbolical possession by virtue of his purchase on 18th July 1919. The purchase was made in the benami of his son, named Bepin Behary Pal who was joined as defendant 2 in the suit. On 4th August 1919 the plaintiff served notice on Chamaria determining the tenancy under which Chamaria was alleged to have held the property in question as from the end of August 1919. The present suit was brought on 17th September 1919, and the claim was for rent at the rate of Rs. 600 per month from 2nd May to 31st August 1919, and for damages at a certain rate, which it is unnecessary to mention, from 1st September to 17th September 1919. The plaint was subsequently amended by an application made on 23rd January 1925, asking for mesne profits or damages up to the date of delivery of possession. By this amendment the original valuation of the suit, which was Rs. 10,000 odd, was increased to Rs 80,000 odd. The defendant objected to the application for amendment which was overruled by the lower Court. The defendant's main defence was that he was never a tenant of the land under the plaintiff or his predecessor-in-interest, and the plaintiff has no right to maintain the suit against him. His case was that one J. C. Galstaun held an equitable mortgage or, as it may be properly described, as a mortgage by deposit of title-deeds, which was effected in the town of Calcutta under S. 59, T. P. Act, by J. B. Sukeas; and that Galstaun was in possession of the property in suit along with other properties as a mort-

gatee, and while in such possession Galstaun let out the property at first to a brother of J. B Sukeas and then to the defendant Chamaria at a rent of Rs. 600 per month. But some time in April 1918 an agreement was entered into between Galstaun and Chamaria that Chamaria would purchase the property in dispute for Rs. 85,000 and that he would have to pay no rent, but would have to pay interest on the purchase money agreed to between them. The sale⁹ could not be affected because Galstaun had no right to effect a sale of the property at the time. But the stipulation was that Galstaun would either take the permission of the Court to sell the property on behalf of the infant heir of J. B Sukeas, or he would himself effect the sale after purchasing the property in execution of the decree on his mortgage which he intended to have. On these pleadings several issues were framed in the lower Court. The main questions are covered by issues 3, 7 and 11. Issue 3 was:

Is there any relationship of landlord and tenant between the plaintiff and the defendant.

Issue 7 was:

Was the plaintiff aware of the equitable mortgage in favour of J. C. Galstaun at the time when he purchased the property in suit? If so, can he get khas possession without redeeming plaintiff's mortgage?

Issue 11 was:

Whether Mr. J. C. Galstaun is mortgagee in possession of the properties in suit. If so, whether the plaintiff is entitled to recover any amount by way of damages?

It should be stated here that the plaintiff did not, at the commencement, admit the mortgage of Galstaun. When the suit was brought by Galstaun on his mortgage the present plaintiff was joined as a defendant as he ought to have been joined as a purchaser of a portion of the equity of redemption. Galstaun's suit on his mortgage was brought on 14th May 1919, four months prior to the present suit by the plaintiff. The plaintiff disputed the mortgage and in that suit he took up a plea that Galstaun having got into possession of the property and having realized the profits, he was bound to account for the receipts, and those must be debited against the debt if any was found due to Galstaun. That suit was decided in the trial Court on 23rd September 1921. There was an appeal against that decision and this Court modified the decree of the Subordinate Judge by its judgment dated 23rd January 1924. I

shall speak later on about this judgment. The judgment and decree of the High Court were affirmed by the Judicial Committee in January 1927: [vide *A. I. R.* 1927 *P. C.* 60—*Ed.*]

In the presesent case before the Subordinate Judge the trial proceeded upon the ground that Galstaun had a mortgage on the property in question. The sole question upon which the parties seem to have been in controversy was whether Galstaun was ever in possession of the property in question as a mortgagee, or, in other words, whether Galstaun's position was that of a mortgagee in possession. The Subordinate Judge found, as it was found in the previous litigation, that the purchase of the plaintiff was with notice of Galstaun's mortgage. The Subordinate Judge found in the present case in deciding issue 7, as stated above, that Galstaun took possession of the property as guardian of the infant son of J. B Sukeas and did not take possession as a mortgagee. That being so, he held with regard to issue 7, that the brother of J. B Sukeas was a tenant of Owen Sukeas, the infant son of the original mortgagor, when Galstaun let out the property to him and that Chamaria was similarly a tenant under Owen Sukeas when Chamaria was let into possession by Galstaun in his capacity of guardian of Owen Sukeas. In that view it was held that the plaintiff, as a purchaser of the right, title and interest of Owen Sukeas stepped into his shoes and thus Chamaria became a tenant under the plaintiff, and that tenancy was terminated at the end of August 1919, by notice to quit which was served by the plaintiff upon Chamaria, and upon that basis the plaintiff was entitled to a decree for rent for the period of the tenancy and also for damages by way of mesne profits till the date of delivery of possession. The property however, was sold in execution of the mortgage decree obtained by Galstaun on 23rd October 1925, and purchased by himself. The value fetched for the property at the execution sale was far below the amount of the mortgage decree. By reason of that sale no decree could have been made by the Subordinate Judge for ejectment of the defendant, as the plaintiff's title to the property ceased to exist by virtue of that sale. But he made a decree for damages up to that date and the total

amount of the decree made by the Subordinate Judge, who modified the claim for damages made by the plaintiff to a considerable extent, was Rs 46,660. The defendant Chamaria has appealed to this Court.

The first ground taken on behalf of the appellant is that the amendment asked for by the plaintiff should not have been allowed by the lower Court. We do not think that there is any substance in this objection. If the plaintiff had not specified in his plaint that he asked for mesne profits till the date of the suit, that is to say, till 17th September 1919, the Court might have been in a position to make a decree for mesne profits up to the date of delivery of possession. But, if the suit is otherwise properly framed, there was no harm in allowing the plaintiff to amend his plaint by striking out from his prayer for recovery of mesne profits the words "up to the date of the suit" and by substituting in their place the words "up to the date of delivery of possession."

The appellant then takes up the position that he was brought on the land by the mortgagee Galstaun who was in possession at the time, and that so long as the possession of Galstaun could not be got rid of, the plaintiff was not entitled to sue him as there was no privity between him and the plaintiff. As I have already stated Chamaria never acknowledged that he was on the land as tenant of Sukeas. Galstaun's possession was not admitted by the plaintiff in this suit either in the plaint or in the evidence on his side. The Subordinate Judge, however, has found that Galstaun was in possession. But he has held that as Galstaun was in possession as a guardian of Owen Sukeas the relationship of landlord and tenant existed between Owen Sukeas and the defendant. The question, therefore, is whether that position is at all maintainable. The learned vakil, on behalf of the plaintiff-respondent, does not seek to support the decree of the Subordinate Judge on that ground. The position that he takes up is this: that Galstaun got into possession without any right. His position was that of a mere trespasser and Chamaria, who was brought on the land by Galstaun, was in no better position. They were joint trespassers upon the facts as established by the evidence. That being so, the plaintiff was entitled to claim damages from any one of them, both of

whom were jointly and severally liable. So long as it is not established that the plaintiff has recovered any damage from the other joint trespasser the plaintiff is entitled to recover damages from this tortfeasor, that is, Chamaria; and upon that ground the decree of the Subordinate Judge is unassailable.

The appellant, on the other hand, contends that Galstaun was in possession as a mortgagee. He brought a suit on his mortgage. In that suit he admitted, in his plaint, as would appear from a recital in the judgment of the Subordinate Judge in the mortgage suit (at p. 42 of the second part of the paper-book), that he had obtained possession of the mortgaged properties and some moveables belonging to J. B. Sukeas, after the death of J. B. Sukeas. He had sold some of the moveables and realized the rents and profits of the mortgaged properties and credited the price and rent and profits towards the satisfaction of his debt. He took upon himself the liability to account as a mortgagee in possession. The present plaintiff was defendant 3 in the previous mortgage suit, who practically alone contested the suit. He also referred to the fact that Galstaun had taken possession of the property left by J. B. Sukeas and that he was bound to account for all the moneys that he had received, (which the present plaintiff described as misappropriation) and also to make good the amount of the loss which he had caused by his neglect to get in any part of the property of the deceased. In substance the present plaintiff, as a defendant in the mortgage suit, pleaded that not only Galstaun was liable to account for what he had actually received or might have received, but he was also liable to account for his wilful default. Upon that an issue was framed as to how much was realized, and that was the sixth issue before the Subordinate Judge in the mortgage suit. Galstaun produced his account books in the mortgage suit. What the receipts were is evident from the fact which was stated in the judgment of the Subordinate Judge (at p. 58 of the same part of the paper-book) where the Judge stated:

The plaintiff, it is true, credited in his accounts the moneys received from the estate of J. B. Sukeas after his death and these should be held as payments made in reduction of the plaintiff's dues.

It should be stated that the decree made by the Subordinate Judge was merely a

money decree as against the representative of the original debtor, J. B. Sukeas, and the sums which were found in the accounts to have been realized from the property by Galstaun were debited against his dues.

Against that decree Galstaun appealed to the High Court, and in the High Court the decree of the Subordinate Judge was modified to this extent that a decree was made in favour of Galstaun as a mortgagee and he was held entitled to recover his dues from the mortgaged property. With regard to the accounts: it appears that neither party pressed for an account being taken and a decree which in ordinary case is made to the effect that accounts should be taken of what was due to the mortgagee by taking accounts of what was due under the bond and what was received by the mortgagee from the mortgaged properties, was not made. Instead of that a decree was made for the sum that was found by the lower Court with interest and costs. The reason evidently seems to have been that both the parties knew that the receipts were less than the interest and outgoings and that on taking accounts the dues of the mortgagee would be found to have been much larger than what was found by the Subordinate Judge, and the mortgaged property not being of sufficient value it would be mere waste of time and money to take further accounts which would have the effect of increasing the debt which was found to be due to the mortgagee. There was an appeal from the decision of the High Court to the Privy Council by the present plaintiff. The judgment and decree of the High Court were affirmed by the Privy Council on the 21st January 1927.* No objection was made in that appeal to the accounts nor to the nature of the decree that was made by the High Court. The only ground upon which the present plaintiff chose to fight the case before the Privy Council was whether there was a mortgage or not. The position of the parties, therefore, stands thus: that if there was a mortgage the equity of redemption purchased by the plaintiff was worth nothing as the mortgage-debt of Galstaun would far exceed the value of the property in whichever way the accounts might have been taken.

It is contended on behalf of the appellant that it is quite clear from the facts

that Galstaun was in possession as a mortgagee. That being so, Chamaria had been brought on the land by the mortgagee in possession, and the plaintiff as a purchaser of the equity of redemption could not treat Chamaria as his tenant so long as the property was not redeemed by him. It is conceded on the part of the respondent that if Galstaun was a mortgagee in possession, and if Chamaria was brought on the property by Galstaun as such mortgagee, the plaintiff would have no case. But his contention is that Galstaun never took possession as a mortgagee and that contention is sought to be supported by the fact that the plaint was not drawn up in the mortgage suit in the form which is prescribed in Appendix A, form No 45, Civil P. C., for a plaint by a mortgagee who had entered into possession; and the decree is not also in the form given in Appendix D, Civil P. C. I have already stated why the decree was not in that form. The plaint, although it is not precisely in the form prescribed in Appendix A sufficiently indicates the position of Galstaun. When he stated in his plaint that he had a mortgage and that after the death of the original mortgagor he got into possession of the property and realized rents and profits which he was willing to debit against the mortgage amount, this is a sufficient statement that the mortgagee was liable to account as mortgagee in possession and I have already indicated the defence in which it was alleged that the mortgagee was not only bound to account for what he received, or what he might have received, but also to account for the loss to the estate by his default. Under the circumstances it seems to me difficult to hold that the position of Galstaun was anything but that of a mortgagee in possession. The Subordinate Judge has held that Galstaun went into possession as a guardian. It is undoubtedly true, as it appears from the record, that, after the death of J. B. Sukeas, who had himself written a pencil note before his death to the effect that Galstaun should look after his minor son, Galstaun thought that he would act as a sort of a guardian of the minor son of J. B. Sukeas as Galstaun seems to have been very much interested in the welfare of the family. With that view he took possession of not only the mortgaged property, but also some moveable properties belonging to Sukeas and

* [vide A.I.R. 1927 P.C. 60—Ed.]

tried to carry on his business. It is apparent that when he found that the debts of the estate of Sukeas were so great that it would be hopeless to try to save the estate, he ceased from acting as a sort of guardian of the infant. Subsequently, a lady, who was the grandmother of Owen Sukeas, took out letters of administration of the estate of J. B. Sukeas. Galstaun was certainly not entitled to enter into possession under his mortgage. But it is quite clear that he got into possession either with the express or tacit consent of the persons who were really interested in the estate of the mortgagor, J. B. Sukeas. This question does not seem to have been properly investigated and that must have been due to the fact that the plaintiff altogether ignored the existence of Galstaun with reference to this property in the present litigation. It appears quite clear from the evidence on the record that Galstaun entered into possession peacefully and without objection on the part of the persons interested in the mortgaged property. That being so, he cannot be treated as a wrongdoer, as he is sought to be treated by the respondent here and unless the plaintiff can maintain the position that Galstaun was a wrongdoer and Chamaria was equally a wrongdoer the present suit cannot in my opinion be maintained as against Chamaria.

It is contended on behalf of the respondent that there is nothing to show that Chamaria paid any money to Galstaun for the period of his occupation or that any sum which he might have paid was taken into account in the mortgage suit and, therefore, the plaintiff is entitled to recover the money from Chamaria for the period of his occupation. We are not concerned in this case, in my judgment, with the question whether proper accounting was made in the mortgage suit of Galstaun. That question does not arise in the present case. The short question which seems to arise here is that, if Galstaun was in possession as a mortgagee and was accountable as such in his mortgage suit, any person who has been brought on the mortgaged property by Galstaun has no privity between himself and the mortgagor so as to be liable to the mortgagor for his occupation of the mortgaged property. It may be conceded that the plaintiff, after his purchase of the equity of redemption could, by giving

proper notice to Galstaun, claim to recover possession of the property. In other words, he might withdraw by notice to Galstaun the consent that was either actually or tacitly given by his predecessor-in-interest to the taking of possession by Galstaun; but it is unnecessary to discuss what the position would have been in that case as there is no allegation anywhere on the record that any such notice was given. The plaintiff was, therefore, bound by the consent given by or on behalf of the owner of the equity of redemption before his purchase to the taking of possession by Galstaun and he cannot on that ground maintain this suit against the defendant for damages or rent.

There is another matter with regard to which I propose to make a few observations. The discussion by the learned Subordinate Judge in his judgment as regards the question whether Galstaun was a mortgagee in possession or not is based upon a discussion in the books as to whether the mortgagee should in certain cases be treated as having taken upon himself the onerous position of a mortgagee in possession. When a mortgagee enters into possession he is bound to account as a mortgagee in possession. But owing to the exceptional severity with which a mortgagee in possession is treated in taking accounts the Courts are slow to decide that such possession has been taken, and will only do so when it is proved that the mortgagee had no reasonable ground for believing himself entitled to take the rents and profits in any other capacity. The mortgagee may relieve himself of the liability to account as a mortgagee in possession by showing that he entered into possession in some other character. If he fails to establish that fact in order to exonerate himself from the liability to account as a mortgagee in possession, he is held to be accountable as much; for example, in this case if in the mortgage suit Galstaun had taken up the position that he did not enter into possession as a mortgagee but simply as guardian of Owen Sukeas, I think his plea could not have been given effect to. He was not the legal guardian of Owen Sukeas and, therefore, as there is no other legal ground, which he could maintain for being in possession of the property he would be liable to account as a mortgagee in possession. My view, therefore, is that Chamaria may shelter himself under

the plea that Galstaun took possession of the property as a mortgagee after the death of J. B. Sukeas and that he was brought on the land by Galstaun.

There was no relationship of landlord and tenant between him and the plaintiff and the plaintiff, therefore, is not entitled to claim anything from him. The plaintiff purchased the equity of redemption which unquestionably was worth nothing and he is not, in my judgment entitled, to recover anything from Chamaria.

In that view this appeal must be allowed and the suit dismissed with costs in all Courts.

Page, J.—I agree. This is a suit brought to recover khas possession of certain immovable property together with arrears of rent and mesne profits. The property in suit was the subject-matter of an equitable mortgage of 22nd May 1914, created by one J. B. Sukeas in favour of J. G. Galstaun.

It was common ground at the hearing of the appeal that even if the sums decreed for rent and mesne profits in the suit had been added to the mortgage security it would have been insufficient to meet the sum due to Galstaun under the mortgage of 22nd May 1914. The ground upon which the decree was based is set out in the judgment of the learned Subordinate Judge as follows :

Defendant 1 (that is appellant) got into possession admittedly as tenant at a monthly rent of Rs. 60). They were let into possession by Mr Galstaun in his capacity as a guardian of Owen Sukeas in 1917, and they paid rent as they had agreed to pay for a period of one year. In March or April 1918 they entered into an infructuous verbal contract with Mr. Galstaun to purchase the property for Rs. 85,000, but they did not pay the money as Mr. Galstaun could not execute any valid deed of transfer and it was settled and agreed that reasonable interest upon the sum of Rs. 85,000 should be paid by H. R. Chamaria & Co. As there was no sale the interest payable, as mentioned above, was really the rent payable for the property and thus the tenancy created at first was practically continued. The relationship of landlord and tenant, therefore, in my opinion, existed as between Owen Sukeas and defendant 1 till the interest of Owen Sukeas was purchased by the plaintiff on the 2nd May 1919 in the benami of his son, defendant 2, in auction sale. On purchase of the equity of redemption the plaintiff stepped into the shoes of Owen Sukeas and thus H. R. Chamaria & Co. became tenants under him. The tenancy terminated with the end of August 1919 as it was put an end to by a notice to quit.

It is quite clear that Galstaun could not legally enter into an agreement for a

tenancy with H. R. Chamaria & Co. in the capacity either of guardian or of agent of the minor son of Sukeas. It follows, therefore, that the suit, as framed must fail, for no privity of estate at any time existed between the plaintiff and Chamaria. At the hearing of the appeal, however, the learned vakil for the respondent contended that, although he could not support the decree upon the ground upon which it was based by the learned Subordinate Judge, it ought to be affirmed upon an entirely different basis. He urged that Chamaria must have been in possession of the property at all material times either without any title or claiming title through the mortgagor or the mortgagee.

As the learned vakil for the appellant admitted that he could not claim title through the mortgagor Chamaria either had no title to be in possession at all or he must rest his claim to be in possession upon the title of Galstaun, the mortgagee. Upon that assumption the learned vakil for the respondent further contended that Galstaun took possession without any pretence of legal right and was liable to be ejected as a trespasser; and that Chamaria, who admittedly was put into possession by Galstaun acting in some capacity or other, was in a like predicament. Being trespassers both Galstaun and Chamaria were jointly and severally liable to pay damages for having been in wrongful possession of the property. That is a different cause of action, involving the consideration of entirely different issues, from the cause of action that was set out in the plaint and canvassed at the trial, and learned counsel who appeared for the appellant strenuously contended that the Court ought not to permit the respondent to set up a new cause of action of this nature for the first time in appeal. It is necessary to decide that question, because, in my opinion, upon the evidence, the learned Subordinate Judge ought to have held that at all material times Galstaun was in possession of the property in suit as mortgagee and not as a trespasser. The oral evidence upon this matter, in my opinion, supported the view that Galstaun took possession of this property as mortgagee with the assent of the mortgagor. That being so, his possession was lawful possession unless and until the assent of the mortgagor to Galstaun remaining in possession of the mortgaged property was

withdrawn. At the hearing of the suit no allegation was made, no issue was raised, and no evidence was led by the plaintiff to prove that any time after he purchased the property the plaintiff had refused or withdrawn his assent to Galstaun remaining in possession of the property as mortgagee under the mortgage of 12th May 1914. It may be that if such an issue had been raised at the trial the defendant might have been in a position to prove that the plaintiff in fact consented to Galstaun remaining in possession as mortgagee. But once it is found that Galstaun took possession of the property as mortgagee with the assent of the mortgagor, in my opinion, the mortgagee's possession continued to be lawful possession until the assent of the mortgagor was withdrawn; and if Galstaun's possession was lawful possession it follows that Chamuria's possession was also lawful.

The result is, therefore, that, even assuming that the respondent ought to be allowed at this stage of the proceedings to put forward the case that Chamuria was a trespasser, such a contention must fail having regard to the evidence that has been adduced. It is unnecessary to consider the legal position of the plaintiff vis-a-vis the mortgagee Galstaun, and I refrain from expressing any opinion with respect to the legal obligation that existed or may exist between them.

For these reasons I agree that the appeal should be allowed and the suit dismissed.

R.K.

Appeal allowed.

A. I. R. 1923 Calcutta 164

B. B. GHOSE AND ROY, JJ.

Hari Chaitanya Sinha Chowdhury—Appellant.

v

Ramram Sinha Chowdhury and others—Respondents

Appeal No 256 of 1925, Decided on 30th June 1927, against original decree of Dist. Judge, Murshidabad, D/- 12th September 1925

(a) *Probate and Administration Act* (1881), Ss. 7 and 9—*Executor can be appointed by necessary implication—Succession Act* (1925), S. 222 (2).

Where a will provided "I appoint my sons S, R and H and on behalf of my minor son, and grandson, their mothers respectively as executors"

Held : that under S. 7, Probate and Administration Act, corresponding to S. 222 (2), Succession

Act an executor can be appointed by necessary implication, and in this particular case the minors were appointed executors by necessary implication [P 165 C 1, 2]

(b) *Succession Act* (39 of 1925), S. 225 (2)—*Probate already granted—Direction to appoint a common manager in the will* District Judge has no power to appoint under that direction.

The District Judge can only exercise jurisdiction under the provisions of the statute in appointing a common manager and he has no power to appoint a common manager according to the direction of the will where he has already granted probate to certain persons, and the grant has not been recalled with respect to any of them [P 165 C 2, P 166 C 1]

Narsh Chandra Sen Gupta and Nagen-dra Nath Ghose and Urukramdas Chakravarti—for Appellant.

Sarat Chandra Bose, Broja Lal Chakravarti, Kali Kinkar Chakravarti, Byomkesh Basu, Panchanon Ghose, Gopendra Nath Das and Durga Das Roy—for Respondents.

Judgment.—This is an appeal by Hari Chaitanya Sinha Chowdhury who was appointed an executor of the will of his father Govinda Sundar Sinha Choudhuri against two orders of the District Judge of Berhampore, one dated the 29th August 1925, and the other dated the 12th September 1925. The facts shortly stated are these: Govinda died leaving four sons and his widow. He had five sons: (1) Hare Krishna who had pre-deceased him leaving a widow Chittasakhi and two sons Gopi Ballav and Radha Ballav, (2) Hare Ram, (3) Ram Ram, (4) Hari Chaitanya and (5) Hare Hare who was a minor at the time of his death. The testator appointed five persons as executors of his will. The ninth paragraph of the will runs thus:

In order to carry on the work according to the terms of this will, I appoint my sons Sriman Hare Ram Sinha Choudhuri Sriman Ram Ram Sinha Choudhuri, Sriman Hari Chaitanya Sinha Choudhuri and on behalf of my minor grandsons, Gopi Ballav and Radha Ballav, their mother Chittasakhi Dassy and on behalf of my minor son Hare Hare Sinha Choudhuri, my wife Srimati Krishna Kamini Choudhuri, these five persons, as the executors of my will.

Probate was taken of the will by Ram Ram and Hari Chaitanya. The order for probate was dated 7th August 1920, but the probate was not issued until the 21st April 1923. Hare Ram, the second son of the testator renounced his executorship. The two ladies Chittasakhi and Krishna Kamini did not apply for probate. On the 22nd December 1923, Hare Hare, the minor son of the testator and one

of his grandsons Gopi Ballav who had attained majority applied for grant of probate. Subsequently, Radha Ballav attained majority and he also apparently applied for probate of the will of his grandfather. In the meantime, an application was made by some persons interested in the property of Govinda for appointment of what has been called a "common manager" under para. 10 of the will which provides that if there is any difference of opinion among the executors and for certain other reasons, the District Judge will appoint a fit person among the sons and grandsons of the testator as common manager according to law for the management of the estate.

The District Judge by his order of the 29th August appointed Ram Ram Sinha Choudhuri one of the executors who had obtained probate as common manager of the estate of the deceased under the terms of the will. By his other order of the 12th September, he appointed the three applicants Hare Hare Sinha Choudhuri, Gopi Ballav and Radha Ballav as executors. The contention on behalf of the appellant is that these three persons cannot be appointed as executors under the terms of the will. It is urged that their mothers were appointed executors and these persons were not so appointed and, therefore, the learned Judge was wrong in granting probate to them. On behalf of these persons, it is urged by Mr. Bose that these minors were appointed executors by implication and what the testator meant was that during the minority of those persons, their mothers would act as executors: otherwise there would be no meaning in the expression used by the testator that Chittasakhi would be the executor on behalf of the minor grandsons Gopi Ballav and Radha Ballav and Krishna Kamini would be the executor on behalf of the minor Hare Hare Sinha Choudhuri.

It is contended that although the language is not according to the legal formula, the real intention of the testator was that these minors were really to be executors but during their minority, their mothers would act on their behalf. It appears to us that this argument is quite sustainable. That being so, there is nothing wrong in making a grant to these persons by the order of the District Judge. Under S. 7, Probate and Administration Act corresponding to S. 222 (2), Indian

Succession Act of 1925, an executor can be appointed by necessary implication, and we think that, in this particular case, the minors were appointed executors by necessary implication. If that is so, there is nothing wrong in the order of the learned Judge in making the order of grant of probate to the son of the testator, Hare Hare and his grandsons Gopi Ballav and Radha Ballav. This may be done under S. 224, Indian Succession Act of 1925, corresponding to S. 9, Probate and Administration Act. The illustration shows that in such a case probate may be granted at different times. The appeal, therefore, with regard to that order is dismissed.

The order of the 29th August 1925, stands on a different footing. Nothing has been shown to us on behalf of the common manager appointed, Ram Ram Sinha Choudhuri, by Babu Brojo Lal which authorizes the Court to make such an order as it has done. No doubt attempt has been made to bring this order within the provision of grants for limited purposes and it was argued that when a grant was made for a limited purpose either as regards the duration of time or for some other purpose, the grant expires on the happening of the event. Similarly, where the testator has made directions that, under certain circumstances, a common manager should be appointed by the Judge, by analogy it should be held that the previous grant made to Ram Ram and Hari Chaitanya jointly has come to an end; and that being so, the lower Court was competent to appoint another person as executor. It does not matter if the name has been given as "common manager."

The real substance is that Ram Ram has been appointed the sole executor and the other executor Hari Chaitanya has either been removed or has ceased to hold the office by reason of the events that have happened. It is very difficult to accept that contention. The District Judge has not removed any executor. On the other hand, he has granted probate to three other persons nominated by the testator. There were, therefore, five executors to whom probate has been granted. The grant has not been recalled with respect to any of them. The argument, therefore, that Ram Ram is now the sole executor must fail. The order of the District Judge dated the 28th August 1925, ap-

pointing Ram Ram as common manager must, accordingly, be set aside. The learned District Judge probably thought that he had the power to appoint a common manager according to the direction in the will. But the Judge could only exercise jurisdiction under the provisions of the statute. If the executors are guilty of anything for which they are liable to be removed, the parties must take the proper procedure for that purpose.

The result, therefore, is that this appeal is allowed in part and dismissed with regard to the rest. Respondents 2 to 4 will obtain their costs of this appeal from the appellant. Hearing-fee: five gold mohurs.

The appellant will get his costs as against respondent 1, Ram Ram. Hearing-fee: five gold mohurs. Respondent 5 will bear his own costs of this appeal.

N K

Appeal allowed.

A. I. R 1928 Calcutta 166

B. B. GHOSE AND ROY, JJ.

Bangshiram Mandal and others—Defendants—Appellants.

v.

Prasannomoyi Debi and another—Plaintiff & Pro-forma Defendant—Respondents.

Appeals Nos 416 to 419 of 1925, Decided on 15th July 1927, from appellate decree of Dist. Judge, Khulna, D/- 4th November 1924.

Landlord and Tenant—Rent payable partly in kind and partly in cash—Market price of grain fixed in patta—Suit for rent—Landlord is not entitled to value paddy at current rate but at rate fixed in the patta.

After stating that the rent will be payable in cash and in paddy the patta provided that if for an unavoidable reason tenant was unable to pay the paddy its market price at the rate of Rs. 4 per pali should be paid. The amount fixed was Rs. 34-5-0. The total price of the paddy together with road and public works cesses amounting to Rs. 50 were to be paid according to certain kists. In a suit for rent landlord claimed market price prevailing on the date of the suit for non-delivery of paddy.

Held, that the landlord was not entitled to claim the value of paddy at its market price but at its price stated in the patta.

Held, further that the fact that no unavoidable reason was pleaded was quite immaterial because it was too vague for any Court of justice to take cognizance of. [P 167 C 1]

J. N. Kanjilal and Nripendra Chandra Das—for Appellants.

Dwarkanath Chakravarti and Hemendra Chandra Sen—for Respondents.

Judgment—These four appeals arise out of four suits for rent. The only question in controversy is whether, according to the terms of the patta by which rent was payable partly in cash and partly in kind by delivering a certain quantity of paddy, for non-delivery of the paddy, the present market price should be recovered by the plaintiff or the price stated in the patta. After stating that the rent will be payable in cash and in paddy, the words in the patta are to this effect:

If for an unavoidable reason you are unable to pay the paddy its market price at the rate of Rs. 4 per pali should be paid. The amount is Rs. 34-5-0. The total price of the paddy together with road and public works cesses amounting to Rs. 50 should be paid according to the kists given below and you will take a receipt after payment of the money.

Then it follows:

Except on the ground that all the lands of the mahal lay fallow, you shall not pay the price of the paddy.

Then follow the other provisions which it is unnecessary to mention. At the end of the document the kists are given. It is stated that the cash rent is Rs. 15-11-0 and the price of paddy is Rs. 34-5-0 making a total of Rs. 50. Lastly, different kists are given in which the amount of Rs. 50 was to be paid. The Munsif gave a decree to the plaintiff according to the price of paddy fixed in the patta, that is to say Rs. 34-5-0. The District Judge reversed that decision and gave the plaintiff a decree at the rate claimed, viz., the present market price of the paddy. On appeal by the defendants it is contended on their behalf that, having regard to the terms in the patta, they are not bound to pay more than the price of the paddy stated in that document. It is contended on behalf of the plaintiff-respondent that that price was fixed in the happening of one event only, that is, if for any unavoidable reason the tenant was unable to pay the value stated instead of the paddy if the whole of the land remained fallow; otherwise, the plaintiff is entitled to get the present market value of the paddy. Upon reading the entire patta we are unable to agree with the District Judge and to accept the contention on behalf of the respondent. Even if it be considered to

be a suit for damages, the amount of damages is mentioned in the deed itself. That being so, we cannot say that the amount should be in lieu of the paddy at one rate if the tenant cannot deliver the paddy for any unavoidable reason and at a different rate for any other reason which the Court does not consider to be unavoidable. The question that no unavoidable reason was pleaded seems to us to be quite immaterial because it is too vague for any Court of justice to take cognizance of. The defendant may say "I am too poor" or other things may be said in support of his inability to pay. These are matters which cannot be taken into consideration. Where, as a matter of fact, the landlord has chosen to fix the price and stated the kists in which the rent is to be paid on that basis, it must be considered that at the time the landlord thought that the highest amount that should be realized on account of the paddy was fixed under the contract. If by some chance the price of the paddy has increased subsequently, it does not seem to be right that that contract is to be given the go-by by giving the present market price to the plaintiff. In this view, the decree of the Subordinate Judge must be set aside and that of the Munsif restored with proportionate costs in both the Courts.

This judgment will govern all the four appeals.

N.K.

Appeals allowed.

* A. I. R 1923 Calcutta 167

B. B. GHOSE AND ROY, JJ.

Madhu Sudan Kundu and others — Appellants.

v.

Chhalimaddin Ahammad and others — Respondents.

Appeal No. 171 of 1924, Decided on 21st July 1927, from decree of 1st Sub-Judge, Barisal (Bakarganj), D/- 24th January 1924.

* (a) *Civil P. C., O. 34, Rr. 5 and 6—Appeal from preliminary decree after passing of final decree is maintainable.*

Under the Civil Procedure Code (1908) a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree but the preliminary decree is

set aside on appeal, the final decree will necessarily fall to the ground. [P 167 C 2]

(b) *Civil P. C., O. 41, R 2—Memorandum of appeal from preliminary decree can be amended to cover final decree.*

Court has power to amend the memorandum of appeal from preliminary decree, so that it will be an appeal both as against the final decree as well as against the preliminary decree in a mortgage suit: *A. I. R. 1921 Cal. 109, Foll.* [P 168 C 1]

Sarat Chandra Basak, Pramatha Nath Bandopadhyaya—for Appellants

Gunada Chaman Sen, Prosanta Bhusan Gupta and Suresh Chandra Talukdar—for Respondents.

B B. Ghose, J.—A preliminary objection has been taken on behalf of the plaintiffs-respondents that this appeal is incompetent. The appeal is against the preliminary decree passed on a mortgage, dated the 21st January 1924. The final decree was made on 28th February 1924. The appeal against the preliminary decree was filed on 27th May 1924. It is, therefore, contended that having regard to some of the cases decided in this Court, this appeal is incompetent. Personally I am of opinion that the cases which have been decided after the passing of the Code of Civil Procedure of 1908 have not laid down the correct rule. Under this Code, a preliminary decree has an independent existence and by the appeal against the final decree one cannot attack the preliminary decree. The case was different under the old Code. What is now a preliminary decree was supposed to be a preliminary order and the final decree was held to absorb that order and by an appeal against the final decree that order might have been challenged. It was, therefore, held under the old Code that after the passing of the final decree in the case, the preliminary order had no separate existence, and, therefore, the appeal against that order was incompetent after the passing of the final decree. That reasoning, however, does not apply when the law is that you cannot challenge a preliminary decree by an appeal against the final decree. A preliminary decree is now an independent decree which is not absorbed by the final decree. The final decree is really dependent upon the preliminary decree, and if there is no appeal from the final decree, but the preliminary decree is set aside on appeal, the final decree will necessarily fall to the ground. The mischief

of the procedure suggested by the learned advocate for the respondents is this : There may be a very good ground for appeal against the preliminary decree, but there may be absolutely no ground for appeal as against the final decree which merely works out the directions made in the preliminary decree. To compel a party to appeal against the final decree against which there is no ground whatsoever to urge in order that his appeal against the preliminary decree may be heard seems to me to amount to a farce. Mr. Sen very rightly recognizes that position, but he relies upon the decided cases of this Court. I may say that the other High Courts have not followed this practice. I would have thought it necessary to have this question referred to a Full Bench for final decision if the appellants had not taken steps which they have taken in this case and which do not compel me to make such reference. The steps that they have taken are that they have made an application after the filing of their appeal to be allowed to amend their memorandum of appeal so as to make it also an appeal against the final decree. This procedure was suggested by the case of *Kulada Prosad Chowdhury v. Ramanand Patnaik* (1). We grant the application made on behalf of the appellants. Let the memorandum of appeal be so amended that it would be an appeal both as against the final decree as well as against the preliminary decree. Now we propose to deal with the merits.

The only point urged before us in the appeal was a question of limitation. Defendants 5 to 10 and 25 were alleged to have obtained the interest in the mortgaged property under a paramount title, that is to say, they had purchased in execution of a mortgage prior to that of the plaintiffs. But in the previous suit brought by the prior mortgagee the present mortgagees who were puisne mortgagees, were not made parties. Thereupon the right of the plaintiffs as puisne mortgagees to redeem the prior mortgage was left intact. Although defendant 25 was impleaded in the suit long after the plaintiff's suit as against the mortgagors was barred by limitation, still the plaintiff's right to redeem defendant 25 was not barred. Therefore, the question of limitation as between the

plaintiffs and the appealing defendants does not arise.

There is, however, a very small point with regard to the amount of money which the appealing defendants were held by the Court below to be entitled to on a sale of the mortgaged property. There is no objection by either party as to the form of the decree. The Court below has ordered the sale of all the properties mortgaged to the plaintiff and has allowed the appealing defendants a first charge on the purchase money for the amount of their mortgage debt under the previous mortgage bond. In working out that sum the appellants have been allowed somewhat less than what they might have been entitled to. The Subordinate Judge has only given them a decree for the amount which was sued for in the plaint. But under the decree in their mortgage suit the defendants were allowed interest at the bond rate of Re 1-8-0 till the date of redemption which was fixed for the 24th August 1913. The appellants are, therefore, entitled to the interest up to that date on the amount sued for plus the costs and after that date interest on the whole at 6 per cent per annum till the date of sale which was the 22nd May 1915. This sum has been worked out by the learned vakils for both the parties agreeing to the figure as Rs 2,400. The decree of the Subordinate Judge must, therefore, be varied to this extent : that defendants 5 to 10 and 25 will get Rs 2,400 out of the money realized by sale of the mortgaged properties prior to the plaintiffs in this case getting anything out of it.

With this modification this appeal is dismissed. There will be no order as to costs in this appeal.

This, however, will not preclude the appealing defendants or any other defendants from redeeming the plaintiffs' mortgage as directed by the decree of the Subordinate Judge, dated the 24th January 1924.

Roy, J.—I agree.

N K.

Decree varied.

(1) A. I. R. 1921 Cal. 109=18 Cal. 1036.

A. I. R. 1928 Calcutta 169

CUMING AND RAY, JJ.

Ramanath Bhattacharjee and others—
Plaintiffs—Appellants.

v.

*Jagannath Mondal and others—*Defendants—Respondents.

Appeal Nos. 300 and 642 of 1925
Decided on 10th August 1927, from appellate decrees of Spl. Judge, Jessore, D/- 22nd November 1924.

(a) *Landlord and tenant—Enhancement of rent—Increase in area—Proof of—Landlord must show what was area at inception of tenancy.*

In a suit for enhancement of rent, the landlords in order to succeed in showing that there has been an increase in area are bound to prove what was the area of tenancy at the time of its inception. It is not sufficient for them to show that area under cultivation is much larger than the area given in the confirmatory kabuliyat: 5 C. L. J. 538, *Foll.* [P 169 C 2]

(b) *Bengal Tenancy Act, S. 50—Purchase of holding by landlord in rent sale and resettlement with the same tenant breaks the continuity.*

Where the landlord purchases a holding at a rent sale and after the sale he resettles the land with the same tenant, there has been a break in the continuity of the tenancy and the presumption under S. 50, does not apply.

[P 170 C 1. 2]

(c) *Bengal Tenancy Act, S. 50—Tenant transferring part of holding—Landlord recognizing transferee—New tenancy is created.*

Where the original holder of a tenancy sells or transfers half of his tenancy, and the landlord recognizes the transferee as his tenant, a new tenancy is created and presumption under S. 50, does not apply.

[P 170 C 2]

Profulla Kamal Das—for Appellants.

Mukunda Behari Mullik and Biraj Mohan Majumdar—for Respondents

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs who are the appellants in this Court sought to enhance the rent of some 17 tenants. These persons were holding separate lands separately under the landlords. They sought to enhance the rent first on the ground of rise in the price of the staple food-crops, and secondly, they asked for additional rent for additional area on the ground that the tenants were holding more lands than what had been settled with them. What practically amounts to 17 suits have been tried together as a single suit. The inconvenience of this procedure is only too obvious and it is quite possible that the plaintiffs have suffered from having adopted this procedure. Be

that as it may, the law allows this procedure to be adopted, and the plaintiffs having deliberately adopted this procedure can hardly now complain.

The Assistant Settlement Officer dismissed the suit on both grounds. He would seem to hold that the jamas were mokarrari ones being held at a fixed rate of rent from the time of the permanent settlement and also that the landlords had failed to prove that there had been any increase in the area. The landlords-plaintiffs appealed to the District Judge. With regard to what I may describe as 4 khatians, namely, Nos. 14, 18, 21 and 32 he decreed the appeal so far as it concerned the claim to enhancement of rent on the ground of rise in the price of the staple food-crops. With regard to the claim for additional rent for additional area he dismissed the appeal as regards these khatian numbers also. With regard to the other 13 khatians he dismissed the appeal.

The plaintiffs have appealed to this Court. They contend that as regards khatians Nos. 16, 24 and 19 it is quite clear from the construction of the kabuliyats that these kabuliyats are not confirmatory as held by the learned District Judge and they further argue with regard to all the khatians that the lower appellate Court was wrong in holding that the landlords having failed to prove the original area on which the present rent was based had failed to prove that there had been any increase in area. They would seem to contend that there were certain kabuliyats and in these kabuliyats certain areas were stated and these kabuliyats formed the basis of the contract, that it must be taken that the area as given in these kabuliyats was the amount of lands for which the defendants agreed to pay the rent mentioned in the kabuliyat and, therefore, it was sufficient for them to show that the present area was much larger than the area given in these kabuliyats. The simple answer to this contention is this: the landlords in order to succeed in showing that there had been an increase in area were bound to prove what was the area of the tenancy at the time of its inception. This is the principle laid down in the case of *Raykumar Pratab Sahay v. Ram Lal Singh* (1). The kabuliyats in these cases do not really form the contract on which

(1) [1907] 5 C. L. J. 538.

the tenancies are base. They are really only confirmatory of the former contract and nothing more. It cannot, therefore, be said that the defendants having agreed in these kabuliyats to pay so much rent for a certain area stated in these kabuliyats it would be sufficient for the landlords to show that the present area varies from that area. As I have stated these kabuliyats being only confirmatory and not the original contract, it is necessary for the landlords to show as is laid down in the case of *Rajkumar Pratab Sahay v. Ram Lal Singh* (1) what was the area at the inception of the tenancy. We are not prepared to interfere with the finding of the learned Judge on this point that the landlords having failed to prove what the original area was on which the present rent was based they were not entitled to additional rent for additional area.

The learned vakil for the appellants has then specifically argued with regard to khatians Nos. 16, 24 and 19, and he argues that on proper construction of the kabuliyat in khatian No. 16, there has been a change of rent. In this kabuliyat it is stated that the original rent was Rs. 29-4-0, and that the defendant now pays Rs. 29, four annas being kept in suspense or *hajat*. In other words the rent is nearly the same, namely, Rs. 29-4-0. Four annas out of this rent is kept in suspense and it is open to the landlord at any time to insist upon the payment of this four annas. In other words, the rent is Rs. 29-4-0. There is really no change in the rate of rent in this khatian. This kabuliyat, therefore, does not prove that there has been any change in the rate of rent so far as khatian No. 16 is concerned.

With regard to khatian No. 24 the position would appear to be this: the landlords purchased it at a rent sale and after the sale he resettled the land with the same tenant. The learned vakil argues that in this case there has been a break in the continuity of the tenancy, that although the land was settled again with the same tenant he cannot be considered as successor-in-interest of himself. There has been a break because his present tenancy is a new tenancy although it has been settled with the same tenant at the same rate of rent. This contention, we think, is sound. It is quite clear that the landlords having purchased

it at a rent sale were entitled to the khas possession of the tenancy of the former tenant. It was open to them to have settled it at any rate they chose. In our view this constitutes a new tenancy, and the presumption under S. 50, Ben Ten Act does not apply. As regards khatian No. 24 the appeal will be decreed, and the case will be remanded to the Court of first instance to determine how much, if any, increase the landlords are entitled to for the rise in the price of the staple food crops.

With regard to khatian No. 19 the position would appear to be this. The original holder sold or transferred a half of his tenancy. The landlord recognized the transferee as his tenant. It seems to us that in this case a new tenancy was created and, therefore, presumption under S. 50, Ben Ten Act, does not apply and the landlords in this case are entitled to an increase on the ground of rise in the price of the staple food crops. Khatian No. 19, therefore, must be remanded to the Court of first instance to be determined how much, if any, increase of rent the landlords are entitled to for rise in the price of the staple food crops. The appeal with regard to khatians Nos. 19 and 24 is decreed and the costs will abide the result. Hearing-fee one gold mohur.

The appeal with regard to the other khatian numbers will stand dismissed with costs. Hearing-fee three gold mohurs.

Appeal No. 642 of 1926 is not pressed and is dismissed with costs. Hearing-fee one gold mohur.

Ray, J.—I agree with the conclusion arrived at by my learned brother and the orders he has passed.

N.K.

Decreed accordingly.

A. I. R. 1928 Calcutta 170

RANKIN, C. J., AND MITTER, J.

G. I. P. Ry. Co.—Defendant 1—Appellant.

v.

Chakravarti, Sons and Co. and others—Plaintiffs—Respondents.

Appeal No. 1336 of 1924, Decided on 11th July 1927, from appellate decree of Dist. J., Nadia, D/- 24th March 1924.

(a) *Railways Act, S. 72*—Risk-note signed by sender of goods is binding on the consignor—

Signing one's own name with addition of agent for company. is signing within the meaning of the section.

When a person tenders the goods to the Railway Company, he has, so far as any question of contract with the railway for carriage is concerned, power under the statute to sign the risk-note so as to bind the consignor.

[P 172 C 2]

Where a person signs not merely his own name but his own name with the addition of agent for a company then the risk-note is signed by the person delivering the goods within the meaning of the section. [P 172 C 2, P 173 C 1]

(b) *Railways Act, S. 72—Packages not delivered in good condition—Plea that they were in good condition will not be allowed—Evidence Act, S. 114.*

If at the time of booking, the Railway Company is dissatisfied and the person delivering the goods for carriage agrees that the condition of the packages is not satisfactory, it cannot afterwards be made matter of objection in a suit upon the contract that the packages were in good condition.

[P 173 C 1]

(c) *Contract Act, S. 24—Contract cannot be accepted as to part.*

A person cannot hold to a part of a contract and reject the rest unless there is statutory authority for so doing.

[P 173 C 1]

(d) *Railways Act, S. 72—Risk-note B signed by an illiterate person—Contract is complete—It is not duty of Railway Company to see literacy or otherwise of sender of goods.*

If a person being illiterate signs a contract thinking it to be of a different character altogether from what it is in fact, or if any misrepresentation is made to him as to what he is signing, then no doubt the signature will not be binding on him, but it is quite wrong to suppose that it is the legal duty of a Railway Company to see whether the person delivering the goods is ignorant or not or to see that he reads and understands before he signs.

If a consignor who can read sends an illiterate person to deliver goods to a railway administration and that person signs the contract, the contract so signed by that person is binding on the consignor as though he has signed it himself: *Kriley v. Great Western Railway* (1863) 18 L. T. 658, *Foll.*

[P 173 C 2]

It is for the sender if he is not satisfied of his competence to give him instructions or assistance. It is quite wrong to treat a Railway Company in a case of this kind as though it were dealing with a pardanashin woman and taking a transfer of her estate, or as a person in a fiduciary relation to the consignor of the goods.

[P 173 C 2]

Surendra Nath Guha and Sisir Kumar Ghosal—for Appellants.

Provas Chandra Mitter, Ambikapada Choudhuri and Jotindra Mohan Choudhuri—for Respondents.

Rankin, C. J.—This is the defendants' appeal in a suit brought by consignees of goods which were dispatched by the defendants' railway from the Victoria Terminus in Bombay to Kushtea a station

on the E. B. Railway. Two consignments of yarn are involved in the case. These goods had been sent out from England and were consigned from Bombay to Kushtea without being repacked. It appears that the yarn was contained in wooden cases and these wooden cases had gunny coverings as to which there is certain evidence that the coverings were old and torn. On the arrival of the goods at Kushtea, it was found that, as regards the first consignment, certain of the goods were damaged and that, as regards the second consignment, certain of the goods were damaged and certain parts of the contents had been lost.

The firm of Mr. P. N. Mehta & Co. were sending these goods to the plaintiffs. P. N. Mehta & Co. had a manager or managing director Mr. Parekh. It is quite clear that when the carters brought the goods to the railway station, some person in charge of the goods employed an individual called Gangaram Punaji to act as muccadam, that is to say, to be the forwarding agent dispatching the goods on the railway. The consignor-defendants say that the muccadam whom they were in the habit of employing was another individual altogether and they say that they gave no authority to anyone to get Gangaram Punaji to do any work for them. It is no way explained how the carter or foreman came to employ Gangaram Punaji or owing to what circumstances or under what instructions Gangaram Punaji was employed: but it is quite clear that he was the person who, in fact, delivered these goods for carriage to the defendants' railway. When he did so deliver the goods, the Railway Company took the view that the cases were damaged and defective. Gangaram Punaji agreed and signed the risk-note in form A. As regards the second consignment, risk notes both in form A and form B were signed by Gangaram Punaji. So far as the risk note B is concerned, it is clear that the rate of freight would be less; so far as the risk note in form A is concerned, it does not appear that the rate of freight would be less, though in such circumstances the consideration for which Risk-note A is executed is that it obviates the expense of putting the packages into proper condition before consignment and also that the sender gains in the matter of weight upon which freight has to be

charged. In this case, what happened was that these goods were damaged in the process of carriage and the suit was brought against the several railways concerned in the carriage. Ultimately, it has been decreed against the appellant Railway, only the G. I. P. Ry. Co., which was the railway to whom the goods were handed over.

The first question which arises is this. It is said that Gangaram Punaji had no authority from the consignor and that his signature does not bind the consignor. It is said, secondly, that he was a man who could not read English and that it is not shown whether he knew what he was signing. As regards the Risk-note A, it is said that the learned Judge has found as a fact that the goods were in proper packing cases, that there was no defect in the packing, and that the defendant Railway can therefore take no advantage from the risk-note in Form A.

These questions turn upon S. 72, Indian Railways Act (9 of 1890). By that Act, the responsibility of a railway company is *prima facie* the responsibility of a bailee under Ss 152 and 161, Indian Contract Act, but agreement may be made limiting that responsibility and:

an agreement purporting to limit that responsibility shall, in so far as it purports to effect such limitation, be void, unless it is in writing signed by or on behalf of the person sending or delivering to the railway administration the animals or goods, and is otherwise in a form approved by the Governor General in Council.

The phrase, "the person sending or delivering to the railway administration" is an important phrase in the Indian Railways Act. It appears in more than one section in one form or another. Its equivalent is to be found in S. 58 and also in Ss. 73 and 75. As a matter of fact, it would appear that the phrase is taken from S. 7, English Railway and Canal Traffic Act 1854 where the words of the last proviso are :

Unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage.

Now, it is quite clear that a railway company, when goods are tendered to it for carriage, cannot hold an inquest as to the right of the person delivering to deal with the goods, the property in the goods, the authority given by the owner to the person presenting the articles for carriage; and when one comes across the phrase

"the person sending or delivering to the railway administration" it is clear that this fact is being recognized by the statute. Under the same words in England, no difficulty has apparently been found. I find in English textbooks that this matter is treated as clear upon the fact of S. 7 of the Act of 1854. I find, for instance in Disney's Law of Carriage by Railway, 6th Edn. at p 37 :

The consignor, therefore, may be bound not only by the signature of himself or his agent, but also by the signature of the person who delivers the goods to the Company whether, in fact, that person had authority to sign or not.

In Alan Leslie's Law of Transport by Railway, the matter is put thus :

The section further provides that the contract may be signed not merely by "the party" but also by "the person delivering (the goods) for carriage." Such person has, therefore, not merely such authority to bind the sender as naturally arises from his position as agent, but an absolute statutory authority to bind him, and it seems that, *prima facie*, he has authority to sign any form of contract.

The English cases in which this matter has been more specifically dealt with are three in number. *Kirby v. G. W. Ry. Co.* (1), *Foreman v. G. W. Ry. Co.* (2), and *Aldridge v. G. W. Ry. Co.* (3). There can, therefore, be no doubt that when Gangaram Punaji tendered these goods to the Railway Company he had, so far as any question of contract with the Railway for carriage is concerned, power under the statute to sign the risk-notes so as to bind the consignor. If, of course, the question were not a question upon a contract of bailment or affreightment, but this suit were a suit by a person claiming in detinue or trover against the railway company for having in possession goods belonging to the plaintiff without his authorization, different principles would apply. That is not the nature of this suit which is a suit on the contract by the consignees.

The next question is this : It is said that because Gangaram Punaji signed not merely his own name, but his own name with the addition of "agent for P. N. Mehta & Co." that vitiates the contract. I am of opinion that there is no reasonable ground for this contention. The risk-notes in this case were signed by the

(1) [1869] 18 L. T. 658.

(2) [1878] 38 L. T. 851.

(3) [1864] 15 C. B. N. S. 582=33 L. J. C. P. 161.

person delivering the goods within the meaning of the section.

So far as regards risk-note A, there is a finding by the learned Judge that "the cases were in perfect good sound condition when they were booked." It does not seem to me that the learned Judge has found that with regard to the coverings as distinct from the cases, but it must be reasonably clear that, if, at the time of booking, the railway company was dissatisfied and the person delivering the goods for carriage agreed that the condition of the packages was not satisfactory, it cannot afterwards be made matter of objections in a suit upon the contract that the packages were in good condition. A person cannot hold to a part of a contract and reject the rest unless there is statutory authority for so doing. In this particular case what have to be applied are the terms of Cl. (b), sub-S. (2), S. 72, Indian Railways Act. The contract has to be otherwise in a "form approved by the Governor-General in Council." In this case, the contract was in such a form. Whether any of the authorized forms are to be used, and if so, which is a matter left by the statute to the parties. In my judgment, it is not open in a suit of this kind to reject the terms of the risk-note in the manner which is contended for.

The learned Judge, in dealing with this case, has committed himself to a certain amount of advice to railway companies and to a statement of the law which cannot in my opinion be accepted. Apart from holding that the railway company have to prove the authority of the person delivering the goods, he has gone on to say that the company must satisfy the Court that the person who signed it knew the terms of the contract and that the contract should be explained to him. He admits that this may be inconvenient, but thinks it necessary in law, when a contract is entered into by an ignorant person. The learned Judge in this respect is entirely mistaken. It is well held in England and the rule is the same in India that, if a person being illiterate signs a contract thinking it to be of a different character altogether from what it is in fact or if any misrepresentation is made to him as to what he is signing then no doubt the signature will not be binding on him; but it is quite wrong to suppose that it is the legal duty of a railway company to see whether the person delivering the

goods is ignorant or not or to see that he reads and understands before he signs.

It has been held in England that, if a consignor who can read sends an illiterate person to deliver goods to a railway administration and that person signs the contract, the contract so signed by that person is binding on the consignor as though he has signed it himself: *Kirley v. Great Western Railway* (1). Apart from the question of authority to sign, the ordinary law of the land is applicable to a case of this kind and a very good statement of it can be found in Pollock and Mulla's Contract Act, in the notes to S. 13. Ignorant people are very commonly sent to deliver certain classes of goods and animals for transit by railway, e.g., grooms, drovers, carters. It is for the sender, if he is not satisfied of their competence, to give them instructions or assistance. It is quite wrong to treat a railway company, in a case of this kind, as though it were dealing with a *parda-nashin* woman and taking a transfer of her estate, or as a person in a fiduciary relation to the consignor of the goods. In the present case Gangaram was professing to be a forwarding agent and might well be very familiar with railway forms in the vernacular translation.

The only other question that seems to call for observation is whether or not it is open to the defendants now to maintain that the plaintiffs have not proved under risk-note B, that the goods which were not delivered were lost. In my judgment, that is not open in this case because it is evident particularly from the judgment of the trial Court that it was in no way in dispute: indeed it could not well be in dispute that the goods which were short delivered having fallen out of damaged cases were goods lost: and the appellants on this point cannot be allowed to make a new case. In my judgment, the appeal should be allowed and the suit should be dismissed with costs in all the Courts as against the defendants-appellants. As regards the other defendants, the judgment of the learned District Judge will stand.

Mitter, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 174

CUMING and ROY, JJ.

Asim Krishna Deb—Defendant 1—Petitioner.

v.

Sailesh Chandra Ghosh and others—Defendants—Opposite Parties.

Civil Rule No. 695 of 1927, Decided on 15th August 1927, against order of Sub-Judge, 3rd Court, 24-Parganas (Alipur), D/- 25th March 1927.

Civil P. C., S. 115—Valid partial award—Refusal of Court to pass decree on partial award—Order is interlocutory—Revision does not lie—(Cuming, J., dissenting. Roy, J.)

In the exercise of a Court's jurisdiction to decide a question of law or fact wrongly is not to refuse to exercise a jurisdiction or to exercise it with material irregularity. [P 175 C 1, 2]

Certain arbitrators who were authorized to make a separate award from time to time in a partition suit made an award regarding suit properties. The parties objected to the arbitrators' award. The arbitrators then refused to have anything more to do with them and the remaining properties which also formed part of the subject of the partition suit were not therefore dealt with by the arbitrators. The award being only a partial award trial Court did not pass decree on it. One of the parties applied to the High Court for revision of this order.

Held: the Judge had jurisdiction to pass an order refusing a decree on a partial award; the High Court has no power to interfere under S. 115. (*Roy, J. dissenting.*) [P 174 C 2, P 175 C 2]

If the parties agreed to abide by the decision of the arbitrators in respect of the whole of the dispute and if the arbitrators had power to make a partial award from time to time the award which they actually made must be effective and cannot be set aside by refusing to pass a decree on it and a decree ought to have followed on the award already made. Great hardship would result to the parties if they were asked to wait until the whole suit was finally decided. In such cases High Court has power to interfere with interlocutory orders.

[P 176 C 2]

Atul Chandra Gupta and Indu Prokash Chatterjee—for Petitioner.

Bankim Chandra Mukherjee, B. K. Mukherjee, N. N. Bose, Manindra Kumar Bose and Jatindra N. Guha—for Opposite Parties.

Cuming, J.—The facts of the case out of which this rule has arisen are these:

The opposite party instituted a suit for partition in the Court of the Subordinate Judge at Alipur, sometime in 1921. A preliminary decree was made in August 1921, a commissioner was appointed and a final decree was passed on 20th February 1923. On an application for a review

being made this decree was set aside and a fresh partition was ordered. The parties then agreed to refer all the disputes in the suit to arbitration. Sir Provash Mitter and his brother Sir Benode undertook this duty. It was agreed that the arbitrators might make separate awards from time to time.

They made an award regarding the Calcutta properties. The parties as usual in these cases began to file various objections to the arbitrators' award. The arbitrators then refused to have anything more to do with them and the remaining properties which also formed part of the subject of the partition suit have not been dealt with by the arbitrators. The Court held that the award being only a partial award it could pass no decree on it. The Court, therefore, set aside the award and ordered the parties to take the necessary steps. The petitioner then moved this Court and obtained this rule. His contention is that a decree can be made on a separate award and that hence the Judge in refusing to make a decree on the separate award has refused to exercise a jurisdiction vested in him by law.

So far as the present matter is concerned it is no doubt an interlocutory order in the suit and the view I have always taken is this, that such an order cannot form subject of revision under S. 115, Civil P. C. It is not, however, necessary to discuss this question because whether or not an interlocutory order can form the subject of S. 115, Civil P. C., I am quite satisfied that the present matter, whether interlocutory or final order, cannot form the subject of an application under S. 115. The argument put forward is this that the Judge wrongly decided that he could not pass a decree on a partial award. Hence he refused to exercise a jurisdiction vested in him by law, and so the matter comes within the provision of S. 115. If this argument be accepted, as far as I can see, every error of law or fact can be converted or perverted into the subject of revision under S. 115.

I will give a few instances.

A Judge wrongly refused to admit a certain document in evidence holding that it was inadmissible in evidence. The document was admissible in evidence so the Court has jurisdiction to admit the document and as the result of wrongly deciding the document inadmissible he refused to exercise a jurisdiction vested

in him by law. Or the Judge held wrongly that a suit was barred by the principle of *res judicata* and so would not take any further evidence and he dismissed the suit. Had he decided rightly that the suit was not barred by the principle of *res judicata* he would have taken evidence in it and, therefore, by wrongly deciding that the suit was barred by the principle of *res judicata* he refused to exercise a jurisdiction vested in him by law which was to take evidence and make a decree in favour of the plaintiff.

It is unnecessary to multiply instances. There would be no difficulty if once this principle were accepted in extending it to errors of fact. A Judge wrongly decides a question of fact and decrees a suit in favour of plaintiff. Had he decided it properly he would have given a decree in favour of defendant. Hence he did not exercise a jurisdiction vested in him by law which was to give a decree in favour of defendant on account of his error of fact. In other words, every error of law or fact would be a refusal to exercise a jurisdiction not vested in the Court. This seems to me to be merely a perversion of the word "jurisdiction." "Jurisdiction means" "the power of deciding." In the present case admittedly the Judge had the power to deal with or decide the case before him which was a partition suit within his territorial and pecuniary jurisdiction. In exercising the power of decision he held that a decree could not be given on a partial award because he held the parties agreed to refer all matters to arbitration and did not agree to abide by the decision of the arbitrators if they decided only some and not all of the matters in dispute. He might be wrong and possibly he could have granted a decree on a partial award and he might have been mistaken as to what the agreement of the parties was in reference to arbitration. A number of rulings have been cited to show that he can. It is unnecessary for me to determine whether he can or cannot. It might be an error of law that he wrongly held he could not give a decree on a partial award or possibly an error of fact that the parties really agreed to have decision on some of the matters in dispute and did not require that all the matters should be decided by the arbitrators. But in the exercise of a Court's jurisdiction to decide a ques-

tion of law or fact wrongly is not to refuse to exercise a jurisdiction or to exercise it with material irregularity. As the Privy Council has pointed out in *Amir Hassan Khan v. Sheo Bakhsh Singh* (1) where a Court has jurisdiction to decide a case and does decide it whether it decides it rightly or wrongly it is immaterial. If it decided wrongly it did not exercise its jurisdiction illegally or with material irregularity. In that case the present contention was not put forward that such exercise really amounted to a refusal to exercise its jurisdiction. It was only argued in that case that the Judge had acted with material irregularity. The present contention amounts to this that the Court by exercising its jurisdiction or power of decision wrongly refused to exercise its jurisdiction or power of deciding. In other words that to exercise jurisdiction is not to exercise jurisdiction. It is unnecessary to further pursue the argument,

In the present case the Judge had jurisdiction and he exercised it and held that he could not pass a decree on a partial award. He might be wrong but that would not give this Court power to interfere under S. 115.

I may here refer to the case of *Kali Charan v. Sarat Chunder* (2) a case which in many respects is very nearly akin to the present case. Further if the Court had the power to interfere under S. 115 this is not a case in which the Court should interfere. The Judge has not finally decided the case. It is still open to the parties to ask for fresh arbitration if they so desire or to leave the case to be decided in the ordinary way. Further I may point out that when the case is finally decided it could still be made a ground of appeal that the Court should have accepted the award. I would therefore, discharge this rule. The rule is discharged with costs. Hearing-fee ten gold mohurs.

Roy, J.—I regret to say that I differ from my learned brother in this matter. As my opinion cannot make any difference in the result of the case I will only indicate my reasons very briefly:

There was a preliminary decree in this partition suit and the parties thereafter agreed to refer the matter to arbitration

(1) [1885] 11 Cal. 6=11 I. A. 237=4 Sar. 55 (P. C.).

(2) [1903] 30 Cal. 597=7 C. W. N. 545.

The arbitrators were given powers to give their award separately from time to time and it was agreed that Calcutta properties should be divided first by the arbitrators. They divided the Calcutta properties and gave an award in respect of these properties. On account of certain circumstances the arbitrators refused to proceed any further with the partition. The learned Subordinate Judge has set aside this award in respect of the Calcutta properties and directed a commissioner to make a fresh partition. The contention of the petitioner is that the order of the Subordinate Judge is in so far as it deals with the properties not dealt with by the arbitrators is good and the order in respect of the properties dealt with by the arbitrators is bad and should be set aside and that a decree should be made on the basis of the arbitrators' award. A question has arisen whether we can interfere with the learned Subordinate Judge's order in revision. The cases of *Rudra Prasad v. Mathura Prasad* (3) and *Chimanbhai Kalyanbhai v. Keshavlal Bulkhadas* (4) amongst others were referred to where the learned Judges refused to interfere with the order setting aside the arbitration. These decisions appear to have proceeded from the point of view that the order of the lower Court was only an interlocutory order.

It has been pointed out, however, by the learned advocate for the petitioners that Piggot, J., who was a party in the Full Bench case of *Buddhoo Lal v. Meera Ram* (5), interfered with an order wrongly superseding an arbitration in *Husain Baksh v. Lachhman Das* (6). On the other hand, the learned advocate for the opposite party has referred to a decision of Maclean, C. J., in *Kali Charan Sirdar v. Sarat Chunder Chowdhry* (2), where the learned Judge refused to interfere with an order of the Small Cause Court in respect of an arbitration matter. It might be said that the last case was governed by the facts of that case. The Calcutta High Court seems to have taken ordinarily a view different from those of the High Courts of Bombay and Allahabad as to the meaning of the word "case" in S. 115, Civil P. C., and has interfered in revision in many cases. Some of these cases have been collected

or mentioned in the case of *Salam Chand v. Bhagawan Das* (7). The ground taken in these cases seems to have been that where there is likely to be grave injustice or injury this Court should interfere even with interlocutory orders and other orders from which there is no appeal. Several of these cases are mentioned in *Salam Chand v. Bhagawan Das* (7). In this particular case it is urged that the error in law of the Subordinate Judge has led him to assume a jurisdiction which he did not possess and the cases of *Lachmi Narayan v. Balmakund* (8), *Birj Mohun v. Rai Uma Nath* (9) and *Umed Mal v. Chand Mal* (10) have been referred to as examples where similar errors have been corrected. It is contended by the learned advocate for the opposite party that the arbitrators had power to make partial award, but it is contended that the parties did not say that they would be bound by such partial award and the decision of the learned Subordinate Judge is a finding of fact with which we cannot interfere.

It seems to me that the case must be decided on the construction of the terms of the reference which was made in the case. If the parties agreed to abide by the decision of the arbitrators in respect of the whole of the dispute and if the arbitrators had power to make partial award from time to time the award which they actually made must be effective and cannot be set aside in that way and a decree should follow on the award already made. It would seem to me that great hardship would result to the parties if they are asked to wait until the whole suit which began in 1921—and which may still be prolonged for a considerable time—is finally decided and then to raise any debateable question by way of appeal against the final decision. With all due respect to my learned brother I would say that this is a case in which we should interfere on the ground that the learned Subordinate Judge had no jurisdiction to deal with the properties in respect of which there had been effective award.

N.K.

Rule discharged.

(3) A. I. R. 1925 All. 506=47 All. 916.

(4) A. I. R. 1923 Bom. 402=47 Bom. 721.

(5) A. I. R. 1921 All. 1=43 All. 564 (F. R.).

(6) A. I. R. 1922 All. 69.

(7) A. I. R. 1926 Cal. 1149=53 Cal. 767.

(8) A. I. R. 1924 P. C. 198=4 Pat. 61=51 I. A. 321 (P. C.).

(9) [1893] 20 Cal. 8=19 I. A. 154=6 Sar. 245 (P. C.).

(10) A. I. R. 1926 P. C. 142=54 Cal. 333=53 I. A. 271 (P. C.).

A. I. R. 1928 Calcutta 177 (1)

COSTELLO, J.

John Carapiet Galstaun—Plaintiff.

v.

Diana Sarkies—Defendant.

Application No. 1365 of 1926, Decided on 11th July 1927.

Calcutta High Court Rules, Ch. 13, R. 17—leave to cross-examine deponents was granted.

An order was taken out in originating summons upon the executrix under a will calling upon her to treat the plaintiff as secured creditor. The objection was that a suit is necessary for the purpose. It was argued that the latter should be set down for deponent's cross-examination.

Held: that the case should be set down for cross-examination. [P 177 C 1]

S. C. Mitter—for Plaintiff.

W. W. K. Page—for Defendant.

Facts.—The plaintiff, J. C. Galstaun took out an originating summons to obtain an order on Mrs. Sarkies executrix of Mr. C. M. Sarkies, to treat him as a secured creditor of the estate. Defendants dispute the plaintiff's debt and affidavits were filed on both sides.

Mr. W. W. K. Page (for the defendants) contended inter alia that the matter could not be decided on an originating summons and that the plaintiff must bring a suit for the purpose (30 Ch. D. 291). Counsel further argued that the property involved was at Dacca, where the suit must be filed.

Mr. S. C. Mitter (for the plaintiff) argued that the matter ought to be set down for cross-examination of deponents under R 17, Ch 13 of the Rules of High Court (1873 W. N. 186). Counsel further contended the relief prayed for was a relief in personam. Probate of the will was granted by the High Court.

His Lordships adjourned the matter into Court and said that he would allow the deponents to be cross-examined.

Judgment. This originating summons is transferred to the list of suits for hearing. Order for mutual discovery within a fortnight. Inspection thereafter. The matter to appear on the Warning List C a month hence. The issues for determination are to be settled at the hearing.

Leave given to call evidence other than that of the deponents and to reserve the question of jurisdiction.

D.D.

A. I. R. 1928 Calcutta 177 (2)

PAGE AND GRAHAM, JJ.

Muhammad Yusuf—Appellant.

v.

Ram Govinda Ojha—Respondent.

Appeal No. 437 of 1926, Decided on 1st June 1927, from appellate order of Dist. Judge, 24-Parganas, D/- 5th May 1926.

(a) *Contract Act, S. 135—Surety to pay decretal amount after contest in Court—Suit compromised and decree obtained—Surety is discharged.*

When a surety agrees that if the creditor is unable to obtain payment of the decretal amount from the debtor, to liquidate any sum which the Court after contest should hold payable by the debtor to the creditor but the suit was compromised and decree was obtained on the basis of the award of the arbitrator:

Held: that such an arrangement operated as a discharge of the surety. [P 178 C 2]

(b) *Deed—Construction—A surety bond should be interpreted in favour of surety,*

The terms of a surety bond should be interpreted in a manner favourable to the surety or guarantor as the case may be. [P 178 C 2]

(c) *Contract Act, S. 135—Surety bond providing that surety is to be proceeded against if debt could not be realized from debtor—Debtor must be proceeded against first.*

When on a consideration of the terms of the security bond, it was incumbent upon the decree-holder to proceed in the first instance against the judgment-debtor and it was only if it was established that the decretal amount could not be realized from the judgment-debtor that it was open to him to proceed against the surety then the judgment-debtor ought to be first proceeded against. [P 178 C 2]

Rupendra Kumar Mitter and Paramananda Lahari—for Appellant.

Harendra Kumar Sarbadhicary and Subodh Chandra Dutt—for Respondent.

Graham, J.—This is an appeal against an order of the Second Additional District Judge of 24-Parganas reversing an order of the Munsif, First Court, Sealdah, and it arises out of certain execution proceedings. The facts shortly are as follows: The plaintiff-respondent brought a suit claiming a sum of Rs. 775 and attached certain cattle and moveables belonging to the defendants before judgment. One Ilahi Bux, who has since died and is represented by the appellant in this appeal, stood surety for any moneys which might be decreed in the suit, and thereupon the cattle and moveables, which had been brought to the Court, were released from attachment. Thereafter the suit was taken up and partly heard. The parties then agreed upon a reference to

arbitration and the chairman of the Tollygunge Municipality was appointed arbitrator. The result of that arbitration was that the arbitrator awarded a sum of Rs 400. The defendant filed an objection which was heard but the Court ultimately accepted the award and decreed the suit accordingly. The decree-holder then applied for execution of the decree and asked for a certificate of non-satisfaction with the intention of proceeding against the surety who had properties within the jurisdiction of the Munsif of Sealdah. The surety filed an objection that the debtor filed a petition in insolvency, and that the decree-holder did not proceed against him. The learned Munsif overruled the objection on the ground that what the decree-holder wanted was to proceed against the surety and not against the judgment-debtor. The application for execution at Sealdah, however, was dismissed by the Munsif on the ground that it was premature and that the decree-holder must proceed against the judgment-debtor in the first instance. There was then an appeal against that decision to the District Judge at Alipore and the learned Second Additional District Judge reversed the decision of the Munsif holding that the decree-holder was entitled to proceed against the surety or against the properties of the surety in the hands of his heirs.

The present appeal is directed against this decision of the learned Additional District Judge and two main points have been urged on his behalf. Firstly, it has been contended that the Court below should have held that the surety was in law discharged from the bond by reason of the judgment-debtor and decree-holder consenting to the case being determined not by the ordinary tribunal, that is to say, by the Court, but by a special tribunal namely by an arbitrator and secondly, it has been urged that having regard to the terms of the surety bond the Court below ought to have held that the decree-holder not having taken any steps to realize the decretal amount from the judgment-debtor could not execute the decree against the surety.

With regard to the first contention: the material portion of the security bond has been placed before us and it appears that what the surety undertook therein was that in the event of a decree being passed

in the suit, if the money could not be realized from the judgment-debtor, then he, the surety, would be liable for the amount. Now the question is what exactly was the liability which the surety undertook. It is arguable no doubt that when he speaks of a decree he means a decree arrived at by any of the various means by which a decree may be arrived at, and that it would cover the case of a decree arrived at after compromise. The terms of such surety bonds should, however, as is well-recognized, be interpreted in a manner favourable to the surety or guarantor as the case may be, and looking to the terms of this particular security bond, in my judgment, what the surety agreed was that in the event of there being a decree in the suit, that is to say, after contest between the parties before the Court, he would be liable for the decretal amount. I do not think, however that it was in contemplation that the surety would hold himself liable for the decretal money in any other circumstances. In my opinion, therefore, the first contention of the appellant is well founded and must prevail.

With regard to the second point I think on a consideration of the terms of the security bond that it was incumbent upon the decree-holder to proceed in the first instance against the judgment-debtor, and it was only if it was established that the decretal amount could not be realized from the judgment-debtor that it was open to him to proceed against the surety. It appears, however, that there was nothing before the Munsif to show that any proper attempt had been made to realize the decretal amount from the judgment-debtor. I think, therefore, that the Munsif was right in the view he took of the application.

For these reasons I am of opinion that the appeal succeeds and must be allowed with costs.

Page, J.—To my mind this is a very plain case. Having regard to the terms of the bond the surety agreed, if the creditor was unable to obtain payment of the decretal amount from the debtor, to liquidate any sum which the Court after contest should hold was payable by the debtor to the creditor. Some tribunal had to decide the issue as to the liability of the debtor.

The parties chose to have this done by some one in the confidence of both parties

But to such an arrangement the surety was no party and he never undertook that the liability of the debtor should be determined by any body whom the debtor and creditor might choose to agree upon as the tribunal; and unless he assented to it such an arrangement as was made operated as a discharge of the surety. I agree that the appeal should be allowed.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 179

M. N. MUKERJI, J.

Nabu Sahu and others—Petitioners

v.

Kamdev Maity and others—Opposite Party.

Civil Revn. No. 35 of 1927, Decided on 26th January 1927, from order of Second Munsif, Tamruk, D/- 13th November 1926

(a) *Civil P. C., O. 21, R. 103—Suit under the rule should be subsequent to investigation under R. 100.*

A suit contemplated under R. 103, O. 21, is one which may be instituted after a due and proper investigation of the matter in accordance with R. 100. Where the matter has not been so investigated, but has been disposed of on default on the part of one or other of the parties the remedy by way of suit is hardly a remedy for the dismissal by default, but is merely a further step which the law provides for all unsuccessful parties in such cases.

[P 180 C 1]

(b) *Civil P. C., S. 151—Application under R. 100, O. 21—Claim allowed in the absence of decree-holder—Whole case not placed before the Court—Suit should be restored under S. 151.*

Where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to.

[P 180 C 1]

A person applied under O. 21, R. 100, in connexion with an execution case and the decree-holder not having appeared, the latter's claim prayed for in the application was allowed. Decree-holder filed an application under O. 9, R. 13, for setting aside the aforesaid ex-parte order and for the rehearing of the claim case, O. 9, not being applicable to application arising out of execution proceedings, the trial Court thinking that in obtaining the ex-parte order the claimants had not put the whole case before the Court, ordered the claim case to be restored under S. 151 to file.

Held : that the trial Court was right in exercising its powers under S. 151 in restoring the claim case : A. I. R. 1927 Cal. 534, *Foll.*

[P 179 C 2, P 180 C 1]

Apurba Charan Mukherji—for Petitioner.

Mukerji, J.—This Rule is directed against an order passed by the Munsif, Second Court, Tamruk, on the 13th November 1926. The petitioners had applied under O. 21, R. 100, Civil P. C., in connexion with an execution case that was pending in the Court of the learned Munsif. The application was registered as a claim case and was taken up for hearing on the 2nd July 1926, when the decree-holder, not having appeared the petitioners' claim was allowed. On the 22nd July 1926 the decree-holder filed an application under O. 9, R. 13, Civil P. C., for setting aside the aforesaid ex-parte order and for the re-hearing of the claim case. The learned Munsif dealt with this matter on the 13th November 1926. He came to be of opinion that there was some mistake somewhere in consequence of which the decree-holder was unable to appear on the day on which the claim case was heard. He held, however, that O. 9, Civil P. C., was not applicable to applications arising out of execution proceedings, and in that view of the matter he was unable to give relief to the decree-holder under the provisions of that order. He thought that in obtaining the ex-parte order the claimants had not put the whole case before the Court and accordingly this was a matter which called for the exercise of the Court's powers under S. 151, Civil P. C. In this view of the matter he ordered the claim case to be restored to file. It is this order against which the present rule is directed.

Now, in the judgment of this Court in *Sarat Krishna Bose v. Mitra* (1), to which I was a party, it was held on a discussion of the authorities bearing upon the subject that O. 9, Civil P. C., is not applicable to applications arising out of execution proceedings and it was further observed that in cases where there is no remedy provided for by the Code when such an application is dismissed for default and there is nothing in the Code to suggest that no remedy should be given, the Court may very well in a proper case resort to the provisions of S. 151, Civil P. C. On behalf of the petitioners it is contended that a remedy in this particular case is provided for by the Code itself, inasmuch as an aggrieved party may institute a suit to establish

(1) A. I. R. 1927 Cal. 534=54 Cal. 405.

the right which he claims in the claim case in accordance with the provisions of R 103, O 21, Civil P. C. That no doubt is so; but a suit contemplated under that rule is one which may be instituted after a due and proper investigation of the matter in accordance with R. 100, O. 21 of the Code, where the matter has not been so investigated but has been disposed of on default on the part of one or other of the parties the remedy by way of suit is hardly a remedy for the dismissal by default, but is merely a further step which the law provides for all unsuccessful parties in such cases. I am accordingly of opinion that it cannot be said that the provision with regard to the suit to which reference has been made on behalf of the petitioners in any way stands in the way of the applicability of the provisions of S 151 of the Code. In the case to which I have referred it has been laid down that where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provision of S. 151 may and should be resorted to. In this particular case the learned Munsif was of opinion that all the facts had not been properly brought to his notice and being of that opinion he thought fit to exercise his powers under S. 151 of the Code. The only defect in the procedure which the learned Munsif adopted appears to have been this that it did not give the petitioners an opportunity of being heard in connexion with these proceedings. Ordinarily, that would have been a good ground for our interference. But in view of the fact that he is the same officer who thought that the facts were not properly placed before him and also in view of the fact that after all the whole matter will now be heard on its merits in the presence of both the parties, I do not think the case calls for the interference of this Court.

For these reasons, I would discharge the rule. The opposite parties not having appeared there will be no order as to costs

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 180

MUKERJI AND MALLIK, JJ.

Kamala Prosad Sukul—Plaintiff—Appellant.

v.

Chandra Nath Pramanik and others—Defendants—Respondents.

Appeal No. 315 of 1925, Decided on 3rd August 1927, from appellate decree of Dist. Judge, Rajshahi, D/- 12th September 1924.*

(a) *Appeal — Competency — Suit for mesne profits against co-trespassers—Decree passed against all—Decree in its entirety only can be challenged in appeal.*

In an action for mesne profits against the trespassers, while it is open to the plaintiff to proceed against one or some or all of several co-trespassers at his own choice, once a decree has been obtained, it is the decree in its entirety that may be challenged on appeal and not otherwise; for so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal as against the others: (*Case law discussed*). [P 182 C 1]

(b) *Tort — Joint tort-feasors — Rule as to joint liability is not inflexible.*

As a general rule the liability of joint wrongdoers in tort is joint and several, but it is not an inflexible rule which needs no relaxation according to the view that is taken of jointness of the act or acts which constitute the wrong: (*Case law discussed*). [P 182 C 1]

Sarat Chandra Roy and Krishna Kamal Maitra—for Appellant.

Sarat Chandra Basak, Jatindra Mohan Chowdhury and Jatindra Nath Sanyal—for Respondents.

Biraj Mohan Majumdar—for Deputy Registrar.

Judgment—This appeal arises out of a final decree determining mesne profits. The proceedings followed a decree for possession with mesne profits in favour of the plaintiff and against a very large number of defendants who belong to two classes, viz., the landlord-defendants and the tenant-defendants. The plaintiff has appealed, but some of the defendants of the latter class are not before us, one of them not having been made a party to the appeal and three others having died and an application to substitute their heirs in their places not having been allowed as it was filed out of time. The decisions of the Courts below assessing the amount of mesne profits are concurrent.

A preliminary objection has been taken as to the maintainability of the appeal in view of the defect of parties noticed above. This objection will have to be dealt with first.

The claim for mesne profits is one to recover damages for the previous occupation of the land and under the present procedure it can be joined with the action for the recovery of the land. In the present case it was so joined and a decree entitling the plaintiff to mesne profits was passed against all the defendants in the suit. In the proceedings relating to the ascertainment of mesne profits, a certain sum was assessed by the trial Court and the decree passed on the basis of the said assessment has been upheld by the lower appellate Court. The object of the plaintiff in preferring this appeal is to vary the amount so assessed. His ground is that the assessment has been made on a wrong principle.

An action for mesne profits is in origin an action of trespass. It is, therefore, regulated by these broad principles which apply to and are now well settled as being applicable to actions for damages against wrongdoers. In such actions joint wrongdoers may be sued jointly or severally.

In Pollock on the Law of Torts, 10th edn p. 206 the principles are stated thus :

Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrongdoer is liable for the whole damage, and it does not matter, whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice, he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied. By that judgment the cause of action transit in rem judicatum and is no longer available. The reason of the rule is stated to be that otherwise a vexatious multiplicity of actions would be encouraged.

As regards joint torts it is said in Addison's Law of Torts, 8th edn. p. 44 :

All who aid or counsel, direct or join in the commission of a tort are joint tort-feasors. 'If divers do a trespass it is joint and several at the will of him to whom the wrong is done', that is to say, he can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants.

In *Thurman v. Waild* (1) and other cases it was settled that an accord and satisfaction by one wrongdoer for the whole injury done discharges all the wrongdoers. A release, therefore, given of the whole cause of action to one discharges the others, the reason being that the cause of action being one and indivisible having been released, all persons otherwise liable thereto are consequently released : *Cocke v. Jennor* (2). But a covenant or agreement not to sue one of them is no defence to an action against the others : *Hutton v. Eyre* (3). If therefore while purporting to release one tortfeasor it reserves rights against another, it will be construed as a covenant not to sue and not a release : *Duck v. Mayeu* (4), *Rice v. Reed* (5). The rule for construing such a document was laid down in the case of *Price v. Barker* (6) and is to the effect that the meaning would turn upon the intention to be gathered as to whether the right against a joint debtor was intended to be preserved or not. In *King v. Hoare* (7) Parke, B, authoritatively laid down :

These considerations lead us, quite satisfactorily to our minds, to the conclusion that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy for the same debt or tort against another party.

See also *Buckland v. Johnson* (8), *Brinsmead v. Harrison* (9), *Kendall v. Hamilton* (10). *Brinsmead v. Harrison* (9) settled the point that after recovering judgment against one wrongdoer, a plaintiff cannot sue the other for the same matter, even if the first action remains unsatisfied a proposition which was doubted before them. Though S 43, Contract Act, is not perhaps quite clear whether a complete adaptation of the

(1) [1840] 11 Ad. & E 453=3 P. & D. 289.

(2) [1724] Hob. 66=30 E. R. 214.

(3) [1815] 6 Taunt 289=123 E. R. 1046=1 Marsh 603=16 R. R. 619.

(4) [1892] 2 Q. B. 511=67 L. T. 547=57 J. P. 23=62 L. J. Q. B. 69=41 W. R. 56.

(5) [1900] 1 Q. B. 54 = 81 L. T. 410 = 69 L. J. Q. B. 33.

(6) [1855] 4 E. & B 760=24 L. J. Q. B. 130=3 C. L. R. 927=1 Jur. N. S. 775.

(7) [1814] 13 M. & W. 491=14 L. J. Ex. 29=2 D. & L. 383.

(8) [1854] 23 L. J. C. P. 204=2 C. L. R. 704=15 C. B. 145=18 Jur. 775=23 L. T. 190=2 W. R. 565.

(9) [1872] 7 C. P. 547 = 41 L. J. C. P. 190 = 20 W. R. 734=27 L. T. 99.

(10) [1879] 4 A. C. 504 = 48 L. J. Q. B. 705=28 W. R. 97=41 L. T. 418.

English rule is intended, yet *King v. Hoare* (7) has been held to apply in this country both in respect of joint debtors and of joint wrongdoers.

If these principles are applied to an action for mesne profits against co-trespassers the position is clear that while it is open to the plaintiff to proceed against one or some or all of several co-trespassers at his own choice, once a decree has been obtained it is the decree in its entirety that may be challenged on appeal and not otherwise; for so long as the decree against some remains a final and operative decree and not subject to an appeal, even though it is not satisfied but is capable of execution, the plaintiff cannot proceed with the suit further and take an appeal as against the others.

The question of the maintainability or otherwise of the appeal may be considered from another point of view, namely, as being dependent upon the question whether there is a right of contribution amongst the defendants inter se because if there is such a right, the decree, on the appeal if it varies that from which the appeal has been preferred will affect the rights and liabilities of those parties who are not before the Court and will produce an inconsistency on the record which is not permitted by law.

No doubt, as a general rule the liability of joint wrongdoers in tort is joint and several, but it is not an inflexible rule which needs no relaxation according to the view that is taken of jointness of the act or acts which constitute the wrong. Mookerjee, J., in an elaborate judgment in the case of *Ram Ratan Kapali v. Aswini Kumar Dutt* (11), in which he has exhaustively dealt with the question, has observed thus :

It cannot be laid down as an inflexible rule that in every case of tort, the Court is bound to pass a joint decree against the wrongdoers making each jointly and severally liable for the whole amount decreed. . . . In cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable.

In that case it was held that in respect of mesne profits which accrue during the pendency of a suit for possession, the

liability of different tenure-holders of the same degree, and of separate under-tenure holders of different degrees, should be apportioned according to the share of the profits intercepted by each. This decision has been dissented from by Page, J., in the case of *Promode Nath Roy v. Secy. of State* (12). With great respect, however, I venture to think that the judgment of Mookerjee, J., carefully read, appears to except from the general rule cases in which the tort-feassors are not really joint and are, therefore, persons to whom the rule does not apply and, in my opinion, therefore, the judgment is unexceptionable. *Merryweather v. Nixon* (13) was a case in which one S brought an action against two persons for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill and having recovered £ 840, he levied the whole upon one of the said two persons, and one of them then sued the other for a contribution of the moiety, as for so much money paid to his use. The plaintiff was nonsuited. Lord Kenyon, C. J., said that he had never before heard of such an action having been brought, where the former recovery was for a tort, that the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit; and that this decision would not affect cases of indemnity where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

The rule has been modified in collision cases : *The Frankland* (14), *Austin Friars Steamship Co. v. Spiller & Bakers Ltd* (15). Relying upon *Palmer v Wick Steam Shipping Co.* (16) it has been said in more decisions than one that the rule will not be extended. The rule has been said by very high authority as having been too widely laid down and it has been said that it is to be taken with the qualification that *it will hold if the nature of the case is such that the plaintiff must be presumed to have known that he was doing an unlawful act* : See Pollock on the Law of Torts, 10th edn.,

(12) A. I. R. 1927 Cal. 182=53 C. I. 992.

(13) [1793] 8 T. R. 136=1 Sm. L. C. (12th Ed.), 443=101 E. R. 1337.

(14) [1901] 70 L. J. P. 42=9 A. S. P. M. C. 193=(1901) P. 161=17 T. L. R. 419=84 L. T. 995.

(15) [1915] 3 K. B. 586=20 Com. Cas. 342=34 L. J. K. B. 1958=31 T. L. R. 4535.

(16) [1894] A. C. 318=71 L. T. 163.

(11) [1910] 37 Cal 559=14 C. W. N. 849=6 I. C. 69=11 C. L. J. 503.

p. 207, referring to the dicta of Lord Herschell in *Palmer v. Wick Steam Shipping Co.* (16); Per Bruce, J., in *The Englishman and The Australia* (17) and *Burrows v. Rhodes* (18): see also *Adamson v. Jarvis* (19)

In this country the doctrine has not been applied in cases of contribution regarding mesne profits where the parties were not wilful tortfeasors, *Bishnu Charan Roy v. Bipin Chandra Roy* (20), and doubt has been entertained whether it applies to this country at all [*Nihal Singh v. Collector of Bulandshahr* (21)] When wrongdoers have acted under a bona fide claim of right and had reason to suppose that they had a right to do what they did, contribution inter se may be allowed: *Sreeputty Roy v. Laharam Roy* (22); *Suput Singh v. Imrit Tewari* (23); *Kishnu Ram v. Rakmini Sewak Singh* (24); *Mahabir Prasad v. Darbhangi Thakur* (25). There has been cases in which the liability of co-trespassers for mesne profits has been apportioned where their shares are capable of being determined, e g, *Makund Singh v. Saraswati Bibi* (26).

On behalf of the appellant it was contended that in the present case it has already been found that all the defendants acted in concert and consequently *Merryweather v. Nixon* (13) should be applied in all its integrity and no question of contribution can possibly arise. In support of this contention reliance has been placed upon certain findings in the judgments declaring the plaintiff's right to khas possession and mesne profits. I have carefully examined these findings, but I am unable to hold that they were ever intended to be treated as findings decisive of the question. The question never arose for determination in the suit as it is obviously a question between the defendants inter se and there was no

(17) [1895] P. 212=7 Asp. M. C. 609=64 L. J. Adm. 74=72 L. T. 203=43 W. R. 670.

(18) [1899] 1 Q. B. 816=63 L. J. Q. B. 545=48 W. R. 13=15 T. L. R. 286=80 L. T. 591=63 J. P. 532.

(19) [1827] 4 Bing. 66=5 L. J. (O. S.) C. P. 68=12 Moore 241.

(20) [1914] 18 C. W. N. 622=25 I. C. 729.

(21) [1916] 38 All. 237=33 I. C. 165=14 A. L. J. 275.

(22) B. L. R. Sup. Vol. 687=7 W. R. 384.

(23) [1880] 5 Cal. 720=6 C. L. R. 62.

(24) [1887] 9 All. 221=(1887) A. W. N. 31.

(25) [1919] 4 Pat. L. J. 486=51 I. C. 697= (1919) P. H. C. C. 289.

(26) [1929] 29 C. L. J. 245=51 I. C. 93.

issue raised for its effective determination.

The result then is that the appeal is no longer maintainable. In that view the appellant's contention as to the propriety of the principle on which mesne profits have been calculated need not be considered.

The appeal is dismissed with costs.

N K.

Appeal dismissed.

A. I. R. 1928 Calcutta 183

C C. GHOSE AND CAMMIADÉ, JJ.

Budhu Tatua—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 85 of 1927, Decided on 27th April 1927, against order of Sess Judge, Hoogly, D/- 18th December 1926.

Criminal P. C. S. 530—Irregularity.

Where part of the evidence in a case is recorded by a Magistrate who has no jurisdiction, and part of the evidence by a Magistrate who has jurisdiction, conviction is illegal and retrial is necessary. [P 183 C 2]

Mrityaunjoy Chatterjee and Gopal Chandra Mukerji—for Petitioner.

Deputy Legal Remembrancer—for the Crown.

Judgment.—In this case we are of opinion that the rule must be made absolute. We have examined the record for ourselves, and we are satisfied that Mr. Mukherjee, who had second class powers and to whom the case was transferred, had no jurisdiction to try the case against the accused under S., 471. The evidence recorded by him could not be legally considered by the Magistrate to whom the case was ultimately transferred and who had jurisdiction in the matter. The result was that part of the evidence was recorded by a Magistrate who had no jurisdiction, and part of the evidence by a Magistrate who had jurisdiction. In this view the petitioner has made good the ground on which the rule was issued, and we, accordingly, set aside the order. But in the circumstances of the case we order a re-trial of the accused in accordance with law in that behalf.

N.K.

Rule made absolute.

A. I R. 1928 Calcutta 184

CUMING AND S. C. MALLIK, JJ.

Naimuddin Biswas and others—Defendants—Appellants.

v.

Maniruddin Lashkar and others — Plaintiffs—Respondents.

Appeal No. 561 of 1925, Decided on 10th May 1927, from appellate decree of Spl. Judge, Jessore, D/- 1st Dec. 1924.

(a) *Civil P. C., O. 22, R. 3—Death of party—Legal representative not brought on record—Abatement operates as a decree.*

A dead person is no longer a party to a suit in any capacity. [P 184 C 2]

An order of abatement by virtue of the death of the party is virtually a decree as it disposes of the plaintiff's claim as completely as if the suit has been dismissed. [P 185 C 1]

Mallik, J.—The order of abatement operates as a judgment as between him and the respondents to the same extent as a judgment on merits : 10 Bom. 220 ; 18 Mad. 496 and 38 M. L. J. 266, *Foll.* [P 185 C 2, P 196 C 1]

(b) *Civil P. C., O. 41, R. 4—Appeal by joint defendants against decree passed against them—Death of one defendant before hearing appeal—His legal representative not brought on record—Whole appeal is incompetent.*

So long as the orders of abatement remain it must be considered to have determined the rights between the parties : 10 Bom. 220 and 18 Mad. 496, *Foll.* [P 185 C 1]

To allow an appellant whose appeal has abated to gain the advantage of O. 41, R. 4 will result in the anomaly that so far as that appellant is concerned, there will be two decrees in the same suit in existence at the same time, one in his favour and one against him. [P 185 C 1]

Tenants of a certain holding brought a suit against landlord who were four in number under S. 106, Ben. Ten. Act, on the allegation that the rent was really Rs. 7 instead of Rs. 10 as entered in the record and got the decree. The landlord-defendants appealed, but before the hearing of the appeal one of the appellants died and his heirs were not brought on the record and consequently the appeal, so far as he was concerned, abated.

Held : that the appeal as it stood was incompetent for one of the necessary parties in whose absence the appeal could not proceed was not on the record. [P 191 C 2, P 185 C 1]

Mallik, J.—For the determination of the question whether the appeal is competent after partial abatement, the true test seems to be whether the appeal can be heard in the absence of the appellant who is dead. Whether the appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and the decree made : 9 C. W. N. 1031, *Foll.* [P 186 C 1]

Nakuleswar Mukherjee—for Appellants.
Prafulla Kamal Das—for Respondents.

Cuming, J.—The facts of the case out of which this appeal arises are these:

In khatian No. 128 the rent of the holding was entered as Rs. 10. The plaintiffs who are the tenants of the holding brought a suit under S. 106, Ben. Ten. Act, on the allegation that the rent was really Rs. 7, and praying that the record might be corrected accordingly.

The Assistant Settlement Officer held that the rent was Rs. 10 as entered in the Record-of-Rights and dismissed the plaintiffs' suit.

The plaintiffs appealed to the Special Judge. The Special Judge was of opinion that the rent was Rs. 7 and decreed the appeal.

The landlord-defendants, who are four in number, appealed to this Court

Before the hearing of the appeal one of the appellants, defendant 4, died. His heirs have not been brought on the record and consequently the appeal, so far as he is concerned, has abated

The respondent now contends that as the appeal has abated with regard to one of the appellants the whole appeal must fail because the right to appeal does not survive to the other three appellants alone. If they are allowed to appeal and are successful, the result will be that so far as some of the landlords are concerned, the rate of rent will be Rs. 7 and as regard others Rs. 10. The contention no doubt is correct: see *Kali Dayal v. Nagendra Nath* (1). The appellants, however, argue that the three appellants, who are still on the record can appeal and as regards the appellant in whose case the appeal has abated the Court can apply the principle of O 41, R. 4.

His counsel contends that the three appellants on the record have appealed from the whole decree on grounds which are common also to appellant 4 and that therefore the Court can reverse or vary the decree in his favour also (O. 41 R. 4).

The first difficulty I have in accepting this contention is that I cannot imagine that the Court can vary or reverse a decree in favour of a person who is dead and no longer has any existence. So far as defendant 4 is concerned, he is no longer a defendant, for he is dead. Possibly he has some heirs, but they are not on the record and so are obviously not parties. O. 41, R. 4 can have no application therefore. A dead person is no longer a party to a suit in any capacity

(1) [1920] 24 C. W. N. 44=54 I. C. 822=30 C. L. J. 217.

No doubt the death of an appellant does not cause the appeal to abate if the right to appeal survives, but this does not mean that any decree can be passed in favour of the dead person. It merely provides that his heir or representatives may carry on the litigation, and if they so desire, have themselves duly been made party. There is a further consideration which I think also makes it clear that O. 41, R. 4 can have no application. The appeal having abated so far as appellant 4 is concerned the rights between him and the respondents have been determined.

As pointed out by Sargent, C. J., in the case of *Bhikaji v. Purshotam* (2) an order of abatement is virtually a decree as it disposes of the plaintiff's (in this case the appellants') claim as completely as if the suit has been dismissed. This view was followed by the Madras High Court: *Subbayya v. Saminadayyar* (3). So long as the orders of abatement remain, must be considered to have determined the rights between the parties. To allow an appellant whose appeal has abated to gain the advantage of O. 41, R. 4 would result in the anomaly that, so far as that appellant was concerned, there would be two decrees in the same suit in existence at the same time: one in his favour and one against him. The conclusion to which I have no difficulty in coming is that O. 41, R. 4 cannot be applied to the case of an appellant whose appeal has abated by his death.

No doubt there are decisions to the contrary: *Chintaman Nilkant v. Gangadai* (4); *Somasundaram v. Vaithilinga* (5). The view however which I have taken seems to have found favour with this Court: *Protap Chandra v. Durga Charan* (6). Clearly the appeal as it now stands is incompetent, for one of the necessary parties in whose absence the appeal could not proceed is not on the record. The appeal must therefore be dismissed as being incompetent. The respondent is entitled to his costs. Hearing-fee: one gold mohur.

Mallik, J.—The suit out of which his appeal arises was one under S. 106, Ben. Ten. Act. The tenants were the plaintiffs in that suit. Their prayer was

(2) [1885] 10 Bom. 220.

(3) [1895] 18 Mad. 496=5 M. L. J. 63.

(4) [1903] 27 Bom. 284=5 Bom. L. R. 90.

(5) [1916] 40 Mad. 846=41 I. C. 546=6 L. W. 253.

(6) [1905] 9 C. W. N. 1061.

for a correction of a certain entry in respect of khatian No. 128 on the allegation that the rent of the holding was Rs 7 and not Rs. 10 as entered in the Record-of-Rights. The Assistant Settlement Officer who tried the suit held that the rent of the holding was Rs. 10, and on that finding he dismissed the suit. On appeal the learned Special Judge found that the rent of the holding was not Rs. 10 but Rs. 7, and accordingly he directed a correction of the entry as prayed for. The defendant-landlords have appealed to this Court.

On behalf of the respondents a preliminary objection has been taken that the appeal is incompetent. It appears that one of the appellants, defendant 4, died after the institution of the appeal to this Court, and it appears also that his legal representatives have not been brought on the record. It was said that under O. 22, R. 3, Civil P. C., the result of this is that the appeal has abated so far as defendant 4 is concerned, and after that abatement the appeal does not stand properly constituted. To meet this contention a number of cases decided by Courts other than this Court were cited before us. Among them are the cases of *Chandar Sang v. Khimabhai* (7); *Chintaman Nilkant v. Gangadai* (4), *Ram Sewak v. Lambar Pande* (8) and *Somasundaram v. Vaithilinga* (5). These cases were decided on the principle laid down in O. 41, R. 4, Civil P. C. O. 41, R. 4 runs thus:

Where there are more plaintiffs or more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be.

It was said that although defendant 4 had died and his legal representatives had not been brought on the record, the Court might proceed to hear the appeal under O. 41, R. 4. I do not think that this contention is sound. In cases falling under O. 41, R. 4 the Court may reverse or vary the decree in favour of all the plaintiffs or defendants. But in the present case that is not possible. The appeal has abated so far as defendant 4 is concerned. This order of abatement operates as a judgment as between him

(7) [1897] 22 Bom 718.

(8) [1902] 25 All. 27=(1902) A. W. N. 171.

and the respondents to the same extent as a judgment on merits: *Rahimunnissa Begam v. Srinivasa Aiyangar* (9). For the determination of the question, whether the appeal is competent after partial abatement, the true test seems to be whether the appeal can be heard in the absence of the appellant who is dead. Now whether the appeal can be heard in the absence of one of the appellants will depend on the nature of the suit and the decree made. In the present case the suit was for correction of a certain entry in the Record-of-Rights and the decree made was the correction of that entry from Rs. 10 to Rs. 7. The appeal, if heard, will have to be either allowed or dismissed. There would be no difficulty in the case of dismissal. But considerable difficulty will arise in case the appeal is allowed. The figure Rs. 7 will have to be altered in the case of the present appellants, but it will have to be kept intact so far as the heirs of defendant 4 are concerned. This, I need hardly say, would be an impossible position. I am therefore of opinion that, in the circumstances of the case the appeal cannot be heard in the absence of the legal representatives of defendant 4. The result of the partial abatement is that the appeal is imperfectly constituted, and in the absence of necessary parties I do not think that we can proceed to decide the appeal on merits. In this view of the matter I am supported by the decision in the case of *Kali Dayal v. Nagendra Nath* (1). The preliminary objection must therefore be sustained and the appeal dismissed with costs.

N.K.

Appeal dismissed.

(9) [1919] 38 M. L. J. 266 = 54 I. C. 565 = 11 I. W. 139.

A. I. R. 1928 Calcutta 186

CUMING AND MUKERJI, JJ.

Upendra Lal Gupta and others—Defendants—Appellants.

v.

Jogesh Chandra Roy—Plaintiff—Respondent.

Appeal No. 315 of 1925, Decided on 27th July 1927, from appellate order of Dist. J., Chittagong, D/- 6th April 1925.

(a) *Civil P. C., O. 41, R. 25—Remand—Court can go back on the views expressed in the order of remand at the final determination of appeal.*

An order of remand made under S. 41, R. 25, Civil P. C., decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. 41, R. 26, Civil P. C., and for helping the lower Court to proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. 41, R. 25, Civil P. C., and indeed it would fail in its duty if in deference to those views which are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. [P 188 C 1]

The finding or decision of a Division Bench of a High Court in remanding a case is not conclusive as between the parties to the appeal and it can be reopened at the final determination of appeal: *A. I. R. 1923 Cal 521, Foll.* [P 187 C 2]

(b) *Bengal Tenancy Act, S. 7—Etmam tenure in Chittagong, not being from the time of permanent settlement—Rent can be enhanced.*

The etmam tenure in Chittagong which has not been proved to have existed from the time of the permanent settlement is excluded from the operation of S. 6, Ben. Ten. Act, and the rent is enhancible under S. 7. [P 188 C 2]

Surendra Nath Guha—for Appellants.

Atul Chandra Gupta and Nripendra Chandra Das—for Respondents.

Mukerji, J—The facts relating to the litigation which has given rise to this appeal and the circumstances under which the appeal has come up for hearing before us are as follows:

The plaintiff instituted the suit for ejecting the defendants from a tenure after service of a notice to quit, and in the alternative for enhancement of the rent of the tenure either at the customary rate or up to such limit as the Court thinks fair and equitable. The defence was that the tenure was an *etmam*, and that it was held as a permanent tenancy at a fixed rate of rent, and that therefore the plaintiffs' claim should be dismissed.

The plaintiffs' case was that the tenure was a temporary one bearing a rental of Rs. 12 and was created by a *kabuliyat* in 1212 M. E. (=1851). The trial Court held that the question whether the *kabuliyat* was genuine or not was barred by *res judicata*, and though it was inclined to hold that it was genuine, it felt constrained to hold otherwise because it had

been so found in a previous suit. It held that the tenancy was an *etmam* which in the part of the district of Chittagaong, to which the suit relates, means a permanent heritable and transferable tenure. The plaintiffs' claim for khas possession was accordingly dismissed by that Court and there it ended.

On the question of enhancement of rent, the defendants relied upon the presumption contained in S. 50, Ben Ten. Act, and also the further presumption based on the dictum of the Judicial Committee in the case of *Port Canning Improvement Co. v. Katyan Das* (1) which is to the effect that where a tenure is proved to be permanent, heritable and transferable, the presumption of fixity of rent must arise in favour of the tenant.

The trial Court gave effect to the latter presumption and dismissed the plaintiffs' claim for enhancement. The District Judge, on appeal by the plaintiffs, appears to have ignored this presumption and was unable to give the defendants the benefit of the presumption under S 50 as it was not known whether the rent of the tenure created in 1851 by the amalgamation of the two tenures that existed before was any different from the sum total of the rents of the latter. Being of that opinion the District Judge held that the rent of the tenure was liable to enhancement. In that view he set aside the decree of the trial Court and remanded the suit for a fresh decision on framing the relevant issues that would arise in a suit for enhancement of rent under S 7, Ben. Ten. Act. He suggested the following issues:

Is there any customary rent payable by persons holding similar tenures in the vicinity?

If so, what is the customary rent?

If not, what is the fair and equitable rent?

What are the gross rents of the tenure-holder?

The defendants then preferred the present appeal. It came on for hearing before a Division Bench of this Court. On the 14th June 1926 that Bench made an order under O. 41, R. 25, Civil P. C. The substance of the order then made was that the Munsif would, on giving the parties opportunity to adduce such further evidence as they might desire, record his findings on the following ques-

tions and then resubmit the records to this Court: 1st.: Whether Rs 12, the rent of the tenure, represented the sum total of the rent of the holdings amalgamated in 1851, and whether the presumption under S. 50, Ben Ten. Act, arose in favour of the defendants; 2nd whether the presumption of fixity of rent which arises from the fact that the *etmam* is a permanent, heritable and transferable tenure has been rebutted; and 3rd what is the customary rate or what is a fair and equitable rent for the tenure? It was indicated in the order that the onus of proving that the presumption mentioned in the second question was on the plaintiff, and that the third question need not be gone into if the Munsif found that the rent is not enhancible.

The Munsif in an elaborate judgment has held that the presumption under S 50 does not arise, but that the other presumption, namely, as to fixity of rent which arises from the fact of the tenure being permanent, heritable and transferable has not been rebutted. On these findings, there was no necessity for him, under the terms of the remand order, to go into the third question and he has not done so. The appeal has then come up before us for final determination.

On these findings of the learned Munsif the appellants contend that there should be an end of the plaintiffs' suit. The respondent, on the other hand, contends that there is no presumption, either in fact or in law, that because a tenure is permanent, heritable and transferable, its rent is fixed; or, in other words, that the remand order made by this Court was misconceived and the enquiry into question of fixity of rent as based on this presumption has been useless. To this contention the appellants rejoined that inasmuch as a Division Bench has already held, rightly or wrongly, that there is such a presumption, that finding or decision is conclusive as between the parties to the appeal and it cannot be reopened. This position however cannot be seriously maintained in view of a long course of decisions of this Court: *Ganendra Nath v. Surya Kanta* (2); *Hiatunnessa Bibi v. Kailash Chandra* (8); *Hanuman Das v. Gur Sahai* (4);

(1) A. I. R. 1929 P. C. 42=47 Cal. 280=46 I. C. 279 (P. C.).

(2) [1912] 17 C. W. N. 462=15 I. C. 89

(3) [1905] 16 C. L. J. 259=17 I. C. 224.

(4) [1907] 18 C. L. J. 181=21 I. C. 700.

Official Assignee of Calcutta v. Bidya Sundari (5) and *Kamini Kumar v. Durga Charan* (6). An order of remand made under O. 41, R. 25, Civil P. C., decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience for the purpose of the determination of the appeal under O. 41, R. 26, Civil P. C., and for helping the lower Court to proceed rightly in carrying out the order. The Court, either the same or differently constituted, when determining the appeal finally, has ample jurisdiction to go back on the views as expressed in the order of remand passed under O. 41, R. 25, Civil P. C., and indeed it would fail in its duty if, in deference to those views which, no doubt, are entitled to the highest respect, it persists in them, although it is satisfied that they are erroneous. It is necessary therefore to consider the respondents' contention on its merits.

The presumption, it must be noted, has no foundation in any statute law and indeed seems to be in conflict with general principles, such as are recognized in numerous authoritative decisions. It rests entirely upon a dictum of the Judicial Committee in *Port Canning Land Improvement Corporation v. Katyayani Debi* (1) which runs in these words:

Ordinarily the two admitted characteristics (meaning, heritability and transferability which were the two admitted characteristics in that case) would create a presumption in favour of the tenant and throw on the plaintiff the onus of showing that the tenure is wanting in the characteristic of fixity of rent.

The decision of their Lordships in that case, however, did not rest on this presumption and on the other hand proceeded in spite of it and throwing the onus on the defendants, the tenants, as is clear from the passages which follow. Though thus obiter, the dictum was treated as laying down a principle well worth acceptance and the order of remand made by this Court was based on it. A later pronouncement of the Judicial Committee in the case of *Krishneendra Nath Sarkar v. Kusum Kamini Debi* (7) however seems clearly to militate against the correctness of the dictum. No such presumption was relied on in that case,

though it should have been if the dictum was correct, and on the other hand the effect of that decision is to hold that unless there is something to indicate that the landlord abandoned his right to enhancement, such right must be taken to exist even in the case of a permanent, heritable and transferable tenure. In the case of *Bhupendra Chandra v. Harihar Chakravarti* (8), it has been pointed out that the dictum was meant to apply to the special circumstances of the case, namely, that the land was let out for purposes of reclamation, that for some years from the commencement of the tenancy no rent was payable, that there was a progressive scale of rent for several periods prescribed thereafter and that there was no provision for any different rent for any period thereafter. It has been pointed out that in view of these special circumstances the last of the series of rents so prescribed was held as being intended to have been fixed in perpetuity. However that may be, the dictum in its broad form in which it is laid down can no longer be treated as authoritative. The appellants seek to justify the correctness of the dictum by reference to the decision of the Privy Council in *Bamasoondery Dassiah v. Radhika Chowdhraim* (9). That decision relates to the rights of a zemindar holding under a perpetual settlement to enhance the rent of his rent-paying lands, and deals with taluks within the meaning of the S. 51 and ryoti and other under-tenures provided for in S. 49, Bengal Regulation 8 of 1793. The decision has very little bearing on the present case.

The plaintiff in the present case is the holder of a Noabad taluk in respect of which the Government stands in the same position as an ordinary zemindar: *Nazir Ahmmad v. Secretary of State* (10). The etmam has not been proved to have existed from the time of the Permanent Settlement so as to attract the operation of S. 6, Ben. Ten. Act. The dictum being out of the way, the rent must be held to be enhancible and the issues necessarily to be decided in order to deal with the question of enhancement will accordingly have to be gone into.

(5) [1919] 30 O. L. J. 428=54 I. C. 700=24 C. W. N. 145.

(6) A. I. R. 1923 Cal. 521.

(7) A. I. R. 1927 P. C. 20=54 Cal. 166=54 I. A. 48 (P. C.).

(8) [1920] 24 C. W. N. 874=58 I. C. 867.

(9) [1869] 13 M. I. A. 248=4 B. L. R. P. C. 8=8 W. R. P. C. 11=2 Suther 293=2 Sar. 524 (P. C.).

(10) A. I. R. 1922 Cal. 337.

There was one contention advanced on behalf of the appellants at the time when the appeal was heard by the former Division Bench. It relates to the form of the remand which was made by the learned District Judge. This contention was reserved for consideration till now. The respondent concedes that it is not necessary to send the whole case down to the trial Court, but that it will be sufficient if the necessary issues are framed and sent to the trial Court for decision—the procedure that is contemplated by O. 41, R. 23, Civil P. C. This contention must be upheld.

We accordingly allow the appeal to this extent that we affirm the decision of the learned District Judge that the rent of the tenure is enhancible and while setting aside the order of remand passed by him in the form in which it has been made, direct that he do lay down the necessary issues, including the three issues already framed by him, and send them to the trial Court for its findings, and on receipt of the findings from that Court, finally dispose of the appeal.

We think that in the events that have happened, all the costs in this appeal will be borne by the parties for themselves.

Cuming, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 189

M. N. MUKERJI, J.

Satish Chandra De Sarkar—Petitioner.

v.

Rakhal Chandra Saha and others—Opposite Party.

Civil Revn. No. 1048 of 1926, Decided on 26th January 1927, against order of Addl. Dist. Judge, Dacca, D/- 23rd January 1926.

(a) *Civil P. C., O. 21, R. 90—Application under R. 90—Failure to make auction-purchaser party—Application is not bad (obiter).*

An application under O. 21, R. 90, Civil P. C., though made within the period of limitation prescribed for such an application is bad if the auction-purchaser has not been made a party thereto. [P 190 C 2]

(b) *Civil P. C., S. 11—Reversion.*

An error on a question of limitation is not necessarily such an error as would bring the case within the purview of S. 115: 37 Bom 387; A.I.R. 1926 Pat. 266; A.I.R. 1924 Pat. 37; and A. I. R. 1922 Oudh 129, Appr.; 50 I. C. 5 and Civil Rule No. 950 of 1923, Doubtful. [P 190 C 2]

S. C. Talukdar—for Petitioner.

Kanaiadhan Dutt—for Opposite Party.

Mukerji, J.—This rule arises out of an application under O 21, R. 90, Civil P. C. which was filed on behalf of the judgment-debtors on the 4th April 1925 in connexion with a sale that had taken place on the 11th January 1922. In the application as originally filed the auction-purchaser was not made a party. He applied on 5th September 1925 to be made a party to the proceedings and on that day an order was made to the effect that he should be made a party. The application was dealt with on its merits by the learned Munsif of Narainganj who on 30th October 1925 set aside the sale and directed the decree-holder to take steps for re-sale of the property. From this order appeals were preferred by the judgment-debtors as well as by the auction purchaser and the result of these appeals was that the learned Additional District Judge of Dacca affirmed the order which the learned Munsif had passed. The auction-purchaser had now moved this Court and obtained the present rule.

The question which arises in this rule is whether the application under O. 21, R. 90, Civil P. C., was competent inasmuch as the auction-purchaser was not made a party therein till long after the prescribed period of limitation for such an application had expired. The question raised is one not free of difficulty. The learned Munsif was of opinion that there was no analogy between the addition of a party in a suit and that in an application under O. 21, R. 90, Civil P. C. and that it would not have mattered in the least if the name of the auction-purchaser was not mentioned in the application. In his opinion all that is required by the law is that before the sale can be set aside or confirmed the notice of the application has to be served upon the auction-purchaser and that such notice should be given by the Court whether the applicant does or does not pray therefor. Upon a consideration of the relevant provisions of the Code I am inclined to agree with the learned Munsif in the view that he has taken. There are, however, conflicting decisions on this point in the different Courts. In the Patna High Court Mr. Justice Ross, sitting singly held in the case of *Sumitra v. Damri Lal* (1) that the auction-

(1) A.I.R. 1911 Patna 498.

purchaser is a necessary party to an application to set aside an execution sale, and where he is not made a party within the time allowed by the law for making the application, the application cannot be entertained. The Patna High Court, however, in a very recent case has taken a contrary view. A Division Bench of that Court, in the case of *Iswardas v. Biseswar Lal* (2) overruled the contention that was put forward on behalf of the auction-purchaser to the effect that it is necessary to have the parties affected by the application as parties to the application and held that the whole object of R. 92, O. 21 is to provide that no adverse order be passed in the absence of the persons affected by the order and that in one sense all the decree-holders and the auction purchaser are to be treated as being parties to the proceeding inasmuch as their names are already on the record. The learned Judges purported to follow another decision of the same Court in the case of *Bibi Zainab v. Paresh Nath* (3).

The Bombay High Court has held definitely in the case of *Ganesh Bab v. Vitthal Vaman* (4) that in a case under O. 21, R. 89, Civil P. C. to which the same considerations would apply, although the auction-purchaser was a necessary party for the determination of the question which would arise under O. 21, R. 92 Civil P. C. an application in which he was not made a party but which was filed within thirty days was not bad on the ground that he was not made a party therein. The same view appears to have been taken in Oudh *Abdur Rahman v. Har Narayan Das* (5). There is a decision of the Allahabad High Court under the Code of 1882 in which a contrary view was taken. That is the case of *Aligauhar Khan v. Bansidhar* (6). It may be pointed out that this decision was by Mr. Justice Burkitt sitting alone. So far as this Court is concerned there is no case on the point reported in any of the authorized reports. There are, however, two unreported decisions one in the case of *Ayuddin Ahamed v. Khoda Buc* (7) and also a decision in Civil Rule No. 950 of 1923 in which it has been held

that an application under O. 21, R. 90 Civil P. C. though made within the period of limitation prescribed for such an application is bad if the auction-purchaser has not been made a party therein. These two decisions, therefore, take a view contrary to that which the learned Munsif has taken and were it not for the reasons which I am about to state and on account of which I do not consider this case to be one which calls for our interference it would have been necessary for me to follow these two decisions although I may say, as I have already said, I do not agree with them. I may state here that for myself I am inclined to take the same view of an application like this as was taken of an application under S. 105, Ben Ten. Act, in the case of *Bir Bikram Kishore v. Ambika Charan* (8).

The considerations which weigh with me in not interfering with the order that has been passed are, firstly, that an error on a question of limitation is not necessarily such an error as would bring the case within the purview of S. 115, Civil P. C., secondly, the auction-purchaser in the present case is the Sadar Naib of the decree-holder and was looking after the execution proceedings all along on behalf of the decree-holder as appears clearly from a vakalatnama which was filed in the execution proceedings on behalf of the decree-holder and to which my attention has been drawn and, thirdly, the findings of the Courts below on the question of the service of the processes and sale proclamation and generally on the question of the proceedings held in connexion with the sale clearly go to show that a fraud was perpetrated on the judgment-debtors by the decree-holder and presumably also in collusion with the auction-purchaser who is but an officer of the decree-holder. In such a case as this merely because there has been an error on the part of the Munsif with regard to the view that may be taken on the question of limitation aforesaid, if really there has been any error at all, I do not think this is a fit case in which this Court should exercise its powers of revision. I am accordingly of opinion that this rule should be discharged, but I would make no order as to costs.

N.K.

Rule discharged.

(2) A.I.R. 1920 Patna 200.

(3) A.I.R. 1924 Patna 37=2 Pat. 800.

(4) [1912] 37 Bom. 387=19 I.C. 475=15 Bom. L.R. 244.

(5) A. I. R. 1922 Oudh 129.

(6) [1893] 15 All. 407=(1893) A. W. N. 173.

(7) [1919] 50 I. C. 5.

(8) A.I.R. 1926 Cal. 1037

A. I. R. 1928 Calcutta 191

PAGE AND GRAHAM, JJ.

Kumar Birendra Nath Roy Bahadur—
Decree-holder—Appellant.

v.

Tarini Kanta Roy and another—Res-
pondents.

Appeal No. 216 of 1925, Decided on 15th June 1927, from original order of Sub-Judge, Rajshahi, D/- 24-3-1925.

Civil P. C., O. 34, Br. 14, 15—Suit for contribution by a co-mortgagor after redemption of mortgage—Separate suit for attachment and sale of property charged with the amount of contribution is not necessary—T. P. Act, S. 95.

Property mortgaged by co-mortgagors was freed from liability to attachment by one co-mortgagor under the mortgage decree and he brought a suit to obtain contribution from the other owners of the mortgaged property. A decree was passed in the contribution suit, and in order to obtain execution of that decree an application was presented by the co-mortgagor for leave to execute the decree by selling the properties of the other owners to the extent to which under the decree they were proportionately liable to contribution,

Held: that it was not necessary to bring a separate suit under Rr. 14 and 15, O. 34, to effect the sale of the said property, but the sale could be effected in execution of the present decree : 22 Cal. 859 and 25 C. L. J. 354, Dist. [P 191 C 2]

*Brojo Lal Chakrabarty and Jatindra Mohun Chaudhury—*for Appellant

*Krishna Kamal Maitra and Rabindra Nath Chaudhury—*for Respondents.

Page, J.—This is an appeal from an order of the learned Subordinate Judge of Rajshahi allowing the opposite party's objection to certain properties being attached in execution of a decree, and ordering the properties to be released from attachment. Defendants 1 and 2 mortgaged some properties including the property in suit to defendant 6 on 19th May 1912. On 26th January 1914 the appellant purchased the properties set out in schedule Ka in execution of a money decree against defendants 1 and 2. A mortgage suit was then brought by the mortgagee to enforce his mortgage and some other property belonging to the mortgagors and subject to the mortgage was sold in execution of the mortgage decree. The appellant as the auction-purchaser of part of the property mortgaged comprised in schedule Ka, was anxious to save the property still unsold from being put up to auction in execution of the mortgage decree, and on 19th September 1916 deposited in Court the full

amount remaining due under the mortgage decree. Thereupon the properties still unsold which had been subject to the mortgage were freed from liability to attachment under the mortgage decree. Now, pursuant to the rights given to him under S. 95, T. P. Act, the appellant brought a suit to obtain contribution from the other owners of the mortgaged property freed from liability to the mortgagee. That suit was numbered 510 of 1919.

On 21st January 1921 the contesting respondent to this appeal one Tarini Kanta Roy purchased Sarat Sundari Debi defendant 1's $\frac{1}{3}$ rd share of property No. 2 in Sch. Ka. On 27th July 1923 a decree was passed in the contribution suit, and in order to obtain execution of that decree an application was presented by the appellant in respect of which the present appeal arises. The application was for leave to execute the decree by selling the properties of the other owners to the extent to which under the decree they were proportionately liable to contribution. One of those properties was the $\frac{1}{3}$ rd share of property No. 2 of Sch. Ka which belonged to Sarat Sundari, and which had been purchased by Tarini. Tarini objected to execution being levied in respect of the property which he had bought from Sarat Sundari, and his objection was upheld by the order against which the present appeal is preferred. Tarini based his objection to execution being levied upon the share in the property mortgaged that he had bought from Sarat Sundari upon three grounds. The learned vakil who appeared for the respondents urged that in the circumstances disclosed in the evidence the Court ought to hold, whatever the legal position might be, that the appellant must be taken to have released the property in dispute from any liability to contribute towards the liquidation of the mortgage debt and the learned vakil, while admitting that the release did not amount to an estoppel, claimed that it must be held that the appellant had forgone any right which he might have had to obtain contribution from Tarini's property. In my opinion, there is no substance in this contention as will be seen as soon as the relevant facts are stated. It appears that the appellant was the holder of an interest in a jote under which the property was held a share of which was purchased by Tarini,

and after Tarini's purchase on 21st January 1921 Tarini went to his landlord, that is the appellant and asked him if he would allow mutation of names in his Sherista. It was agreed that there should be mutation of names in the Sherista upon Tarini paying a Selami of Rs 200 and four years' arrears of rent.

It is in those circumstances that the learned vakil contended that the Court ought to hold that the appellant had agreed to forgo any right that he might have in respect of any other charge upon the property. It is quite obvious that no such inference reasonably can be drawn. Tarini purchased the share belonging to Sarat Sundari with full knowledge of all the facts, for he was a party to the contribution suit, and whether there was a charge or whether there was not a charge as alleged upon this property it was necessary that Tarini should obtain a mutation of names in the Sherista. There was no evidence whatever to support the contention that it was made a term of Tarini assenting to become a tenant and to pay the sums that I have mentioned that any other charge upon the property which the appellant might have should be released. That contention, therefore, fails.

The learned vakil further urged that the appellant was in a dilemma. Either the decree in the contribution suit was a personal decree against the parties against whom the decree was made, or it was a decree granting a charge upon the property for the amount for which the property was held liable to contribute. If it was merely a personal decree against the defendants the property of the objector could not be attached in execution. If it was a decree imposing a charge upon the property and not merely for money, then, it could not be enforced by way of sale in the present suit, but must be made the subject of a second suit. The ground upon which this contention was based was that under O. 34, Rr 14 and 15, it was clear that the legislature intended that before the mortgaged property was brought to sale the mortgagor, or mortgagors if there were more than one, should have an opportunity of redeeming the property before it passed by way of sale out of the hands of its former owner, and the learned vakil in this connexion referred to two cases : *Abhoyessury Dabee v. Gouri Sun-*

kar Panday (1) and *Gobind Chandra Pal v. Kailash Chandra Pal* (2). The learned vakil for the appellant has contended that there is a difference between a suit upon a mortgage which had developed in the present proceedings and a suit upon a charge not amounting to a mortgage, which was the case in each of the two authorities to which the learned vakil referred.

Where a suit is brought against several co-obligors upon a bond for the purpose of obtaining a declaration that there was a charge upon the property secured by the bond no doubt an opportunity should be given to the co-obligors to redeem the debt secured by the bond, and so to release the property. But in the present case the ratio upon which it has been held in the decisions referred to above that it is incumbent to bring a separate suit is absent, for in the present case a mortgage suit was brought, and in that mortgage suit the co-mortgagors were each of them in a position in which if they elected to do so, they could redeem the mortgaged property by paying the mortgage debt. The predecessor of Tarini, to the extent to which she was a mortgagor of the interest purchased by Tarini although she had the opportunity to do so, elected not to redeem the property.

This opportunity having been given to the mortgagors and the appellant alone having availed himself of the chance of redemption open to all the co-mortgagors now brings a suit for contribution, and, assuming that the decree was not a mere personal decree for money against the defendants, but also declared a proportionate charge which attached to the several properties, in my opinion, the two cases upon which the learned vakil for the respondents relied are inapplicable. The third contention raised on behalf of the respondents, therefore, becomes material, namely, was this decree a mere money decree, or was it also a decree under which the several properties were proportionately charged with the amounts due for contribution? The plaint in the suit has not been printed in the paper-book, but reference has been made to it and it does not appear from the plaint (so far as we are in a position to understand it), that any specific claim was made that a charge

(1) [1895] 22 Cal. 859.

(2) [1916] 25 C. L. J. 354=40 I. C. 230.

should be laid upon the properties liable to contribution.

But in order to enable us to understand the decree we have been referred to the judgment in the suit which is in the printed paper-book, and, in my opinion, it is clear beyond doubt or controversy that the decree in the contribution suit did impose not merely a personal obligation upon the defendants against whom the decree was passed, but also a proportionate charge upon the properties liable to contribution. It is enough to say that in more passages than one the learned Subordinate Judge emphasizes the importance of bearing in mind that

the liability attaches to the property and not to the person, and, as the mortgage charge is indivisible and attaches to the property, every person who holds the property must contribute.

In dealing with issue 12, which relates to the relief to which the plaintiff is entitled, the learned Subordinate Judge specifically states that there is to be a charge upon the properties, and he takes the opportunity of specifically laying down the contribution chargeable to each of the several properties liable to contribute. The decree recites what the plaintiff's claim is, and after stating in detail the several sums which the plaintiff claims as payable by the owners of the several properties respectively proceeds to state that the plaintiff reserved a lien for the said sums on the respective properties set out in the schedule and held by the defendants. Coming to the operative part of the decree, "it is ordered and decreed that this suit be decreed with costs," and although no special reference is made to the word "charge," it is, to my mind, abundantly clear that the learned Judge by this decree declared and imposed a proportionate charge upon the property liable to contribution to be paid by each of the properties respectively. It follows, therefore, in my judgment, that the application for execution was well-founded, and that the objection of Tarini was misconceived. The order will be that the order of the learned Subordinate Judge be discharged that the objection of the respondent Tarini be dismissed, and that the application of the plaintiff-appellant for leave to issue execution be granted. The appeal, therefore, in this sense will be allowed with costs in both the Courts—the hearing-fee in this Court being assessed

at three gold mohurs. The application is dismissed without costs.

Graham, J.—I agree.

N.K.

Application dismissed.

A. I. R 1928 Calcutta 193

SUHWARADY AND CAMMIADÉ, JJ.

Ataharuddin Taluqdar and another—
Plaintiffs—Appellants.

v.

Murari Mohun Dutt and others—
Defendants—Respondents.

Appeal No. 1141 of 1924, Decided on 25th November 1926, from appellate decree of 2nd Sub-Judge, Backergunj, D/- 27th February 1924.

(a) *Bengal Tenancy Act, S. 155 — Lease—Miras karsha lease—Covenant for re-entry on breach of any condition—Landlord must give notice under S. 155.*

Whenever a landlord sues for ejectment of a tenant on the ground that he has broken a condition in the lease, he is bound to follow the procedure laid down in S. 155, as there is nothing in S. 155 or in general law to hold that because a tenant commits an act in breach of the terms of the tenancy, he ceases to be a tenant within the meaning of S. 155. He continues to be a tenant until he is declared by a Court of justice that he has forfeited his tenancy and is liable to be ejected: 29 C. L. J. 40, *Foll.*; 24 C. L. J. 40, *Dist.* [P 194 C 1, 2]

In a lease creating a miras karsha there was a covenant that if the tenant transferred the holding without the landlord's consent, the landlord would have the right of re-entry. The tenant sold the holding to another person and continued to remain in possession as a sub-lessee under him. In a suit brought by the landlord,

Held: that the suit was not maintainable in view of S. 155 without serving a notice on the tenant [P 195 C 1; P 196 C 1]

(b) *Landlord and tenant—Abandonment.*

A landlord is not entitled to treat a holding abandoned where the original tenant is in possession as a sub-lessee without some act of repudiation of tenancy to him: A. I. R. 1924 Cal. 647, *Foll.*; 24 C. L. J. 40, *Dist.* [P 195 C 1, 2]

*Abinash Chandra Guha and Bhupendra Nath Das—*for Appellants.

*Asitaranjan Ghosh—*for Respondents.

Suhrawardy, J.—[In a lease executed by defendant 4 in favour of the landlords whose interest has now devolved upon the plaintiffs, creating a miras karsha, there was a covenant that if the tenant transferred the holding without the landlord's consent the landlord would have the right of re-entry. In 1326 defendant 4 sold the holding to defendant 1

who purchased it in the benami of defendant 2. Thereafter the plaintiffs brought the present suit for recovery of khas possession of the holding on the ground of breach of the covenant and also of abandonment. The defence was that defendant 4 was not aware of the stipulation in the lease and that she had a permanent transferable interest in the holding. The most important question raised at the trial was whether the plaintiff's suit was maintainable in view of S. 155, Ben. Ten. Act. There was also a denial of abandonment inasmuch as defendant 4 had taken a sublease from the purchaser (defendant 1) of the holding in suit. The Munsif found both the points in favour of the plaintiffs and gave them a decree. On appeal the learned Subordinate Judge has reversed the findings of the Munsif on these two points and dismissed the plaintiff's claim for khas possession allowing them a decree declaring their title to the oshat nimhowla and mirasijara claimed by them and further declaring that defendant 4 had no right to transfer the holding in suit.

The plaintiffs have appealed and it is argued on their behalf that the view of law taken by the learned Subordinate Judge on the two vital points raised in the case viz., the application of S. 155, Ben. Ten. Act, and the abandonment by defendant 4 are erroneous.

With regard to the first point: the question that falls for determination is whether a case of breach of covenant giving the right of re-entry to the landlord is covered by S. 155, Ben. Ten. Act, and makes it compulsory on the landlord in suing on the covenant for recovery of khas possession to serve a notice upon the tenant under that section. That a covenant which gives the landlord the right of re-entry, on the tenant transferring the holding, is subject to the provisions of the Bengal Tenancy Act, cannot be doubted. It has been held that even if there be such a covenant under which the landlord can take possession of the holding without the intervention of the Court, he is unable to do so by virtue of S. 89, Ben. Ten. Act: *Buddhimanta Paramanik v Sarat Chandra* (1). S. 155, so far as it is relevant to the present purpose, says that a suit for ejectment of a tenant, on the ground that he has broken a condition on breach of which he

is, under the terms of a contract between him and the landlord, liable to ejectment, shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular breach complained of prima facie, and giving their natural meaning to the words of the section it is clear that, whenever a landlord sues for ejectment of a tenant, he is bound to follow the procedure laid down in S. 155, Ben. Ten. Act. But, on the authority of the decision in the case of *Dwarka Nath v. Mathura Nath* (2) it is argued that where a tenant holding under a lease covenanting against alienation sells the tenancy he ceases to be a tenant and, therefore, S. 155, Ben. Ten. Act is not applicable in his case.

The high authority of the decision has made it incumbent upon me to look very closely into the law and the reasoning which induced their Lordships to hold the view expressed therein. With very great respect I do not find anything either in S. 155 or in the general law to hold that because a tenant commits an act in breach of the terms of the tenancy, he ceases to be a tenant within the meaning of S. 155. He continues to be a tenant until he is declared by a Court of justice that he has forfeited his tenancy and is liable to be ejected: S. 89, Ben. Ten. Act. The view taken by one of the learned Judges in that case seems to be otherwise, but the wording of S. 155 is so general and clear that it cannot be questioned that the application of the section does not depend upon the nature of the covenant the breach of which is complained of but it applies to every case where the landlord sues the tenant for ejectment even though on the allegation that he has forfeited his tenancy on account of the breach of a covenant in the lease. It is not necessary to dwell further upon this point because the ratio decidendi of the case *Dwarka Nath v. Mathura Nath* (2) is not applicable in the present case. The learned Chief Justice held that the purchaser from a tenant under disability as regards transfer is a trespasser and, therefore, he cannot rely on S. 155, Ben. Ten. Act, which is not applicable to one in his position. Mookerjee, J., based his judgment more on this fact than on any other. He observes:

(1) [1910] 13 C. L. J. 672=6 I. C. 147.

(2) [1916] 24 C. L. J. 40=34 I. C. 833=21 C. W. N. 117.

In the case before us it is, in my opinion, plain that no title passed to the defendant 1 by the execution sale; the landlord has not waived forfeiture by receipt of rent or otherwise; and the forfeiture must be held to have taken effect from the date of sale. Defendant 1 thus cannot take advantage of S. 155, Ben. Ten. Act, as he is not a tenant but a trespasser. The original tenants are quite content with the decree for ejectment and do not claim to be relieved against forfeiture.

This view does not commend itself to me inasmuch as the plaintiffs sue for recovery of possession and they must prove, even in the presence of a trespasser, that they have obtained the right to recover possession by following the procedure as laid down in law. In view of the facts of the present case we need not consider this question further. Defendant 4, the original tenant, has appeared in his suit and objected to the plaintiff's recovering possession of the holding. In this connexion we prefer to follow the ruling in the case of *Afiladdi v. Satish Chandra Bannerji* (3), where the learned Judges held that S. 155, Ben. Ten. Act applies to every case of breach such as breach of covenant against alienation. In this view I am of opinion that the view taken by the learned Subordinate Judge that the plaintiff's present suit is barred under S. 155, Ben. Ten. Act, is correct.

With regard to the second question, that is, abandonment, the Subordinate Judge has found that defendant 4 is still in possession of the land; she was sued for rent by the plaintiffs for a period after the transfer, and there is no evidence that there was any repudiation of the tenancy by defendant 4. On these grounds he held that there was no abandonment in law. With regard to the second ground as regards the suit for rent, he is not quite precise. The sale by defendant 4 was on 22nd Kartick 1326, and the suit for rent was for the years 1323 to 1326 Pous. There was an overlapping of a few months only and there is nothing to show that the plaintiffs were aware of the sale by defendant 4 to defendant 1, before they brought the rent suit. The other ground seems to me on the authorities to support the view of the lower appellate Court. In *Monmatha Kumar v. Josada Lal* (4), it is said that a landlord is not entitled to treat a holding abandoned where the original tenant

is in possession as a sub-lessee without some act of repudiation of tenancy by him. I am not prepared to accept the view without further consideration as it would seem that the very fact of the tenant transferring the whole of the holding to a stranger and attorning to him, is sufficient evidence of repudiation of tenancy under the original landlord. But I am not at present disposed to differ from the view taken in that case and the other cases which it has followed. I must, therefore, hold that the judgment of the lower appellate Court is substantially correct and must be upheld. The appeal is dismissed with costs.

Cammiade, J.—The finding of the Subordinate Judge regarding the status of the defendant who has transferred his interest is that that defendant's interest was a nontransferable occupancy holding. The case has been argued before us on that footing both sides having accepted that finding. The suit was instituted by the plaintiffs for ejectment of both the transferor and the transferee from the land of the holding. The question is how such ejectment may be effected. The grounds on which the ejectment is prayed for are: firstly, that there was a breach of covenant against alienation in which there is a proviso for re-entry by the landlord; secondly that the tenant has abandoned the holding. With regard to the relief sought on the first ground the question is whether or not the vendor is still to be considered a tenant for the purpose of the suit for ejectment. In the first place, the provisions of S. 155, Ben. Ten. Act, undoubtedly relate to all cases of breaches of conditions which create forfeiture of tenancies and render the tenants liable to ejectment, and therefore covenants restraining alienation must be held to be included within the scope of the section. A further consideration is that the tenancy being an occupancy holding unless the relationship of landlord and tenant is determined by some act on the part of the contracting parties or by operation of law that relationship continues and the vendor must therefore be a tenant till he is ejected under the provisions of S. 155, Ben. Ten. Act. For these reasons I am entirely in agreement with the view expressed by a Bench of this Court in *Afiladdi v. Satish Chandra* (3). In that case also as in the present one the tenant who had sold the holding

(3) [1916] 29 C. L. J. 40=34 I. C. 497.

(4) A. I. R. 1924 Cal. 647.

which was also an occupancy holding had remained in possession by taking a sub-lease from his vendee; and it seems to me, specially in cases of this nature, that there can be no doubt the notice required by S. 155 (1) is necessary before a tenant can be ejected. In the case of *Dwarka Nath v. Mathura Nath* (2), it appears that the tenants had vacated the land, and took no interest in the result of the suit for ejectment, and therefore as the purchaser who was the only contesting party was a trespasser, as far as he was concerned, no notice was necessary.

The other ground on which ejectment has been sought cannot be supported, on the rulings of this Court in various cases *Monmatha Kumar Kay v. Jasoda Lal Podder* (4); *Siperunnessa Bibi v. Ramdeb Rai* (5) and *Madar Mondal v. Mahima Chandra Mazumdar* (6). In all these cases it has been held that there a non-transferable occupancy holding is sold by the raiyat who after transfer takes sub-lease from the vendee and continues in possession, there is no abandonment of the land, and there is nothing in the mere act of transfer to show any intention either to abandon the holding or to repudiate the relationship of landlord and tenant. This being the view held by this Court in various cases, we are bound to follow that view. I accordingly agree with my learned brother that this appeal must be dismissed with costs.

N.K. *Appeal dismissed.*

- (5) [1919] 24 C. W. N. 11, =55 I. C. 360.
(6) [1906] 33 Cal. 531=3 C. L. J. 343.

A. I. R. 1928 Calcutta 196

B. B. GHOSE AND ROY, JJ.

Rohinikumar Pal—Defendant 1—Appellant.

v.

Kusum Kamini Pal and others—Plaintiffs—Respondents.

Appeal No. 264 of 1925, Dated 5th July 1927, from original decree of Sub-Judge, 4th Court, Mymensingh, D/- 27th July 1925.

(a) *Hindu Law—Widow residing with her brother during the period for which arrears of maintenance is claimed—Claim cannot be disallowed.*

The claim of a Hindu widow for maintenance and also arrears of maintenance at the full rate

for the period during which she resided with her brother cannot be disallowed or cut down. [P 199 C 1]

(b) *Civil P. C., O. 33, R. 10—Court has discretion as regards costs.*

The Court may in the exercise of its discretion, having regard to the circumstances of the case mould its decree according to what the justice of the case requires with reference to the Court-fees payable, and it can also direct which of the parties should pay the Court-fees due to the Government: 38 *All. 469, Diss.* and 14 *Mad. 163, Expl. & Dist.* [P 198 C 1, 2]

Prafulla Chandra Chakravarti—for Appellant

Bimal Chandra Das Gupta and Surendra Nath Guha—for Respondents

B. B. Ghose, J.—This appeal is by defendant 1 against a portion of the decree of the Subordinate Judge and arises out of a suit for maintenance brought by the plaintiff, a Hindu widow, out of the estate left by her deceased husband. Defendant 1 was the son of her husband by another wife. There were other defendants in the suit who were joint in mess with her husband, but they have no concern with this appeal as the suit was dismissed against them. The plaintiff sued as a pauper and her claim was for future maintenance at the rate of Rs 30 per month for herself and at the rate of Rs 15 per month for the minor daughter she had by her husband. There was also a claim for arrears of maintenance for six years and three months which was valued at Rs. 4,444 odd. The future maintenance was valued at Rs. 5,400. All the defendants contested the suit. The plaintiff brought another suit for some ornaments alleged to have been kept with the defendants. We are not concerned with that suit in the present appeal which was dismissed by the lower Court. The suit with which we are concerned was defended on various grounds and a large number of issues were framed on the defence set up by the defendants. It is not necessary to mention all of them. But it may be stated that the defence was that the plaintiffs' claim for maintenance was barred on the grounds of estoppel, acquiescence and waiver, and as regards the past maintenance it was barred by limitation. Then it was urged that the plaintiff was not entitled to separate maintenance apparently on the ground that her husband at the time of his death made some injunction to that effect. It was also stated in defence that the ar-

rears of maintenance could not be charged against the property and so forth. The learned Subordinate Judge decided all the issues against the defence and held that the plaintiff was compelled to leave the dwelling house of her deceased husband on account of quarrels and oppression on her by another lady, her husband's elder brother's wife, and that defendant 1 who was at the time student, connived at the oppressions exercised by that lady upon the plaintiff. The result was that the plaintiff had to leave her house and to take shelter under her brother.

Under these circumstances, she asked for maintenance from out of the estate left by her husband. The next question which the learned Subordinate Judge took up for decision was what should be the rate of the maintenance. He considered, no doubt, upon the evidence given by one of the plaintiffs' witnesses, that costs for plaintiffs' board per month might be Rs. 8 or Rs. 9 and he took into consideration the fact that Re. 1 only would be the cost per month for her clothing and Rs. 1 per month for her bratas and the other religious rites. Taking all these into consideration, he fixed the maintenance at the rate of Rs. 10 per month and also the maintenance on account of her infant daughter at Rs. 6 per month. The annual income of the property left by the husband has been found to be approximately Rs. 900 per year. The maintenance, therefore, allowed to the widow and to her infant daughter, amount to Rs. 192 per year, only a small fraction of the total income. The Subordinate Judge, however, in considering the question of the arrears reduced this amount at the rate of Rs. 10 per month and gave only a decree for six years to the extent of Rs. 720. But in making the order for costs, the Subordinate Judge directed that the plaintiff would recover proportionate costs for the suit from defendant 1 only and Government would recover Court-fee from defendant 1 which the plaintiff would have paid, if she were not permitted to sue as a pauper. The appeal of defendant 1 is directed against that part of the decree which makes him liable to pay the Court-fees with regard to the suit. The matter then stands thus. The total Court-fee payable on the claim as made by the plaintiff in her suit

was Rs. 817-8-0. The amount decreed for arrears is Rs. 720 only and the valuation of the future maintenance allowed by the Subordinate Judge would amount to Rs. 1920 only. The Court-fees payable with regard to this amount would be Rs. 268-8 as. What defendant 1 complains against is that the difference between the Court-fees payable on the plaint, that is Rs. 817-8-0 and the amount of Court-fees on the sum decreed to the plaintiffs, which is Rs. 268-8-0 should not be imposed on him. This amount is Rs. 549. In support of this contention, the learned vakil for defendant 1 relies upon two cases, the earliest of which is the case of *Chandra Reka v. Secy. of State* (1). In that case the plaintiff was the brother of the defendant and sued her for partition of the properties which were alleged to be worth Rs. 34,000 odd. He brought the suit as a pauper. The defence was that the ancestral property was worth very little and that all the property that the plaintiff claimed was acquired by the defendant herself who was a prostitute by profession. It was found by the trial Court that the ancestral property was only worth Rs. 200 and upon that finding he made a decree in favour of the plaintiff to the extent of Rs. 100. But in making the order as to the payment of the Court-fees, he observed :

Both plaintiff and defendant 1 have lived disreputable lives—defendant 1 being a prostitute while the plaintiff was the hanger-on of a prostitute. Yet himself is a pauper and defendant 1 has acquired comparatively great wealth ; in the undefined state of the law, this induced the plaintiff to attempt to get a share, he has failed and she has succeeded in resisting his claim by setting up a disreputable defence. There is a large sum due to Government for stamp duty. In these circumstances, I think it right to direct that defendant 1 considering the nature of her defence, be ordered to pay her own costs and the stamp duty due to Government.

Under these circumstances the learned Judges held that the order of the trial Court was erroneous. As Mr. Justice Muthusami Ayyar puts it;

Notwithstanding her profession, she (appellant) has rights of property, and is entitled to the protection of law, and no penalty can lawfully be imposed upon her for pleading what is found to be substantially true to entitle her to such protection.

To my mind, there cannot be any analogy to the case before us with reference to the case in the Madras High

Court. In my judgment, the District Judge in that case quite wrongly made the order in the exercise of his discretion, simply because the defendant acquired the property by her disreputable mode of life. This case, therefore, can be of no assistance to us in deciding the present question which has been raised by the learned vakil for the appellant. But that cannot be said with regard to the other case, *Ganga Dahal Rai v. Mt. Ganra* (2), on which the learned vakil relies. In its facts the Allahabad case bears a great resemblance to the case before us. There the plaintiff had to bring a suit for maintenance claiming Rs. 40 per month. The Court allowed only Rs. 5 per month, but directed the defendant to bear the costs actually incurred by the plaintiff and further directed the Collector to realize from the defendant the whole amount of Court-fees payable on the claim. The learned Judges held that the principle laid down in the case, *Chandra Reka v. Secretary of State* (1), was applicable to the case before them; and they further held that in that case it was decided that

it was illegal to lay upon the defendant in such a suit a larger proportion of the Court-fee leviable from the plaintiff than would have been payable by the plaintiff if the claim had been limited originally to that portion which was successful.

With great respect, it seems to me that no such general rule was laid down by the learned Judges of the Madras High Court. They decided the case upon its facts and they were of opinion that the reason for which the District Judge in that case made the defendant liable for the Court-fees could not be supported on the ground on which she was made so liable. The learned Judges of the Allahabad High Court observe at p. 473:

The question of the discretion of the Court in dealing with a matter of this sort, i. e., with a case in which a pauper plaintiff has partially succeeded and partially failed, is perhaps one which deserves to be dealt with by a special rule.

I must again observe with very great respect that the discretion given to the Court under R. 10, O. 33, Civil P. C., is quite sufficient for the purpose, and the Court may, in the exercise of its discretion having regard to the circumstances of the case, mould its decree according to

what the justice of the case requires with reference to the Court-fees payable. The words in the last portion of the rule run thus:

... such amount shall be recoverable by the Government from any party ordered by the decree to pay the same.

This, to my mind, leaves the discretion entirely with the Court to direct which of the parties should pay the Court-fees due to the Government. Dealing with the equities of the case the learned Judges of the Allahabad High Court make this observation:

In an ordinary litigation the defendant has some protection against any extravagant exaggeration of his claim on the part of the plaintiff who knows that he has a good case for some relief, in the fact that the plaintiff is bound to pay out of his own pocket in the first instance the whole of the Court-fee leviable on the plaint as drafted. It is otherwise in the case of a suit brought by a pauper plaintiff and it would not be equitable to permit such a plaintiff to penalize the defendant by exaggerating his claim.

I have nothing to add with reference to this observation to what I have already stated that the Court has been given ample discretion in the matter by the rule I have already cited; and the equities of a particular case must be considered by the Court in making the order. No hard-and-fast rule can be laid down with regard to the equities of such a case as this. Take for an example the case of a person in the position of the plaintiff. The widow of a member of the joint family has no means whatsoever of knowing what is the annual income of her husband's share in the property. When all the people were living together she was probably in affluent circumstances. During the lifetime of her husband, all her wants had been met; but when she had to leave the family house, she has been held to be bound to maintain herself on the paltry sum of Rs. 10 per month. How is she to know that the claim which she made of Rs. 30 was unduly exaggerated? The income of the husband's estate being Rs. 900 per year, and he having left only an adult son besides herself and her infant daughter she could reasonably have thought that the maintenance for the widow and the daughter might have been much more than what has been allowed by the Court, and in such a case as this, to my mind, it is iniquitous to saddle her with the costs of the Court-fees. The defendant resisted her entire claim, and pleaded

(2) [1916] 38 All. 469=35 I. C. 46=14 A. L. J. 657.

that she was not entitled to a single rupee for maintenance. It is unnecessary for me to dilate further on this point and I can only repeat that in my judgment the matter is entirely left to the discretion of the Court which must make the appropriate order having regard to the facts of each particular case. With great respect I am, therefore, unable to agree in the decision of the learned Judges of the Allahabad High Court in the case referred to above. It is, next urged by the learned vakil for the appellant that in this case the Subordinate Judge has not given any reasons for the exercise of his discretion and his order is, therefore, liable to be set aside on appeal. It is true that the discretion of the Court must be exercised with reference to the facts of each particular case, as I have already stated, but no materials have been given to us in this case in order to enable us to decide that the discretion has been wrongly exercised. The evidence with regard to the case has not been printed, and we are, therefore, unable to say that the Subordinate Judge has not exercised his proper discretion in making defendant 1 liable for the Court-fees. The appeal must, therefore, be dismissed with costs.

We have been referred to the cross-objection preferred by the plaintiff-respondent. Although, in the course of his argument, the learned vakil for the respondent stated that the amount of the maintenance for the plaintiff and her daughter had been fixed at a low figure, we are unable to give her any assistance, as the cross-objection is not directed against the future maintenance allowed by the Court. The only objection that is preferred is with regard to the disallowance of maintenance of Rs. 6 per month which he has given to the minor daughter for the arrears. The reason given by the Subordinate Judge does not commend itself to me, as he says that the lady was maintained by her brother in his family during the period for which the arrears of her past maintenance are claimed. We are not aware of the circumstances of the brother; and because she had to live with her brother, there is no reason for disallowing the full rate allowed for maintenance or cutting it down to six years only. In my opinion, she ought to be allowed the past maintenance for 6 years and 3 months, that

is, the period of the claim at the rate of Rs 16 per month. The cross-objection to the extent of Rs. 480 is, therefore, allowed with costs. The Court-fees for this has been paid by the respondent and she is entitled to recover it from the appellant.

Hearing-fees both in the appeal and the cross-objection is assessed at three gold mohurs each

Roy, J.—I entirely agree.

S.J.

Appeal dismissed.

A. I. R. 1928 Calcutta 199

MUKERJI AND ROY, JJ.

Harendra Nath Singha Ray—Defendant—Appellant.

v.

Purna Chandra Goswami and others—Plaintiffs—Respondents.

Appeal No. 231 of 1926, Decided on 31st March 1927, from appellate order of Dist. Judge, Nadia, D/- 20th March 1926.

Civil P. C., O. 1, Rr. 1 and 3, and O. 2, R. 3—Plaintiff suing to recover certain properties in his personal capacity from certain defendants and to recover another property in the capacity of shebait from one of the defendants in the same suit—Plaint should be treated as comprising two suits and they should be tried separately.

Where plaintiff sued in his individual capacity as reversioners of a certain person to recover possession of the properties B, C, D and E on the death of the widow, from defendants 2 to 5 who, under a transfer from the widow and the son said to have been adopted by her or in collusion with the latter's widow, were in possession, and he also sought to recover in the same suit the property A in the capacity of shebait which belonged to the deity Nandadul Thakur and which was in the possession of defendant 2, who claimed to hold it as transferee from the widow and the said adopted son:

Held: that the plaint should be treated as comprising two suits, one at the instance of the plaintiff as shebait of the deity Nandadul Thakur in respect of property A and the other at the instance of the plaintiff in his personal capacity in respect of the properties B, C, D and E and the two suits should be separately tried: (*English and Indian cases, Ref.*).

[F 200 C 1,2, P 202 C 1]

Sitaram Banerji and Bijay Prasad Singha Roy—for Appellant.

Mrityunjay Chatterji—for Respondents.

Mukerji, J.—The plaint in this suit relates to five items of properties, which for the sake of convenience may be called A, B, C, D, and E. The plaintiff claims to be the reversionary heir of one Rashbe-

hari Goswami. He also claims to be the shebait of the deity Nandadulal Thakur, installed by the ancestors of the said Rashbehari Goswami, on the ground that according to the rule and practice prevailing in the family, from the time of his ancestors, the shebaitship has all along vested in the heirs according to the law of inheritance. The plaint states that Rashbehari Goswami left a widow Tarini Debi, and one Susil Kumar alias Sachindra, whose widow is defendant 1, had set up a claim that he had been adopted by her as her son. The plaintiff seeks to have his title declared as owner in respect of properties B, C, D and E, and the title of the deity Nandadulal Thakur to property A and asks for recovery of possession of properties B, C, D and E as such owner and of property A as such shebait. According to the plaint properties A and B were in the possession of defendant 2, who claims to have obtained the same from Tarini Debi and Sachindra, by a conveyance and a lease respectively; property C is in the possession of defendant 3; property D is in the possession of defendant 4 and property E in the possession of defendant 5. It is alleged in the plaint that the three last-mentioned defendants were in collusion with each other and with defendant 1.

The Subordinate Judge held that the suit, in the form in which it was laid, was not maintainable. He gave the plaintiff an opportunity to elect as to how he would proceed with the suit and against which of the defendants; and on the plaintiff not having availed of the opportunity, he dismissed the suit.

The District Judge held on appeal that the suit was maintainable and remanded it for trial on the merits. Defendant 2 has then preferred this appeal.

The question of maintainability of the suit was dealt with by the Courts below from the point of view of O. 1, R. 1, O. 1, R. 3 and O. 2, R. 3, Civil P. C. The Subordinate Judge held that all the three rules have been contravened, while the District Judge has held that none of them has been infringed.

As regards properties B, C, D and E, it is clear that the plaintiff seeks to sue in his individual capacity and recover possession of the properties on the death of the widow from defendants 2 to 5 who, under a transfer from the widow and the son said to have been adopted by her or in

collusion with the latter's widow, are in possession thereof. Property A belongs to the deity Nandadulal Thakur and it is in the possession of defendant 2, who claims to hold it as transferee from the widow and the said adopted son.

Order 1, R. 1 and O. 1, R. 3, Civil P. C., are in practically the same terms. They correspond to a part of O. 16, R. 1 and to O. 16, R. 4, respectively, of the English rules. Before 1896, this part of O. 16, R. 1, ran in these words :

All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.

In 1896 it was amended and as amended it runs thus :

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise.

Rule 4, O. 16, stands as before in these words :

All persons may be joined as defendants against whom the right to any relief is alleged to exist whether jointly, severally or in the alternative.

Two matters must now, upon the authorities, be regarded as well settled. First, O. 16 of the English Rules, though headed "parties" only, deals not only with joinder of parties but also joinder of causes of action (see the cases referred to in *Ramendra Nath Roy v. Brajendra Nath Dass* (1), in the judgment of Woodroffe, J., at p. 123 and of Mookerjee, J., at p. 132) : and second, though R. 4 was not amended, the alteration of R. 1 alters the effect of R. 4 and whatever construction is placed on R. 1 ought now to be applied also to R. 4. [*Oesterreichische Export A. G. v. British Indemnity Insurance Co. Ltd.*, (2), *In Re Beck* (3)] and that a plaintiff is entitled to join as co-defendants persons against whom he has different causes of action in cases where common questions of law and fact are involved : *Payne v. British Time Recorder Co. Ltd.* (4). It follows, therefore, that under R. 3, O. 1, Civil P. C., which, unlike the English R. 4, O. 16

(1) [1917] 45 Cal. 111=27 C. L. J. 158=41 I. C. 944=21 C. W. N. 794.

(2) [1914] 2 K. B. 747=83 L. J. K. B. 971=110 L. T. 955.

(3) [1918] 87 L. J. Ch. 335=34 T. L. R. 286=118 L. T. 629.

(4) [1921] 2 K. B. 1.

has been amended and brought on the lines of R. 1, O. 1 Civil P. C., there is greater reason for interpreting it in that way. As regards the joinder of defendants, if the plaintiff's right to relief is in respect of, or arises out of, the same act, transaction or series of acts or transactions, whether it exists jointly, severally or in the alternative all the defendants could be joined in one action, provided that if separate suits were brought against such persons any common question of law or fact would arise. So also as regards the joinder of plaintiffs.

It has been repeatedly pointed out by the House of Lords that although the decisions, since the amendment of O. 16, R. 1, the effect of which was to widen its language, have not been always consistent nor wholly satisfactory, still the more recent decisions have tended in the right direction, namely, to show an increasing tendency to give effect to the obvious purpose of the rule. In *Drincqbier v. Wood* (5), Byrne, J., pointed out that "transaction" was not confined to something taking place between two parties. In *Stroud v. Lawson* (6). Smith, L. J., said :

According to the terms of the rule the plaintiff in this case cannot join the two causes of action which he is putting forward in different capacities, unless he can show that they both arise out of the same transaction. It is not enough for him to show that, if separate actions were brought, "a common question of law or fact would arise" for those words do not apply, unless the right to relief in each case arises out of the same transaction.

Chitty, L. J., in the same case observed :

They are, therefore, as I have said, in reality two separate plaintiffs suing in respect of two separate and distinct causes of action in this case. The question then arises whether both the causes of action arise out of the same transaction within the meaning of O. 16, R. 1 It is necessary that both these conditions should be fulfilled, that is to say, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule I do not deal with the words "series of transactions" because they were not relied upon by the plaintiff's counsel.

While Vaughan Williams, L. J., said :

I do not, however, understand that by the new rule it was intended to prevent the joinder

of different causes of action under it. On the contrary I understand its object to be to facilitate such joinder, and to allow plaintiffs to join different causes of action where, under the old rules as interpreted in *Smurithwaite v. Hannay* (7) by the House of Lords they could not do so I do not think that the rule means that the whole of a transaction must be involved in each of the causes of action joined. I think that, if there was a transaction or series of transactions in respect of which one plaintiff was interested up to a certain point, and the other plaintiffs were interested, not only up to that point, but in respect of the entire transaction or series of transactions from beginning to end, under this rule they might join their separate causes of action in one action, because there would be one transaction or series of transactions in respect of which the various plaintiffs all claimed a right to relief.

That the rule deals with joinder of causes of action as well as joinder of parties is now well settled: see *Bullock v. London General Omnibus Co.* (8); *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co. Ltd.* (9); *Times Cold Storage Co. v. Lowther & Blankley* (10); *Oesterreichische Export A. G. v. British Indemnity Insurance Co., Ltd.*, (2) In *Markt & Co. v. Knight Steamship Co. Ltd.*, (11), Fletcher Moulton, L. J., while pointing out the distinction between this rule and that which relates to a representative suit, said, with regard to this rule :

This makes it clear that (subject to the control of the Court) persons can unite as plaintiffs though seeking individual relief in cases where the investigation would to a great extent be identical in each individual case. The policy of the rule is to avoid needless expense where it can be done without injustice to anyone. And it carries out its object.

The question of joinder of plaintiffs or defendants and the meaning of R. 16, Rr. 1 and 4, have been considered lately by the Court of appeal (Lord Sterndale, M. R., Warrington, L. J., and Scrutton, L. J.) in *Payne v. British Time Recorder Co. Ltd.*, (4) and it has been said :

Broadly speaking, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same

(7) [1894] A. C. 494=63 L. J. Q. B. 737=7 Asp. M. C. 485=43 W. R. 113=71 L. T. 157=6 R. 299.

(8) [1907] 1 K. B. 264=76 L. J. K. B. 127=23 T. L. R. 62=95 L. T. 905.

(9) [1910] 2 K. B. 354=79 L. J. K. B. 1094=103 L. T. 333.

(10) [1911] 2 K. B. 100=80 L. J. K. B. 901=55 S. J. 442=104 L. T. 637.

(11) [1910] 2 K. B. 1021=79 L. J. K. B. 939=103 L. T. 369.

(5) [1869] 1 Ch. 393=68 L. J. Ch. 181=47 W. R. 252=6 Manson 76=15 T. L. R. 18=78 L. T. 548.

(6) [1898] 2 Q. B. 44=46 W. R. 626=67 L. J. Q. B. 718=14 T. L. R. 421=78 L. T. 729.

time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.

This is a good working rule for practical purposes and, applying it to the present case, it seems to us clear that the action as framed is justified by O. 1, Rr. 1 and 3, Civil P. C. Looking at the matter, however, from the point of view of O. 1, R. 2, we are of opinion that the trial of the suit as laid is likely to be somewhat embarrassing, especially as some of the questions that will arise so far as property *A* is concerned, will have no bearing upon the claim as regards properties *B*, *C*, *D* and *E* and also because the question of costs, in so far as the deity is concerned will arise, which, if possible, must be kept separate from these which the plaintiff will incur or be entitled to recover in his personal capacity.

We, accordingly, set aside the orders passed by both the Courts below and direct that the plaint be treated as comprising two suits: one at the instance of the plaintiff as shobait of the deity Nandadul Thakur in respect of property *A* and the other at the instance of the plaintiff in his personal capacity in respect of the properties *B*, *C*, *D*, and *E*, and the two suits be separately tried.

We make no order as to costs in this appeal.

Roy, J.—I agree.

N.K

Orders set aside.

A. I. R. 1928 Calcutta 202

MUKERJI AND ROY, J.

Tamirannessa Bibi and Khatimannessa Bibi, minors, represented by their mother Mangalbi Bibi — Auction-purchasers — Appellants.

v

Mt. Kachhiman Bewa, widow of Ektiar Mondal, Tamijaddin Mondal and others — Respondents.

And in the matter of an application of the auction-purchasers, appellants, filed on 25th June 1925.

Appeal No. 278 of 1925, Decided on 30th March 1927.

(a) *Bengal Tenancy Act, S. 173 (3)—Sale set aside — Appeal by auction-purchaser is not competent.*

From an order setting aside the sale under S. 173, Ben. Ten. Act no appeal lies at the instance of the auction-purchaser: 3 C.W. N. 184; 3 C.W. N. 14 (notes); 13 C. W. N. 100 (notes); and 19, C. L. J. 81, Foll. [P 204 C 2]

(b) *Civil P. C., S. 115—Limitation.*

An erroneous view of law on the question of limitation is not by itself a ground for revision. [P 204 C 2]

J. N. Roy and Bansori Lal Sarkar—for Appellants.

S. C. Maity and M. A. Quasem—for Respondents.

Mukerji, J.—This appeal arises out of certain proceedings taken at the instance of some of the judgment-debtors to set aside a rent sale. The Subordinate Judge refused to set aside the sale. The District Judge, on appeal, set it aside. The auction-purchasers have preferred this appeal.

The application to set aside the sale was under O. 21, R. 90, Civil P. C., as well as under S. 173, Cl. (3), Ben. Ten. Act. Under O. 21, R. 90, Civil P. C., it was alleged that the sale processes were not duly served, and that there was material irregularity in publishing and conducting the sale and that substantial injury in the shape of gross inadequacy of price resulted therefrom. As resting on S. 173, Cl. (3), Ben. Ten. Act, it was alleged that one of the judgment-debtors, Tahed Mahmud Mandal, in collusion with the decree-holders, managed to purchase the properties in the benami of his daughters.

The sale was held on 5th October 1923. The present application was originally filed on the date the Courts reopened after the Dusserah vacation and so within time. When so filed the auction-purchasers were not made parties therein. On 12th January 1924 the auction-purchasers were added as parties.

The Subordinate Judge held that the application must be treated as having been filed beyond time. He held that the sale processes were not proved to have been served, but that there was no reliable evidence to prove that the property was undersold. He held further that the evidence fell far short of proving that the purchase was made by Tahar Mahmud in the benami of his daughters, though there were reasons to suspect that it was the case of a benami purchase.

The District Judge, on appeal, reversed the decision of the Subordinate Judge by an order which is not very remarkable for its lucidity. He found that Tahar Mahmud had made the purchase in the names of his daughters. He held that there was material irregularity and that

the price fetched was inadequate. The question of limitation he appears to have left undecided. He expressed himself somewhat loosely on this question, confusing an appeal with an application under O. 21, R. 90, Civil P. C., in these words:

As regards the appeal under O. 21, R. 90, the auction-purchasers were not made parties till after the 30 days' time allowed by the Limitation Act. The petitioners themselves alleged that they were necessary parties and it is difficult, therefore, to accept this contention that O. 21, R. 90, merely demands that the auction-purchasers should have notice before the orders are passed, without making them parties, but it appears to be a perfectly possible interpretation of O. 21, R. 92. If correct the appeal is not time barred.

The respondents have urged that no second appeal lies in this matter. The appellants seek to justify the appeal firstly on the ground that fraud was alleged by the judgment-debtors in their application for setting aside the sale and that, therefore, the question that was decided by the Subordinate Judge and the District Judge fell within S. 47 of the Code. This justification is not possible as, though a general allegation of fraud was made in the petition, the evidence that was adduced and the order that the Subordinate Judge passed dealt only with fraud in publishing or conducting the sale within the meaning of O. 21, R. 90, Civil P. C., for which only one appeal is allowed by the law. It is nextly urged on behalf of the appellants that the question raised under S. 173, Cl. (3), Ben. Ten. Act, involves a question under S. 47 of the Code and, that therefore, a second appeal is competent.

The authorities bearing upon this question are not quite uniform. It should be observed at the outset that no appeal is allowed against an order under S. 173, Cl. (3), Ben. Ten. Act, by any provision of the Act itself and this section is not included in the list of orders made appealable as such by the Civil Procedure Code. The only way in which an order under S. 173, Cl. (3), Ben. Ten. Act, may be regarded as an appealable one is by treating it as one made under S. 47, Civil P. C., and thus satisfying the definition of a "decree" under that Code and being thus appealable as such.

Mookerjee, J., discussed this question very fully in the case of *Joytara v. Pran Krishna Seal* (1), and observed thus:

(1) [1911] 13 C. L. J. 257=7 I. C. 769=15 C. W. N. 512.

Our attention was invited to a number of judicial decisions which are perhaps not easy to reconcile. A detailed examination of these cases is each unnecessary, as, in our opinion, an inflexible rule cannot be formulated that an order under S. 173 is or is not appealable as a decree. The test to be applied in the circumstances of each case is what is the true nature of the question raised, and who are the parties between whom it arises. The answer must depend largely upon the position of the applicant and the title he claims. We may observe, however, that there are expressions used in some of the cases in the books which may be open to criticism.

The tests which the learned Judge laid down in that case were two, viz: (1) whether the question raised in the application under S. 173 is one between the parties to the suit in which the decree was passed or their representatives; and (2) whether the question relates to the execution of the decree. The second test is obviously satisfied, as, if the objection prevails the same must be reversed and the decree-holder must proceed to execute the decree again for its satisfaction. The first test is also satisfied because, if the question arises between the parties to the suit or their representatives and relates to the execution, discharge or satisfaction of the decree within the meaning of S. 47 of the Code, it does not cease to be a question within that section merely because the auction-purchaser, who was not a party to the suit, is a party to these proceedings. Judged by these two tests alone, the order appealed from would fall within S. 47 of the Code and the appeal before us would be competent; were the question *res integra*, I should have felt great difficulty in holding that the appeal before us is not maintainable.

But the authorities, which I have already said are not uniform, that have clustered round this point, have laid down certain restrictions in the matter of appeals that may be preferred from an order passed under S. 173, Cl. (3), Ben. Ten. Act. The cases of *Roghu Singh v. Misri Singh* (2), *Chandmonee v. Samtomonee* (3), *Hara Bandhu v. Harish Chandra* (4), *Hira Lal v. Chundra Kanta* (5), *Amir Rai v. Basde Siagh* (6), *Sriram Chandra Singh v. Guru Das Kundu* (7), and *Mohima Chandra v. Jog-*

(2) [1894] 21 Cal. 825.

(3) [1897] 24 Cal. 707=1 C. W. N. 534.

(4) [1899] 3 C. W. N. 184.

(5) [1899] 26 Cal. 539=3 C. W. N. 403.

(6) [1907] 5 C. L. J. 204.

(7) 3 C. W. N. 104 (notes).

endra Kumar (8), have been discussed in the judgment of Mookerjee, J., in *Joytara v. Pran Krishna Seal* (1). Of these the more important ones and bearing directly upon the case before us are *Chandmonee v. Santamonee* (4), *Sriram Chunder Singh v. Guru Das Kundu* (7), *Mahima Chandra v. Jogendra Kumar* (8), and *Hira Lal v. Chandra Kanta* (5). In the first of these cases the application was made by one of the judgment-debtors and the heirs of a deceased judgment-debtor on the allegation that a third judgment-debtor had purchased the property in the name of his wife; it was held that from an order setting aside the sale under S. 173, Beng. Ten. Act, no appeal lay at the instance of the auction-purchaser. In the second case the application was by the judgment-debtors and the appeal also was by them; it was held that the appeal lay on behalf of the judgment-debtors, though it would not lie on behalf of a third party. In the third case, the application was by a judgment-debtor and it was held that when there was an order under S. 173, Beng. Ten. Act, an appeal would not lie at the instance of the auction-purchaser. In the fourth case it was pointed out that the question of a right to a second appeal does not turn upon who may happen to be the appellant, but upon whether or not the case is one within S. 244 of the Code. This last-mentioned principle has evidently been ignored so far as the present question is concerned in the first three cases. There are other cases of this Court in which an appeal at the instance of the auction-purchaser has been held to be incompetent e. g., *Durlav Pradhan v. Mahomed Mainuddi Bepari* (9) and *Jadav Chandra v. Joy Gopal* (10), in the latter of which cases Coxe, J. on a review of the authorities said that the matter is no longer *res integra*, but the point must now be regarded as settled.

Whatever may be my own opinion on the propriety or correctness of the proposition that no appeal would lie at the instance of the auction-purchasers I feel bound to follow the long series of decisions to which I have referred and following them I must hold that the appeal before us is not maintainable. The appeal accordingly is dismissed.

(8) 3 C. W. N. 14 (notes).

(9) [1909] 13 C. W. N. 100 (notes)=1 I. C. 279.

(10) [1913] 19 C. L. J. 81=20 I. C. 191.

We have been then asked to deal with the order of the District Judge in revision. The ground on which we are asked to do so is that his decision on the question of limitation is wrong. My own view of this question I have had occasion to express in *Satish Chandra De v. Rakhal Chandra* (11), but, assuming that I am not right in the view that I entertain, I am not prepared, upon the findings of fact which the learned Judge has recorded, to interfere with his decision merely because he may have taken an erroneous view of law on the question of limitation. This application accordingly must be rejected. As regards the appeal: in view of the unsatisfactory character of the order appealed from each party will bear their own costs.

Roy, J.—I agree.

D.D.

Appeal dismissed.

(11) A. I. R. 1928 Cal. 189.

A. I. R 1928 Calcutta 204

B. B. GHOSE AND MALLIK, JJ.

Durga Priya Chowdhury—Appellant.

v.

Durga Pada Roy & others—Respds.

Second Appeal No. 1413 of 1924, Decided on 24th March 1927.

(a) *Contract Act*, S. 129, Ill. (a)—*Continuing guarantee explained.*

Where A was appointed for the purpose of collecting rents of the plaintiff's zemindari and B held himself responsible for the due collection and payment by A of those rents to the extent of a certain sum by a security bond executed by him :

Held : that the contract of the surety was a continuing guarantee : A. I. R. 1920 P. C. 35, Dist. [P 206 C 1]

(b) *Interpretation of Statutes*—*Illustrations should not be rejected except on the ground of repugnancy with the section.*

It is the duty of the Court to accept, if that can be done, illustrations given under the section as being of value in the construction of the text and it would require a special case to warrant their rejection on the ground of repugnancy with the section : A. I. R. 1916 P. C. 242, Foll. [P 205 C 2, P 206 C 1]

(c) *Contract Act*, S. 131—*Whether death of a surety operates as a revocation of a continuing guarantee depends upon contract between parties in each case.*

Unless there is any contract to the contrary, the death of the surety operates as a revocation of a continuing guarantee. So in each case the contract between the parties must be looked into in order to determine whether the contract of the surety has been revoked by the death of the surety or not. If from the contract it can be gathered either from the express provisions contained in it or by necessary implication, that there was a contract that the death of the

surety would not operate as a revocation, then the contract of guarantee must be held to continue even after the death of the surety. It would be otherwise if no such agreement can be discovered in the contract of the surety : *Lloyds v. Harper*, (1880) 16 Ch. D. 290 & *In re Silvester*, (1895) 1 Ch. 573, *Dist.* [P 206 C 1, 2]

Hira Lal Chakravarti and *Bhudar Halidar*—for Appellant.

Brojalal Chakravarti and *Mritunjoy Chatterji*—for Respondents.

B. B. Ghose, J.—This is an appeal by the plaintiff. The suit was for accounts against the principal defendant 1 for the period of his service under the plaintiff as gomasta. The other defendants were made parties as they are the representatives of one Mahendra Nath Roy who was the surety for defendant 1. A preliminary decree was made on 11th March 1922. The final decree was made by the Subordinate Judge on 25th April 1923. In making the final decree the Subordinate Judge found that the plaintiff was entitled to get from defendant 1, Rs. 2,000 odd for not accounting for moneys received on behalf of the plaintiff. The final decree was made by him against defendants 1 to 8. It was directed that if the money was not paid by defendant 1 within a month of the date of the decree the plaintiff would be entitled to realize the money by the sale of the property hypothecated by the surety bond and if the entire sum was not realized by that, the balance was to be recovered from any property left by Mahendra Nath Roy in the hands of defendants 2 to 8. Defendants 2 to 8 appealed against that decree. The District Judge on appeal reversed the decision of the Subordinate Judge holding that under the provisions of S. 131, Contract Act, the death of the surety operated as a revocation of the contract of guarantee so far as regards all future transactions. I ought here to state that the surety bond entered into by defendant 1 and Mahendra Nath Roy was dated 27th March 1914. Mahendra Nath Roy died on 10th August 1914. The learned Judge found that defendant 1 had not committed any act of default during the life-time of Mahendra Nath Roy. He held that, if there had been any default by defendant 1 during the life-time of Mahendra Nath Roy, the other defendants would be liable for the amount ; but, inasmuch as it had been found that defendant 1 was not guilty of any default

during the life-time of the surety, defendants 2 to 8 were not at all liable. Against that decree the plaintiff appeals to this Court.

The contention on behalf of the plaintiff-appellant is, first, that the contract of guarantee in this case is a continuing guarantee. Reliance has been placed in support of this contention on the case of *Sen v. Bank of Bengal* (1). In that case their Lordships doubted whether there was any contract of guarantee at all. They, however, expressed the opinion that in that case there was only one transaction, that is, the appointment of the principal to a place of trust and the pledging of the security deposited with the bank. That seems to take the present case out of the ruling in that case as there was no continuing guarantee. The present case, however, comes within the purview of S. 129, Contract Act Ill. (a) to that section is exactly like the transaction in the present case. Here defendant 1 was appointed for the purpose of collecting rents of the plaintiff's zamindari and Mahendra Nath Roy held himself responsible for the due collection and payment by defendant 1 of those rents to the extent of Rs. 600 by a security bond executed by him.

This illustration I may refer to for the purpose of construing the section. It was held by their Lordships in the case of *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (2) that it is the duty of the Court to accept, if that can be done, illustrations given under the section as being of value in the construction of the text ; it would require a special case to warrant their rejection on the ground of repugnancy with the section. In my opinion, therefore, the present contract of the surety is a continuing guarantee. That being so, the relationship between the parties after the death of the surety must be governed by the provisions of S. 131, Contract Act. The learned vakil for the appellant has relied upon two English cases in support of his contention that the death of the surety did not amount to a revocation of the contract of surety. The cases referred to were *Lloyds v. Harper* (3) and *In re Sil-*

(1) A. I. R. 1920 P. C. 35=47 I. A. 164 (P. C.)

(2) A. I. R. 1916 P. C. 242=43 I. A. 256 (P. C.)

(3) [1880] 16 Ch. D. 290=50 L. J. Ch. 140=29 W. R. 452=43 L. T. 481.

vester (4). The rule in England, however, is quite different from the provisions of the Indian Contract Act. The law in England has been thus summarized in De Colyar on Guarantees, 3rd edn, p. 392 :

With respect to subsequent transactions and liabilities, whether a guarantee is revoked by the death of the surety depends, it would seem, upon the nature of the guarantee given. If it be a guarantee which the surety could himself have determined by notice, then it appears that the notice of his death will operate as a revocation. But if, on the other hand, the surety could not himself have put an end to the guarantee by notice, then his death does not revoke the instrument, nor does it extinguish his liability thereunder.

It has also been similarly summarized in Rowlatt on Principal and Surety, 2nd edn, at p. 87. It is stated thus :

Revocation by notice of death of the guarantor, however, can only take place when the guarantee is such as, apart from special stipulation, might have been revoked by the guarantor himself at any moment.

Under S. 130, Contract Act a continuing guarantee may be revoked as to future transactions by the surety by notice at any moment. The provisions of S. 131, Contract Act, run thus :

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

As I read the section the provision is, that unless there is any contract to the contrary the death of the surety operates as a revocation of a continuing guarantee. So in each case the contract between the parties must be looked into in order to determine whether the contract of the surety has been revoked by the death of the surety or not. If from the contract it can be gathered either from the express provisions contained in it or by necessary implication, that there was a contract that the death of the surety would not operate as a revocation, then the contract of guarantee must be held to continue even after the death of the surety. It would be otherwise if no such agreement can be discovered in the contract of the surety. In the present case the security bond was executed by Nagendra Nath Mukerji, defendant 1, and Mahendra Nath Roy, the surety. The important portion of the security bond with regard to this point runs thus :

I (Mahendrar Nath Roy) shall continue to stand surety for him (Nagendra Nath Mukerji)

and shall be bound by all the debts incurred by him. If the said Nagendra Nath Mukerji does not voluntarily pay up his debts and render account of the works done by him during his incumbency and make over the papers, or if he fails to do the same then I shall pay the same out of my own pocket, and if I do not pay it voluntarily you shall be at liberty to bring a suit against us and realize the amount by causing the mortgaged properties mentioned in the schedule below to be attached and sold at auction. To that the heirs and legal representatives of none of us both parties shall be entitled to raise any objection or plea.

Towards the end of the bond, it is further stated :

Our heirs and legal representatives shall be bound by the terms of this security bond in the same way in which we are bound by them.

From these terms it seems to be clear to me that the surety bound himself as well as his heirs and legal representatives by the terms of the contract entered into between him and the plaintiff for standing as surety for defendant 1. There is in this contract, as contemplated under S. 131, Contract Act, the stipulation that the representatives of Mahendra Nath Roy would be bound for any act done by defendant 1 during the continuance of his service even after the death of Mahendra Nath Roy. The learned Judge below in his judgment overlooked the last provision of the bond, which I have already cited. Probably, on account of that omission his judgment has been in favour of the defendants. The next point that has been urged on behalf of the appellant is that the question of the liability of the defendants for the period of defendant 1's service, after the death of the surety, Mahendra Nath Roy, could not have been raised by them before the District Judge on appeal from the final decree. The argument on his behalf is that the defendants raised in their written statement the question of their non-liability for the period after the death of Mahendra Nath Roy. Upon that an issue was raised which runs thus :

Are properties of the late Mahendra Nath Roy liable for the debt of defendant 1? If so, for what amount are the properties liable? What other relief, if any, is the plaintiff entitled to?

This issue was decided against the defendants. It does not, however, appear that the question of the liability of those defendants after the death of Mahendra, was specifically brought to the notice of the Subordinate Judge. The ordering portion of the judgment was that a preliminary decree for rendition of ac-

(4) [1895] 1 Ch. 573=64 L. J. Ch. 390=43 W. R. 443=72 L. T. 283=13 R. 448.

counts be passed in this case ex parte against defendant 1 and on contest against defendants 2 to 8. Then there was a certain direction as to costs. The plaintiff's contention is that these defendants might and ought to have appealed against this preliminary decree. Not having done so, they are precluded from disputing the correctness of the preliminary decree in an appeal preferred from the final decree under S. 97, Civil P. C. The learned vakil for the respondents, however, argued that there was no decree from which those defendants could appeal, because on the facts found accounts had to be taken in the presence of these defendants in order to find whether they were liable for any amount for which defendant 1 had not accounted during the lifetime of their father Mahendra Nath Roy. The question seems to me to have been left in obscurity on account of the perfunctory manner in which the judgment of the former Subordinate Judge was written and the decree drawn up. It appears, however, that this question as to the liability of defendants 2 to 8, after the death of their father, was fully argued before the second Subordinate Judge when he was hearing the case with regard to the final decree, and no objection was taken to that. He decided the point against the defendant's contention.

On appeal the very same point was allowed to be raised without objection before the District Judge who decided in favour of those defendants. Having regard to this circumstance I do not think it is open to us to say that this question ought not to have been allowed to be raised by these defendants after the preliminary decree had been passed. However, upon the finding that there was a contract to the contrary, as referred to in S. 131, Contract Act, that these defendants would be bound by the contract of suretyship entered into by their father Mahendra Nath Roy, for the period even after his death, this question becomes of no importance.

It is now necessary to find what the extent of liability of those defendants is. It has been contended on their behalf that they cannot under any circumstance, be made liable for anything in excess of Rs. 600, which can only be recovered by the sale of the property mortgaged in the surety bond by their father Mahendra Nath Roy. The learned vakil for the

appellant rightly concedes that he cannot claim anything more.

The result, therefore, is that the judgment and decree of the District Judge, so far as defendants 2 to 8 are concerned must be set aside, and in lieu thereof a decree should be made modifying the decree of the Subordinate Judge to this effect : that if the plaintiff is unable to realize the amount decreed from defendant 1 he will be entitled to realize from the property mortgaged in the security bond dated the 27th March 1924, the amount due to the plaintiff not exceeding Rs. 600 by sale of the property. The costs of this appeal and those of the lower appellate Court will be in proportion to the success of each of the parties.

Mallik, J.—I agree.

N K.

Decree modified.

A. I. R 1928 Calcutta 207

RANKIN, C. J., AND BUCKLAND, J.

Ram Gopal Goenka—Petitioner.

v
Corporation of Calcutta — Opposite Party

Criminal Revn. No. 1017 of 1927, Decided on 16th December 1927.

Calcutta Municipal Act (3 of 1923), S. 557 (a) — *New procedure prescribed by Act 5 of 1926 is to be applied to proceedings in contravention of the old Act as well as the new Act.*

By Act 5 of 1926 provision has been made whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899, are to be taken in the manner prescribed by the Act of 1923 ; in other words, the new procedure is to be applied to contravention of the old Act as well as to contravention of the new Act. [P 208 C 1]

Suresh Chandra Talukdar and Mohendra Kumar Ghose for Petitioner.

D. N. Bagchi, Baranashbasi Mukerjee and Gopendra Krishna Banerjee—for Opposite Party.

Rankin, C. J.—In this case it would appear that it is alleged by the Corporation of Calcutta that the present applicant at his house No. 7, Bysack Street, had certain additions and alterations made without any necessary sanction being obtained from the Corporation in that behalf. It would seem that these additions and alterations were made at some time prior to 1923 and it would seem that after the new Municipal Act of 1923 came into force proceedings were taken to get a demolition order from a Magistrate in respect of the erections complained of. Those proceedings were apparently

brought without taking the necessary preliminary steps prescribed by Ss. 363 and 364, Calcutta Municipal Act 1923 and it was pointed out at the time that even if those proceedings were regarded as proceedings under the old Act of 1899 they again were incurably defective by reasons that there had been no preliminary sanction given by the General Committee as required by the old Act. Accordingly those proceedings came to nothing and what has happened after that has been first of all that the legislature has passed Bengal Act 5 of 1926. That having been passed the present proceedings were really founded by a notice dated 22nd July 1927, calling upon the applicant to

show cause why an order should not be made under S. 363 of the Act of 1923 directing that the work of all erections done at premises No. 7, Bysack Street, or so much of the same as has been unlawfully executed be demolished at your expense on the following among other grounds: additions and alterations without sanction.

That is a notice which was headed "S. 363, Act 3 (B. C.), 1923".

Now, it appears to me that if this matter has stood upon S. 363 of the Act of 1923 alone, it might very well be said that these erections having been completed before 1923 were not "alterations or additions" within the meaning of that particular S. 363 of the Act of 1923. But it has been drawn to our attention that by Act 5 of 1926 provision has been made whereby proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899 are to be taken in the manner prescribed by the Act of 1923; in other words, the new procedure is to be applied to contravention of the old Act as well as to contravention of the new Act. Accordingly this would be perfectly good order to make under S. 363 of the new Act although the breach of the regulation was committed under the old Act.

It has been suggested in argument by Mr. Taluqdar that the third clause of the new 557 (a) section, inserted in the Act of 1923 by the amending Act of 1926 does not have this effect. If one looks at the three clauses of that new section one finds therein that the first clause is to say that a proceeding which has been instituted under the old Act or which might have been instituted under the old Act may be continued or instituted by the Corporation as constituted under the new Act. That is the first clause. With reference

to those provisions which require certain sanctions or preliminary procedure before legal proceedings can be validly started there is the second sub-section. The purpose of that is to say that the powers and duties of the General Committee and of the Chairman under the old scheme shall be deemed to have vested in the Corporation and the Chief Executive Officer respectively and that when any action has been taken in accordance with the old Act such action shall be deemed to have been taken by the corresponding authority under the new Act, and the corresponding provisions of the new Act shall be deemed to have been complied with. The third clause begins by saying: "Save as provided in sub-S. (2)." With that exception, namely the exception of the particular provisions already made with regard to those matters, it says that

the procedure prescribed by this Act shall be followed in all proceedings relating to a contravention of the provisions of the Calcutta Municipal Act, 1899.

In my judgment the effect of that is this: there is no doubt that necessary sanction had been taken before these proceedings were instituted before a Magistrate. That being clear enough, sub-S (2) of the new section, having been complied with in that way, for the rest the new procedure is to be applied to a legal proceeding relating to a contravention of the old Act. That being so I am of opinion that the application to the Municipal Magistrate is quite in order.

It has been suggested that because the previous proceedings to obtain a demolition order came to nothing by reason that there was no sanction in the proper way no further application can be made by the Corporation to have these structures demolished. How the matter would have stood had the previous application been dealt with on the merits is another matter. But I am quite satisfied that the mere fact that proceedings have been held to be nugatory because they were not started after proper sanction cannot prevent new proceedings after sanction from being started to obtain a demolition order.

In this view the rule must be discharged.

Buckland, J.—I agree.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 209

GREGORY, J.

A. B. Mitchell—Applicant.

v.

J. C. Dutt—Opposite Party.

Ordinary Original Civil Jurisdiction,
Decided on 26th May 1927.

(a) *Calcutta Municipal Act (3 of 1923), S. 27 (3)*—*Fine to receive deposit money extended by Corporation—Candidate paying his deposit money after three days but within extended time—His nomination is still rendered void.*

Section 27 is mandatory, and its plain sense is that within three days of the nomination the candidate must pay the deposit money, otherwise his nomination is rendered void.

[P 210 C 1]

The last date fixed for the filing of the nomination papers was 27th February 1927. As 27th February was a Sunday, the Chief Executive Officer of the Corporation published a notice in the "Statesman" to the effect that 27th February being Sunday, the deposit money of the candidates, ordinarily due on 1st March under S. 27 (3) of the Act, would be received up to 5 p.m. of 2nd March. A, a candidate for election, paid the deposit money on 2nd March. The scrutiny of the nominations was held on 3rd March. A's nomination was accepted as a valid one and he was duly elected as Councillor for the Corporation.

Held: that his nomination was void.

[P 210 C 1]

(b) *Calcutta Municipal Act (3 of 1923), Ss. 27 (3) and 46*—*Improper acceptance of a nomination is an admissible ground for the purposes of S. 46.*

Because the improper rejection of a nomination at the scrutiny, for any of the reasons contained in R. 15, is made a ground for disputing the election, it is not the reasonable and correct inference to be drawn from the words of the section that the improper acceptance of a nomination which had been rendered void is not an admissible ground for the purposes of S. 46.

[P 210 C 1]

(c) *Maxim*—*The doctrine of ejusdem generis explained.*

Every word ought *prima facie* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

[P 210 C 2]

The rule of construction which is called the *ejusdem generis* doctrine or sometimes *noesitur socus* is one, which ought to be applied with great caution because it implies a departure from the natural meaning of words in order to give them a meaning which may or may not have been the intention of the legislature: *Attorney-General v. Mercers*: (1883) 8 App. Cas. 773 and other English cases, *Ref.*

[P 210 C 2]

H. S. Suhrawardy—for Petitioner.

N. N. Sircar, Lingford James and C. C. Biswas—for Opposite Party.

Judgment.—This is an application under the Calcutta Municipal Act (3 of 1923 B. C.), for an order declaring the election of Mr. J. C. Dutt as Councillor for the Corporation for the Waterloo Street Constituency Ward No. 12 of the Corporation of Calcutta at the second Municipal General Election null and void. It is also prayed that one Mr. S. J. Cohen, the next candidate, be declared duly elected for the said ward.

The petitioner, Mr. A. B. Mitchell, is a gentleman whose name is enrolled in the electoral roll as a voter, and he disputes the validity of Mr. Dutt's election in the present proceedings which have been instituted under S. 46, Municipal Act. By this section any person enrolled in the electoral roll may apply to the High Court

if there is any dispute as to whether any person whose name is published under sub-S. (8) of S. 29 is qualified to be elected a Councillor, or if the validity of any election is questioned, whether by reason of the commission of any corrupt practice by a candidate or his agent or by any other person or by reason of the improper rejection of a nomination or of the improper reception or refusal of a vote or for any other cause.

Section 47, to which I shall refer, later states the grounds on which the election of a returned candidate shall be void.

The facts, which are not disputed, are as follows:

The last date fixed for the filing of the nomination papers was 27th February 1927. As 27th February was a Sunday, the Chief Executive Officer of the Corporation published a notice in the "Statesman" (issue of 24th February) to the effect that 27th February being Sunday, the deposit money of the candidates, ordinarily due on 1st March under S. 27 (3) of the Act, would be received up to 5 p.m. of 2nd March. Mr. Dutt paid the deposit money on 2nd March. The scrutiny of the nominations was held on 3rd March. Mr. Dutt's nomination was accepted as a valid one, and he proceeded to election as a validly nominated candidate. The election for Ward No. 12 took place on 16th March and Mr. Dutt was declared by the Receiving Officer as the candidate who had been duly elected as Councillor for the Corporation for Ward No. 12. His election is now impugned on the ground that it proceeded upon a nomination that was void.

Section 27 (3) of the Act provides as follows :

A candidate who has been duly nominated shall within three days of his nomination deposit with the Executive Officer Rs. 250 Failure to deposit the said amount shall render the nomination void.

It is not disputed that under this section the deposit money was due on 1st March, and I have not understood counsel for Mr Dutt to contend that the Corporation had any authority to extend the time prescribed by the Act for paying the deposit money, but the answer made to the objection that Mr. Dutt's nomination was void, is that S. 27 (3) does not say that failure to deposit Rs. 250 within three days of the nomination shall render the nomination void. I think the section can mean nothing else, it is mandatory; and its plain sense is that within three days of the nomination the candidate must pay the deposit money, otherwise his nomination is rendered void. On the admitted facts it must be held that the nomination in this case was rendered void.

Then it is contended that, assuming the nomination was void, an objection to the validity of the election on that ground does not lie under S. 46 of the Act. It is argued that the scope of that section is confined to two general matters : the qualification of the elected candidate to be elected a Councillor and to the validity of the election on any of the grounds stated, and that the general words "or for any other cause" must be construed so as to admit only such other grounds as are ejusdem generis with those preceding these words. In support of the argument it is pointed out that inasmuch as only an improper rejection of a nomination is under the section made a ground for disputing the validity of an election, an improper acceptance of a nomination is by implication shut out from the section as a valid ground of objection. I am unable to construe the section in this way. I cannot agree that because the improper rejection of a nomination at the scrutiny, for any of the reasons contained in R. 15, is made a ground for disputing the election, the reasonable and correct inference to be drawn from the words of the section is that the improper acceptance of a nomination which had been rendered void is not an admissible ground for the purposes of S. 46.

On the subject of limiting general terms in a statute the Judicial Committee in the case of *Attorney-General v. Merces* (1) laid it down as a sound rule that every word ought prima facie to be construed 'in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context.

In the case of *Smelting Co. of Australia v. Commissioners of Inland Revenue* (2) Rigby, L.J., on the same subject said :

The rule of construction which is called the ejusdem generis doctrine or sometimes *noesitur socus* is one, which, I think, ought to be applied with great caution because it implies a departure from the natural meaning of the words in order to give them a meaning which may or may not have been the intention of the legislature.

I may also refer to a short passage in the judgment of Esher, M. R., in *Powell v. Kempton Park Racecourse Co.* (3), which shows how far the rule of ejusdem generis should be carried, if it is applied:

That rule requires an interpretation of the general words limiting them to matters or things of the same kind as to the mischief being dealt with, as the previous words, but an interpretation as wide as the limitation just described will admit.

In the present case the ground of objection taken to the validity of the election is consistent with every word in S. 46, and I cannot see that any difficulty or complication can arise if this ground of objection is admitted under the general words as a proper one for the purposes of S. 46. In my opinion it would be pushing the principle of the rule of ejusdem generis too far not to do so.

Section 47 of the Act, referred to before, states the grounds on which the election of a returned candidate shall be void, and it provides that when the High Court is of opinion that the result of the election has been materially affected by any noncompliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void. In this case, as stated before, by reason of the noncompliance with the provisions of S. 27(3) Mr. Dutt's nomination was rendered void, but it was acted upon at the scrutiny of nominations as a valid one—probably because

(1) [1883] 8 A. C. 778.

(2) [1897] 1 Q. B. 175=65 L. J. Q. B. 137=45 W. R. 203=75 L. T. 534=61 J. P. 116.

(3) [1897] 2 Q. B. 242=66 L. J. Q. B. 601=61 J. P. 543=45 W. R. 8=77 L. T. 2.

the receiving officer proceeded upon the assumption that the Act had been complied with by virtue of the notice published by the Executive Officer in the "Statesman." Be that as it may, in the result Mr. Dutt was elected though he was not a duly nominated candidate. In my opinion, the objection to the election falls within the purview of S. 46, and the result of the election was materially affected by the noncompliance with the provisions of S. 27(3). The consequence of that non-compliance vitiated the election which I hold was null and void and which I set aside.

With regard to the contention that the next candidate should be declared elected I may say at once that I can find nothing in the Act to support it. It is urged that whereas S. 46 provides that a fresh election shall be held if the Court sets aside an election or holds it to be null and void, S. 47 merely provides that the election shall be void, and that it does not provide that a fresh election must be held. I must confess I am unable to appreciate the argument. S. 47 is not independent of S. 46 for it applies, in terms, to proceedings instituted under S. 46. It is clear from its scheme that S. 47 was intended to set out in Cl. (1) those cases in which an election shall be deemed void, and in Cl. (2) those cases in which discretion is given to the Court to find that an election is not void. There is no sensible distinction between the expressions "void" and "null and void" which are used indifferently in the two sections. I hold there is nothing in the Act to support the contention that the next candidate, Mr. Cohen, must be declared elected. In the result, though I must hold that Mr. Dutt's election was void, the prayer that Mr. Cohen be declared elected cannot be entertained.

Besides this petition of Mr. Mitchell, another petition was presented to this Court and a rule obtained on it by Mr. Prabodh Das who appeared and argued his petition in person. By agreement of all the parties both petitions were heard together. Mr. Das impugns the validity of Mr. Dutt's election on the same ground as that taken in Mr. Mitchell's petition, but he does not contend that the next candidate (Mr. Cohen) must be declared elected. As both these questions have been dealt with in my judg-

ment I need not say anything further with regard to them.

N.K. *Election declared void.*

A. I. R. 1928 Calcutta 211

SUHRWARDY AND GRAHAM, JJ.

Jewraj Khariwal—Appellant.

v.

Doyal Chand Johury and another—Respondents.

Appeal No. 168 of 1927, Decided on 17th November 1927, from Original Order of Dist Judge, of 24-Parganas, D/- 2nd and 8th February 1927.

Provincial Insolvency Act, S. 70—Court has discretion to satisfy itself in any way it thinks proper before ordering insolvent's prosecution.

Considering the history of S. 70, Provincial Insolvency Act, it would appear that the legislature intended that the Judge should satisfy himself in any way he thinks proper before ordering a prosecution of the insolvent; and this interpretation is justified by the omission from the amending Act of the direction which made it necessary for the Court to serve a notice on the debtor and hear him before ordering his prosecution: 20 Cal. 474, Foll.; 15 C. W. N. 691, Dist. [P 213 C 2]

(Doubted) Whether the words "preliminary enquiry" in S. 70 of the Act necessarily mean a judicial enquiry on sworn evidence. [P 214 C 2]

Panchanon Ghose and Apurba Charan Mukherjee—for Appellant.

J. N. Majumdar and Ramesh Chandra Pal—for Respondents.

Suhrawardy, J.—This is an appeal against an order of the District Judge of 24-Parganas passed under S. 70, Provincial Insolvency Act, 1920, directing the prosecution of the appellant on making a complaint to a Magistrate of some offences mentioned in S. 69 of the Act. It appears that one of the creditors of the insolvent made an application before the District Judge complaining of certain fraudulent acts of the insolvent which were mentioned under seven heads in the petition. There was also a report from the Receiver in which it was complained that the insolvent had not disclosed all his properties. The learned Judge, presumably on the material before him held that

he was satisfied that the insolvent had wilfully failed to perform the duties imposed on him by S. 22 of the Act by not producing his accounts and other books and by withholding documents relating to his affairs and that he had failed to disclose certain property to wit, two motor cars.

The appellant has appealed against the propriety of this order, having obtained

special leave from this Court under S. 75, Provincial Insolvency Act. The point which has been pressed before us is that the District Judge ought to have held a preliminary enquiry before making a complaint under S. 70, and in the present case he did not give sufficient opportunity to the insolvent to prove that he had not committed the offences mentioned in the Judge's order. Great stress is laid on the words "after such preliminary enquiry, if any, as he thinks necessary" in S. 70 as it now stands. In order to understand what is meant by those words in the section it may be necessary to go back into the history of S. 70 of the Act. In the Act of 1907 S. 43 which dealt with offence in the course of insolvency proceedings, provided thus :

If a debtor, whether before or after the making of an order of adjudication wilfully makes false entries in the inventories, &c., the Court may sentence him, by order in writing, to simple imprisonment for a term which may extend to one year ; and in every such case the Court shall record the facts constituting the offence with the statement (if any) made by the debtor.

In practice the wording of the section was found to be vague and unworkable and it was, therefore, considered necessary to make it more explicit. S. 43 of the Act of 1907 was accordingly replaced by S. 70 of the Act of 1920. That section provided as follows :

Where the Court is satisfied that there is ground for enquiring into any offence referred to in S. 69 the Court shall direct that a notice be served on the debtor in the manner prescribed in the Code of Criminal Procedure, 1898 for services of summons calling upon him to show cause why a charge or charges should not be framed against him.

The section further provided that the Insolvency Court might try the charge itself and convict the accused and sentence him to terms of imprisonment not exceeding three years. The last clause of S. 70 provided that the Court might instead of itself inquiring into an offence under S. 69 make a complaint thereof in writing to the nearest Magistrate of the First Class. S. 70 of the Act of 1920 therefore authorized the insolvency Court either to enquire into the offence itself and punish the accused or to send him to a Magistrate for trial. Then came the report of the Civil Justice Committee, 1924-25, which recommended that the procedure in this respect should be simplified and assimilated to that in England

and recommendation was made in the following words :

We think, moreover, that the necessity for notice to the insolvent might well be discarded altogether and that the procedure in such cases might be further assimilated to the procedure in England whereby an order for prosecution should be obtained from the bankruptcy Court without consulting the bankrupt on the subject, the bankrupt having plenty of time and opportunity to say when he is arraigned before the criminal Court.

Attempt was made to give effect to this recommendation and S. 70 of the Act of 1920 was amended by Act 9 of 1926. By that Act the first three clauses of S. 70 of the Act of 1920 were repealed and following clauses substituted :

Where the Court is satisfied, after such preliminary enquiry, if any, as it thinks necessary, that there is ground for enquiring into any offence referred to in S. 69 and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the First Class having jurisdiction, and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.

The effect of this amendment to take away the power from the insolvency Court of itself trying the insolvent and sentencing him to punishment, and also to dispense with the necessity of serving notice on the debtor setting forth the substance of the offence and of hearing him in answer. In place of the latter provision in the Act of 1920 it was enacted that the insolvency Court might hold a preliminary inquiry, if any, before ordering the prosecution of the insolvent. It is not necessary for our present purpose but I may mention that the amendment made in 1926 was so clumsily done that the last two Cls. (4 and 5), of S. 70 and the last sentence in S. 69 of the Act of 1920 were left undisturbed. These clauses, by amendment made in 1926, had become redundant and meaningless. This omission was subsequently discovered and Acts 10 and 12 of 1927 were passed with certain repealed words in the amending Act 9 of 1926 in S. 69 of the Act of 1920 the effect of which is that S. 70 stands as it was enacted by the Act of 1926 minus Cls. (4) and (5) of S. 70 of the Act of 1920. The amendment made in 1927 does not affect this case as the order of the learned District Judge was passed before the Act of 1927 came into force the order being dated 2nd February 1927.

Now we have to consider the meaning of the words "after such preliminary

enquiry, if any, as it thinks necessary" that have been introduced into the section by the Act of 1926. If the plain and natural meaning is given to these words they make it discretionary with the Judge; (1) to hold a preliminary enquiry; and (2) if it holds one, to have it of such a nature as it thinks necessary. In other words the Judge may or may not hold a preliminary enquiry and, if he decides to hold one, he may make such enquiry as he thinks necessary in order to satisfy himself that there is ground for enquiring into the offences referred to in S. 69. That seems to be the ordinary sense in which the words have been used leaving it entirely to the discretion of the Judge to determine how he will be satisfied before ordering the prosecution of the insolvent. But reference has been made to S. 476, Criminal P. C., 1898, where those very words are used in connexion with the procedure in case of complaints by Courts of Justice. In interpreting those words in the section the Courts have held that they make it entirely discretionary with the Court to order inquiry; but in some cases the superior Courts have interfered with the order of the inferior Court on the ground that the case is such in which preliminary enquiry ought to have been made. There are considerations which do not depend upon any interpretation of the statute but upon the facts of each particular case. For myself I prefer to adopt the dictum of Pigot, J. in the case *Baperam Surma v Gouri Nath Dutt* (1):

Although it may sometimes well be that a preliminary inquiry ought to be held, the adoption of a rigid rule to that effect would simply introduce into the criminal procedure in this country a new stage as a matter of imperative necessity. We do not think that such a practice is rendered imperative by the law, and it is not desirable that it should be necessarily, and in every case, introduced.

In the case of *Durpa Narayan Bera v. Bepin Behary Mitter* (2) it has been held that the holding of a preliminary enquiry in a proceeding under S. 476, Criminal P. C., is discretionary and a person against whom an order for prosecution has been passed without such an enquiry cannot complain. Then the learned Judges add, "unless he has been prejudiced by the omission" This qualification might have been considered necessary in that case; but there is nothing in the law

to support the view that the discretion of the Judge is in any way restricted or saddled with any qualification by the law. It is not always safe to interpret one statute with reference to another statute dealing with a different subject; but as S. 70, Provincial Insolvency Act and S. 476, Criminal P. C., deal with offences, though of different nature, it might be taken that in introducing the words in S. 70 the legislature had S. 476, Criminal P. C., in view. Considering the history of S. 70, Provincial Insolvency Act, as I have attempted to detail above, it would appear that the legislature intended that the Judge should satisfy himself in any way he thinks proper before ordering a prosecution; and this interpretation is justified by the omission from the amending Act of the direction which made it necessary for the Court to serve a notice on the debtor and hear him before ordering his prosecution. As the section now stands the Court may pass an order under S. 70 *ex parte* and in the absence of the insolvent. This being the law the District Judge has not acted in contravention of any provision of the law. The question that remains for consideration is whether in the circumstances of the present case he has exercised his judicial discretion properly or whether he should have given the insolvent an opportunity of satisfying him that there was no ground for ordering his prosecution. It appears that the creditor filed a statement formulating the charges and the nature of the evidence he sought to produce. The insolvent's pleader was informed of that fact and he took time to look into the charges. A week after the learned Judge heard the pleader for the insolvent and also the creditor and on the following day held that he was satisfied that the insolvent had committed the offences under the Act.

Section 70 of the Act of 1920, as I have observed, was amended by removing from it the procedure under which the District Judge could himself try and convict the insolvent as it was found in practice that it entailed waste of time of the insolvency Court and as it was found undesirable that the Court dealing with insolvency proceedings should itself try the offence in regard to which it might reasonably be held to have formed an opinion prejudicial to the alleged offender.

(1) [1892] 20 Cal. 474.

(2) [1911] 14 O. L. J. 123=10 I. C. 66=15 C. W. N. 691.

If we adopt the view that has been pressed before us, namely, that the District Judge ought to hold a preliminary enquiry by which is suggested a judicial enquiry giving opportunity to both sides to adduce evidence and fight the matter out before him the object of the amendment would be entirely lost. In that case there should be two enquiries: one before the Judge and another before the Magistrate to whom the case might be sent. I am not prepared to hold that in the present case the learned Judge has not exercised his judicial discretion properly in ordering the prosecution of the insolvent. But it is argued that the learned Judge ought not to have relied upon the report of the receiver and upon the petition filed by the creditor. We do not know if the learned Judge merely relied upon the allegation made by the creditor. But it seems to me that he was within his rights in attaching importance to the report of the receiver, his own officer. There is no question whether the report of the receiver is admissible in evidence according to the Evidence Act; it is the report of an officer of the Court bringing certain facts to its notice; and the Court, after perusing the report, may in its discretion call for proof of the facts alleged or act upon the report. The fact that the learned Judge out of the seven charges made by the creditor, picked out two for consideration shows that he gave proper consideration to the case after hearing the insolvent's pleader and has come to a conclusion which cannot be said on the materials before him to be wrong. I will, therefore, dismiss the appeal with costs four gold mohurs to come out of the estate of the insolvent.

Graham, J.—The facts shortly are that the appellant, Jewraj, applied on 27th June 1927 to be adjudged an insolvent and a receiver was appointed. In the case of the proceedings which followed, it transpired, or at all events it is alleged, that the insolvent had wilfully failed to perform some of the duties imposed on him by S. 22, Provincial Insolvency Act, by not producing his account books and other books and by withholding documents relating to his affairs; and further that he had failed to disclose certain property, to wit, two motor-cars. A report was called from the receiver and on the basis thereof and

on hearing the pleaders on both sides the learned Judge ordered the prosecution of the insolvent under S. 69 of the Act and directed to issue a letter of complaint to the Magistrate as provided for in S. 70 of the Act. The main ground on which the orders are assailed is that they have been passed upon insufficient materials and that the learned Judge should, before making the orders, have held a judicial enquiry, it being contended that the words "preliminary enquiry;" in S. 70 mean a judicial inquiry, that is to say, upon sworn evidence. In my judgment this contention is without substance. S. 70, as it now it stands, after the amendment effected by the repealing Act (10 of 1927), reads as follows:

Where the Court is satisfied, after such preliminary enquiry, if any, as it thinks necessary, that there is ground for such enquiry into an offence referred to in S. 69, and appearing to have been committed by the insolvent, the Court may record a finding to that effect and make a complaint of the offence in writing to a Magistrate of the First Class having jurisdiction and such Magistrate shall deal with such complaint in the manner laid down in the Code of Criminal Procedure, 1898.

It is clear that the Court has the discretion to make a preliminary enquiry or not as it thinks fit. It is not bound to do so. Speaking myself I do not think that upon the facts of the present case we should be justified in interfering with the discretion which has been exercised by the learned District Judge. It seems to me further to be open to some doubt whether the words "preliminary enquiry" in S. 70 of the Act necessarily mean a judicial enquiry on sworn evidence. We have not been shown any authority in support of this proposition. It is to be born in mind that in the insolvency proceedings the report of the receiver is often acted upon by the Court and I see no reason why the learned District Judge, acting as he did upon the report of the receiver and after hearing the pleaders on both sides, should not be held to have sufficiently complied with the requirements of the section. It is to be observed that what the section requires is that the Court should be satisfied that there is ground for enquiry. What seems to be contemplated is that the enquiry should be made, if necessary, before the Magistrate instead of taking up the time of the District Judge whose time ought not to be wasted over such matters. The Magistrate has to

deal with the complaint in the manner laid down in the Criminal Procedure Code and it by no means follows that he will necessarily issue process on the complaint without making a preliminary enquiry or directing investigation as he is empowered to do under S. 202, Criminal P. C. I agree, therefore, with my learned brother that the appeal fails and should be dismissed. Civil Rule 408 (m) of 1927 is discharged.

N.K.

*Appeal dismissed.
Rule discharged.*

A. I. R. 1928 Calcutta 215

PAGE AND S. C. MALLIK, JJ.

*Surendra Nath Dutta and others—
Judgment-debtors—Appellants.*

v.

*Tripura Pada Bhattacharjee and others
—Auction-purchasers and Decree-holders
—Respondents.*

Appeal from Original Order No. 379 of 1926, Decided on 15th August 1927.

Civil P. C., O. 1, R. 10—Appellant becoming insolvent—Official Assignee not proceeding with appeal—Party claiming to be entitled to the property of appellant under mortgage applying for substitution—Substitution cannot be allowed.

During the pendency of the appeal from an order of dismissal of an application for setting aside the sale the appellant judgment-debtor was adjudicated a bankrupt. Thereupon, the Official Assignee elected not to proceed with the appeal. A petition was presented by a party who claimed to be entitled to the property in dispute under a mortgage executed in his favour by the judgment-debtor. Throughout the whole of these proceedings the claimant took no steps to vindicate his rights. He sought for an order that he might be added or substituted for the insolvent or the Official Assignee as appellant in the appeal.

Held: that such an application was misconceived, and the petitioner was not entitled to the order which he claimed having elected not to enforce whatever rights he had. [P 215 C 2]

Sarat Chandra Mukherjee and Indu Bhusan Mukherjee—for Appellants.

Haradhan Chatterjee, Sushil Chandra Dutt, Khitindra Nath Basu and Shishir Kumar Banerjee—for Respondents.

Page, J.—This is an application by the respondents in an appeal that the appeal be dismissed as against them and for incidental relief. The respondents are the auction-purchaser and the decree-holder. The decree was obtained against the person who presented the appeal in

the suit. In execution of that decree the property in dispute was sold at an auction sale. After the sale, the judgment-debtor applied to set aside the sale under O. 21, R. 90. That application was dismissed. From that application an appeal was preferred to the High Court. During the pendency of the appeal the judgment-debtor was adjudicated a bankrupt. Thereupon the Official Assignee elected not to proceed with the appeal. Hence the present application. Now, the judgment-debtor having been adjudicated an insolvent pending the appeal ceased to have any interest in the matter, and his assets passed to the Official Assignee. The Official Assignee having elected not to proceed with the appeal the respondents are entitled to have the appeal dismissed.

A petition has been presented by a party who claims to be entitled to the property in dispute under a mortgage executed in his favour by the judgment-debtor in 1922. Throughout the whole of these proceedings until the present application was filed, this claimant has taken no steps to vindicate his rights. He now seeks for an order that he may be added or substituted for the insolvent or the Official Assignee as appellant in the present appeal. In my opinion, such an application is misconceived, and the petitioner is not entitled to the order which he claims. Whatever rights he has or may have had, he has elected not to enforce. He is at liberty, of course, to take such steps as may now be open to him to vindicate his rights. But after the adjudication and after the refusal of the Official Assignee to prosecute the appeal, in my opinion, he is entitled to proceed with the appeal. The result is that the appeal will stand dismissed with costs, the costs of and incidental to the appeal to be a claim against the estate of the insolvent. The petition is dismissed with costs. The hearing-fee in respect of the appeal is assessed at two gold mohurs for each respondent, and the hearing-fee of the petition on behalf of the Karnani Industrial Bank, Ltd. is two gold mohurs in favour of each of the opposite parties. The unspent balance of the paper-book costs, deposited by the respondents, should be refunded to them.

S. C. Mallik, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 216

PAGE AND GRAHAM, JJ.

Chandra Kishore Chakravarty—Defendant—Appellant.

v.

Biseswar Pal and *Sachindra Kumar Goswami*, executor to the estate of *Bashiram Pal*, and another—Plaintiffs—Respondents.

Appeal No 489 of 1925, Decided on 28th July 1927, from appellate decree of 2nd Addl. Dist. Judge., Dacca, D/- 7th November 1924.

(a) *Cosharer*—Possession by a cosharer of common land in excess of his share without objection from other cosharers—He is not bound to pay profits accrued from the same.

Where one cosharer is in separate possession of the common land (whether or not the portion of the land which he is occupying is in excess of the area that would fall to him upon partition) without objection from or ouster or exclusion of the other cosharers, he is under no obligation either to account or to pay compensation to such cosharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession: *Henderson v. Eason*: (1852) 17 Q. B. 701, *Foll.*: 18 Cal. 10 (P. C.); 23 Cal. 799; and *A. I. R. 1924 P. C. 144, Dist.* [P 216 C 2 P 217 C 1]

(b) *Cosharer* — Terms “exclusion” and “ouster” explained—Physical possession is not necessary for proving an ouster.

To exclude is to “keep out,”; to oust is to “put out,” of possession. But it is not essential to prove physical dispossession in order to establish an ouster. For ouster and exclusion may be actual or constructive, and whenever a cotenant remains in separate occupation in defiance of a claim to joint possession asserted by his cosharers, and thus prevents them from obtaining possession, he is deemed to have excluded or ousted his cosharers. Separate occupation by one cosharer, therefore, is not necessarily exclusive occupation; it may or may not be, according to the circumstances that are proved, and each case will turn upon its own facts. [P 217 C 2]

Birendra Kumar De—for Appellant.

Rajendra Chandra Guha and *Charu Chandra Choudhuri*—for Respondents.

Page, J.—This is a suit brought by cosharers against another cosharer of immovable property to recover compensation for occupation by the defendant of more than his share in the land of which all the cosharers are tenants-in-common. The appeal depends upon an issue of fact, for, when that issue has been decided, the Court will be enabled to determine whether this particular case falls within the ambit of decisions such

as *Robert Watson and Co. Ltd. v. Ram Chand Dutt* (1), *Robert Watson and Co. v. Ram Chand* (2), *Midnapur Zamindari Co. Ltd v. Nares Narain Roy* (3), or within the principles laid down in *Lachmeswar Singh v. Manowar Hussain* (4), *Mohes Narain v. Nowhatt Pathak* (5), *Debendra Narayan Singha v. Narendranarayan* (6). Now, it has been found or admitted that the defendant was in possession of land in excess of the share that he would receive on partition; that the plaintiffs have never sought joint occupation of the land; and that no objection has been raised by the plaintiffs to the occupation of the land by the defendant. The defendant has not claimed any exclusive right of possession, or any title by adverse possession as against the plaintiffs. In the circumstances it cannot be pretended that the defendant has been in occupation of this land after excluding or ousting the plaintiffs from their right to joint possession thereof with him. Nevertheless, the plaintiffs claim that, inasmuch as the defendant admittedly is receiving profits by reason of his occupation of the land, he is bound to account to the other cosharers for such portion of the profits arising from his separate occupation as the Court deems to be fit compensation to them for not being in actual joint possession of the land. Now, where cosharers are entitled to joint possession of immovable property as tenants-in-common each of such cosharers is entitled to be in possession of each and every part of the common land. But, for the purpose of the profitable occupation of the joint property, it usually happens that some of the cosharers are found to be in occupation of some portions of the land, and other cosharers of other portions; and it is, I think, clearly established, that where one cosharer is in separate possession of the common land (whether or not the portion of the land which he is occupying is in excess of the area that would fall to him upon partition) without

(1) [1891] 18 Cal. 10=17 I. A. 110=5 Sar. 535 (P. C.).

(2) [1900] 23 Cal. 799

(3) *A. I. R. 1924 P. C. 144*=51 Cal. 631=51 I. A. 293 (P. C.).

(4) [1892] 19 Cal. 253=19 I. A. 48=6 Sar. 133 (P. C.).

(5) [1905] 32 Cal. 837=1 C. L. J. 437.

(6) [1919] 23 C. W. N. 900=51 I. C. 976=29 C. L. J. 504.

objection from, or ouster or exclusion of the other cosharers, he is under no obligation either to account or to pay compensation to such cosharers in respect of the profits which have accrued to him by reason of the skill or industry which he has employed in making good use of the property while he was in possession. If the law were otherwise it would put a premium upon sloth, and all that a cosharer need do would be to allow an industrious cosharer to spend time, money, and energy upon the land of which they are tenants-in-common, and having lain by until the fruits of his industrious cosharer have been gathered to claim a share of the profits for the accrual of which he can claim no credit, and which in no way are due to any skill or labour on his part. Upon what principle of fairness or commonsense is such a co-sharer entitled to claim compensation from the cosharer in occupation? I can think of none. And I am fortified in this view when I look at the other side of the picture. Suppose an industrious cosharer, while in separate occupation of the common land with the consent, express or tacit of the other cosharers, suffers a reversal of fortune, and, notwithstanding all his efforts, a loss accrues to him as the outcome of his occupation; can he claim from his cosharers a proportionate contribution towards the loss that he has suffered? Clearly not. On the other hand, if a cosharer, notwithstanding an objection from the other co-sharers, claims an exclusive right to occupy a portion of the land of which they have a common right to possession, or excludes or ousts from possession the other cosharers, it is equally clear, in my opinion, that he will have to pay compensation to the other cosharers for any profits that they may be held to have lost by reason of his exclusive occupation of the common land. In *Henderson v. Eason* (7) Parke, B., laid down that

if one tenant-in-common occupied, and took the whole profits, the other had no remedy against him while the tenancy-in-common continued unless he was put out of possession when he might have his ejectment, or unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted that appointment, when an action of account would lie, as against a bailiff of the owner of the entirety of an estate.

His Lordship further observed that there are obviously many cases in which a tenant-in-common may occupy and enjoy the land or other subject of tenancy-in-common solely, and have all the advantage to be derived from it, and yet it would be most unjust to make him pay anything. For instance, if a dwelling house, or barn, or room, is solely occupied by one tenant-in-common, without ousting the other, nothing is received; and it would be most inequitable to hold that he thereby, by the simple act of occupation or use, without any agreement, should be liable to pay a rent or anything in the nature of compensation, to his cotenants for that occupation or use to which to the full extent to which he enjoyed it he had a perfect right . . .

Parke, B., also stated that

there are many cases where profits are made, and are actually taken by one cotenant, and yet it is impossible to say that he has received more than comes to his just share. For instance, one tenant employs his capital and industry in cultivating the whole of a piece of land, the subject of the tenancy, in a mode in which the money and labour expended greatly exceed the value of the rent or compensation for the mere occupation of the land; in raising hops, for example, which is a very hazardous adventure. He takes the whole of the crops and is he to be accountable for any of the profits in such a case, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do had it been so cultivated by the mutual agreement of the cotenants.

It is necessary, however, to appreciate the meaning of the terms "exclusion" and "ouster" in this connexion. To exclude is to "keep out," to oust is to "put out," of possession. But it is not essential to prove physical dispossession in order to establish an ouster. For ouster and exclusion may be actual or constructive, and whenever a cotenant remains in separate occupation in defiance of a claim to joint possession asserted by his cosharers, and thus prevents them from obtaining possession, he is deemed to have excluded or ousted his cosharers. Separate occupation by one cosharer, therefore, is not necessarily exclusive occupation; it may, or may not, be, according to the circumstances that are proved, and each case will turn upon its own facts. In *Watson & Co. v. Ram Chand Dutt* (1) & (2), *Midnapur Zemindary Co. Ltd. v. Nares Narain Roy* (3), a cosharer who claimed a right to compensation or mesne profits was held to be entitled to a decree because the defendant cosharers had excluded or ousted him from possession, or had challenged his title to joint possession of the land of

(7) [1852] 17 Q. B. 701=16 Jur. 518=21 L. J. Q. B. 82.

which they were tenants-in-common. The learned vakil for the respondents placed much reliance upon the following passage in the judgment of the Privy Council in the *Midnapur Zemindary Co. v. Naras Narain Roy* (3):

Where lands in India are so held in common by cosharers each cosharer is entitled to cultivate in his own interests, in a proper and husband-like manner, any part of the lands which is not being cultivated by another of his cosharers, but he is liable to pay to his cosharers compensation in respect of such exclusive use of the lands. Such an exclusive use of lands held in common by a cosharer is not an ouster of his cosharers from their proprietary right as cosharers in the lands.

But when the facts of that case are ascertained it is found that for many years the Midnapur Zemindary Co. or their predecessors-in-title have repudiated the title of the plaintiffs cosharers to joint possession of the land in dispute, and in that suit had resisted the plaintiff's claim and had challenged the plaintiffs' title, both upon the ground of adverse possession, and also because they had purchased in execution of a decree a jote which they themselves had granted in respect of a part of the land of which they were entitled to joint possession with the plaintiffs. The passage to which we have been referred must be read in connexion with the facts of that particular case, and, in my opinion, is not to be taken as in any way conflicting with the principles of law that we have endeavoured to restate. When these principles are applied to the facts of the present case the solution of the problem presents no difficulty, for the plaintiffs have not asserted a claim to joint occupation of the land in dispute; they have not objected to the defendant being in occupation of such land; and they have neither been excluded nor ousted from possession of the land by the defendant. What they claim is a share of the profits which have resulted from the defendant's occupation of the land. In the circumstances obtaining in this case it is, in my opinion, clear that the plaintiffs' claim is misconceived, and, if they are not content with the manner in which the cosharers are enjoying and occupying the land of which they all are entitled to possession as tenants-in-common, their remedy is to proceed by way of partition.

The result is that the appeal is allowed.

and the plaintiffs' suit is dismissed with costs in all the Courts.

Graham, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 218

PANTON AND MALLIK, JJ.

(*Sreemati*) *Radharani Santra*—Plaintiff—Appellant.

v.

Rameshchandra Kalamuri and others—Defendants—Respondents.

Appeal No 157 of 1926, Decided on 11th February 1927, against order of Offg. Sub-Judge, 3rd Court, Midnapore, D/- 25th February 1926.

(a) *Civil P. C.*, S. 151—Remand under S. 151—*Appeal is competent.*

Where a remand order is one under S. 151, it is appealable: 37 *C. L. J.* 491, *Rel. on*: 31 *C. L. J.* 357, *Dist.* [P 219 C 2]

(b) *Bengal Tenancy Act*, S. 7—*Absolutely accurate rate is not possible.*

It is impossible for a Court acting under S. 7 to arrive with absolute accuracy at a rate of rent. The best that the Court can do is to make an approximation to what the rent of a tenure should justly be. [P 219 C 2]

Sarat Chandra Bose, Pyari Mohan Chatterjee and Gurudas Mukherjee—for Appellant.

Usha Kanta Guha—for Respondents.

Panton, J.—This appeal arises from an application made to the Munsif under S. 7, Ben. Ten. Act, which resulted in an ex-parte order. He found, on the evidence before him, that the gross collection from the tenure was 8 aras and 6 kuris odd of paddy and Rs 32-9-0 in money rent. He valued the paddy at an agreed rate which brought the total gross collection to Rs. 130 after deducting one-third from the value of the paddy for what he called "uncertainties in the value of the paddy and for other uncertain elements." He left to the defendant 50 per cent. of profits and thus fixed the rent of the tenure at Rs. 65. From this decision both parties appealed to the Subordinate Judge of Midnapur. For the tenureholder it was contended that the learned Munsif should not have heard the case ex-parte. The learned Subordinate Judge's finding on this point was that the defendants had had enough indulgence and that they could not complain that they did not get more. The second contention

for the tenure-holder was that the learned Munsif did not come to any finding as to the existence of a customary rate. The learned Subordinate Judge found that, while there was no express finding on this point, yet there was evidence on the record that there was no such customary rate existing. It is the third contention of the tenure-holder which found favour with the learned Subordinate Judge. This was that the learned Munsif should not have made the value of the produce rent the basis of his calculation, but should have ascertained and substituted for it a fair and equitable cash rent. The learned Subordinate Judge was of opinion that the principle involved in Sub-S. 4, S. 7, should have been applied to so much of the land as paid the produce rent, because, at any future date on which proceedings might be taken under S. 40, Ben. Ten. Act, equilibrium might be disturbed by the settlement of cash rent under that section. For this reason he remanded the case to the Munsif for a fresh trial. The appeal of the landlord was apparently not seriously pressed before the learned Subordinate Judge. The landlord has appealed against this order of remand.

It is contended on behalf of the respondents, in the first place that, no appeal lies. It is said that the order of remand was not one under O. 41, R. 23, but was one under S. 151, Civil P. C., and, therefore, it is urged, there is no second appeal. In this respect reliance is placed upon a decision of this Court in *Mohendra Nath Chakravarti v. Ramtaran Bandopadhyaya* (1). For the appellant it is contended that in form and in substance this was an order under O. 41, R. 23, and that consequently, on the authority of *Basumati Debi v. Tarubasini Dasi* (2), which was followed in *Prosanna Chandra v. Baidya Nath Mistri* (3), there is a second appeal. But we are satisfied that in the present instance the order complained of was not in form or in substance one under O. 41, R. 23, and these decisions have, therefore, no application. On the other hand reference is made to a decision of this Court in *Bhairab Chandra Dutt v. Kali Kumar Dutt* (4). It would appear, at first

sight, that this later decision is in conflict with that in *Mahendra Nath v. Ramtaran Bhattacharjee* (1), to which I have just referred. In the earlier decision, however, the case was not considered upon the footing of the remand being one under S. 151, and it was upon this footing that this Court in the later decision held that there was a second appeal. It seems to us plain that the remand here cannot possibly fall under either of the rules contained in O. 41, but was made under S. 151. The result in our opinion is that an appeal does lie to this Court.

Turning then to the merits of the appeal: it is impossible for a Court acting under S. 7, Ben. Ten. Act, to arrive with absolute accuracy at a rate of rent. The best that the Court can do is to make an approximation to what the rent of a tenure should justly be. It is possible that the more refined method which the learned Subordinate Judge directed to be applied might result in a somewhat closer approximation to what the rent to be fixed under S. 7 should be though it is impossible to foresee what result might ensue from the application in the present case; that is, whether it would increase or decrease the rent as fixed by the Munsif. It is, however, necessary to point out that there is latent, in the learned Subordinate Judge's method, the same defect, though possibly in a less degree, as in that of the learned Munsif. For it does not follow that a fair and equitable rent, such as is spoken of in Sub-S. 4, S. 7, will be the same as the money-rent which may, at some future date, be fixed under S. 40. Bearing this in view, it seems to us that a remand on this ground was neither necessary nor desirable, and that a possible increase in accuracy is quite incommensurate with the expense to which the parties would be put by a further investigation of the matter. In this view we are unable to support the order made by the learned Subordinate Judge. In the ordinary course of events we would remit this case to the learned Subordinate Judge in order that he might rehear the appeal. In the circumstances, however, we do not think that this course is in the interest of either party. The facts are now before us and we think that it is possible for us finally to decide the question between them. As I have pointed out, the first

(1) [1920] 31 C. L. J. 357=55 I. C. 96.

(2) [1920] 31 C. L. J. 354=44 I. C. 416.

(3) [1920] 31 C. L. J. 360=55 I. C. 516=24 C. W. N. 708.

(4) A. I. R. 1923 Cal. 606.

two objections taken by the tenure-holder to the result arrived at by the learned Munsif did not find favour with the learned Subordinate Judge and in this respect we agree with his view. The only point which remains, therefore, is this matter of the produce rent of a part of the land. In this respect we have little fault to find with the result at which the learned Munsif had arrived and we are of opinion that the rent of the tenure which he has fixed is just and equitable and that the proper course for us to take is to set aside the order of the learned Subordinate Judge and to restore the order of the Munsif. This we accordingly do.

The parties will bear their own costs in all Courts.

Let the record be sent down at once.

Mallik, J.—I agree.

D.D. *Appeal allowed.*

A. I. R. 1928 Calcutta 220

WALMSLEY AND SUHRAWARDY, JJ.

Jagadamba Debi — Plaintiff — Appellant.

v.

Uma Sankar De and others—Defendants—Respondents.

Second Appeals Nos. 667, 668 and 669 of 1921, Decided on 13th June 1923, against appellate decrees of Dist. Judge, Birbhum, D/- 16th December 1920.

Bengal Tenancy Act, Ss. 15 and 16—Heirs transferring patni tenures without complying with S. 15—Transferee not debarred from recovering rent from tenants.

Although the vendors who had succeeded to the tenure have not complied with S. 15 before transferring the tenure to the plaintiff the latter is not debarred by S. 16 from recovering the rent from the defendant tenants; in order to attract the bar created by S. 16, two conditions must co-exist: the plaintiff must have succeeded to the tenure and the rent sued for must be payable to him as the holder of the tenure. [P 221 C 1, 2]

Bankim Chunder Mukherjee—for Appellant.

Sarat Chunder De—for Respondents.

Suhrawardy, J.—These three appeals arise out of three rent suits in respect of three holdings which the plaintiff has purchased from the heirs of the holder of a patni tenure. The defendant pleaded that the areas of the holdings and the rents were not correctly described. The plaintiff accepted the defendants' statement as the amount of the jamas and the

suits were decreed by the first Court accordingly. The defendants appealed to the District Judge on the ground that the plaintiff should not have been allowed to amend her plaint and that the suits ought to have been dismissed. The learned Judge, while dismissing the appeals, gave effect to a plea not taken in the grounds of appeal before him or raised in the first Court, viz., that the plaintiff was not entitled to recover the rent claimed under S. 16, Ben. Ten. Act as she had not observed the procedure as laid down under S. 15, of the Act. The learned Judge, in dismissing the defendants' appeal, added a rider that the plaintiff must get herself recognized by the landlord within a month, on failure of which her suits would stand dismissed.

The plaintiff has appealed and has also filed petitions in revision in case no appeal lay from the decree of the lower appellate Court. The respondents have taken a preliminary objection that the appeals are incompetent inasmuch as no appeals lay to the District Judge from the decrees of the Munsif who was specially authorized to try rent suits under S. 153, Ben. Ten. Act. This objection applies to appeals Nos. 667 and 669 of 1921 which are valued at less than Rs. 50. The objection is valid, but the appellant relies on the authority of the case of *Kalipada Karmakar v. Sekhar Bashini* (1), and maintains that the appeals in this Court were competent. It is not necessary to examine this question as the appellants have also presented petitions in our revisional jurisdiction in the exercise of which we may set the matter right. We accordingly hold that the decrees passed by the lower appellate Court must be vacated and those of the first Court restored.

With regard to Appeal No. 668 of 1921 valued at over Rs. 50: an appeal lay to the Court of appeal and we have to examine the correctness of the decision of that Court. Now the learned Judge admits that the point that the plaintiff is not competent to maintain the suit under S. 16, Ben. Ten. Act, was not raised in the first Court nor taken as a ground in the memorandum of appeal before him. It is a matter for regret that in such circumstances the learned Judge should have thought it proper to investi-

(1) [1916] 24 C. L. J. 235=35 I. C. 348=20 C. W. N. 967.

gate the question the correct determination of which might depend upon evidence, for I find that one of the grounds taken before us in appeal is that it should have been held that the rent receipts produced by the plaintiff from her landlord furnished legal proof of her recognition. It is possible that the plaintiff could have adduced more evidence in support of the recognition if the objection were taken in time. But since the Judge has considered that question as a pure question of law and come to a decision, I propose to examine the correctness of it as a question of law.

Chapter 3, Ben. Ten. Act, makes a well-marked distinction between a transfer of a tenure and succession to it. In the former case, whether the transfer is voluntary or involuntary, the provisions of Ss. 12 and 13 must be complied with. In the case of succession by which is meant succession to the interest by inheritance or any mode of devolution other than transfer, the requirements of S. 15 should be observed before the successor can maintain a suit for rent.

Now in this case the plaintiff is a transferee from the heirs of the patidar, who (the heirs) had not got their names registered with the landlord in terms of S. 15, Ben. Ten. Act. As a transferee S. 15 is not applicable in her case: she might be governed by Ss. 12 and 13: but, as it is a patni tenure, those sections do not apply in her case: *Gyanada v. Brahmamoye* (2). The question then arises that her vendors who had succeeded to the tenure not having complied with S. 15 before transferring the tenure, is the plaintiff debarred by the provisions of S. 16 from recovering rent from the defendant, for Ss. 15 and 16, Ben. Ten. Act, have been held to be applicable to patni tenures? *Durga v. Brindaban* (3). These sections, being penal in effect, ought to be strictly construed: *William Shariff v. Jogmaya* (4), and *Masbahuddin v. Abdul Burkat* (5). No doubt plaintiff's vendors could not have recovered rent accruing due during the period of their possession and apparently they would not vest their transferee with a right they did not possess; but, in order to attract the bar created by S. 16, two

conditions must co-exist: the plaintiff must have succeeded to the tenure and the rent sued for must be payable to him as the holder of the tenure. In the present case the first condition does not apply to the plaintiff, and it follows that she is not precluded by the provisions of S. 16 from maintaining the present suit. To hold otherwise would lead to an absurdity which presumably was not in the contemplation of the legislature. If, as in the present case, one of the intermediate holders of the tenure who has succeeded to it fails to comply with the provisions of S. 15 and his transferee is, therefore, incompetent to maintain a suit for recovery of rent, the transferee from such transferee and all subsequent transferees will be similarly debarred with the result that the tenants will occupy the lands rent free for ever. As I have said the section must be strictly construed and I am not prepared to extend its operation beyond its strict terms. I am of opinion that the plaintiff is entitled to a decree in this case and the learned Judge has acted illegally and without jurisdiction in qualifying that decree in the way he has done. Even though an appeal may not lie to this Court under S. 153, Ben. Ten. Act, we may interfere with the decree of the lower appellate Court under S. 115, Civil P. C. The result is that the decree of the lower Court of appeal is set aside and that of the Munsif restored.

The appeals are, therefore, dismissed but without costs. The rules are made absolute in the terms indicated above. The plaintiff is entitled to recover her costs in the Rules, only one hearing-fee of two gold mohurs being allowed and that in R. 99 S of 1921. In the other two Rules no vakil's fee is allowed, but the plaintiff will be entitled to realize the other costs incurred by her.

Walmesley, J.—I agree

D D.

Appeals dismissed.

Rules made absolute

* A. I. R. 1928 Calcutta 221

MOOKERJEE AND PANTON, JJ.

Mohiruddin Mollah—Petitioner—Appellant.

v.

Gayan Nath Poddar and others—Objector.—Respondents.

Appeal No. 387 of 1920, Decided on 20th December 1922.

(2) [1890] 17 Cal. 162.

(3) [1892] 19 Cal. 504.

(4) [1900] 27 Cal. 535.

(5) A. I. R. 1921 Cal. 303.

Provincial Insolvency Act (1920)—Act is not retrospective—Applications by debtor before its passing are to be dealt with under the old Act of 1907.

The provisions of the new Act, which have substantially altered the pre-existing law cannot be given retrospective operation so as to take away the right enjoyed by the debtor under the Act of 1907, if the latter was in force when the application was made: *Colonial Sugar Refining Co. v. Irvine*: (1905) A.C. 369 and A. I. R. 1921 Mad. 272, Ref. [P 222 C 2]

*Phanindra Lal Moitra and Dinesh Chandra Roy for Heremba Lal Sanyal—*for Appellant.

Judgment.—This appeal is directed against an order of dismissal of an application made by a debtor to be adjudicated an insolvent. The application was presented on 18th September 1919 when the provisions of the Provincial Insolvency Act of 1907 were in force. The presentation of the application is an act of insolvency under S. 4, Cl. (F), which provides that a debtor commits an act of insolvency if he petitions to be adjudged an insolvent under the provisions of that statute. The petition complied with the requirements of S. 6, sub-Cl. (3), which ordains that a debtor shall not be entitled to present an insolvency petition unless his debts amount to Rs. 500. The debtor stated that the total amount of money claimed against him was Rs. 1,269. The application was registered and notice was directed to be issued to the creditors through registered posts. The 14th November 1919 was the date fixed for hearing. On that date, one Sarat Chandra Chaudhury and fifteen others put in a petition of objection in which they stated that the debts of the petitioners amounted to Rs. 1,985. There can be no question that in these circumstances an order for adjudication should have been made as a matter of course. The case, however, was adjourned from time to time till 4th September 1920, when it was taken up for disposal. Meanwhile, the Provincial Insolvency Act, 1920 had received the assent of the Governor-General in Council on 25th February 1920 and had come into operation. A question was raised before the District Judge whether the matter should be determined on the basis of the provisions of the Insolvency Act, 1907 or the Insolvency Act, 1920. The District Judge held that the provisions of the new Act were applicable. He investigated the case on the merits and held that the application

was not bona fide. In this view he dismissed the application.

We are of opinion that the District Judge was clearly in error when he dealt with the application under the provisions of the new Act. The nature of the right enjoyed by the debtor under the Provincial Insolvency Act, 1907 was considered by the Judicial Committee in the case of *Chhatrapat Singh v. Kharag Singh* (1), Sir Lawrence Jenkins pointed out that

If the conditions prescribed by the Act are satisfied, the Act entitles a debtor to an order of adjudication. This does not depend on the Court's discretion, but it is a statutory right, and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an abuse of the process of the Court.

We are unable to hold that the provisions of the new Act, which have substantially altered the pre-existing law, could be given retrospective operation so as to take away the right enjoyed by the debtor under the Act of 1907 which was in force when the application was made: *Colonial Sugar Refining Co. v. Irvine* (2). The view we take is in accord with that adopted in *P. Hanmayya v. Ramayya* (3).

The result is that this appeal is allowed and the order of the District Judge discharged. We make the order which should have been made by him, namely, the order of adjudication.

We direct that the records be sent down to the District Judge so that he may take steps to give effect to our order.

D.D.

Appeal allowed.

- (1) A. I. R. 1916 P. C. 64=44 Cal. 535=44 I.A. 11 (P. C.).
- (2) [1905] A. C. 369=71 L. J. P. C. 77=21 T.L. R. 513=92 L. T. 739.
- (3) A. I. R. 1921 Mad. 272.

* * A I R 1928 Calcutta 222

PAGE AND GRAHAM, JJ.

*Mahesh Chandra Sadhu and others—*Decree-holders—Appellants.

v.

*Jogendra Lal Sarkar and others—*Judgment-debtors—Respondents.

Appeal No. 466 of 1925, Decided on 22nd July 1927, from original order of Sub-Judge, Asansole, D/- 29th August 1925.

* * Civil P. C., O. 21, R. 29—Words “ pending suit has been decided ” include an appeal and mean “ finally decided.”

The words “ pending suit has been decided ” in O. 21, R. 29, include an appeal, if any, and mean “ finally decided,” that is to say, after all rights of appeal have been exhausted.

[P 224 C 1,2]

Ram Chandra Majumdar and Bijan Kumar Mukherji—for Appellants.

Bankim Chandra Mukherji and Shib Saran Sarkar—for Respondents.

Page, J.—The determination of this appeal depends upon the true construction of O. 21, R. 29, Civil P. C. The question raised is one of first impression, for in none of the High Courts in India does it appear to have been considered or decided. O. 21, R. 29 runs as follows :

Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

The question to be determined is whether the words “ until the pending suit has been decided ” mean until a decree has been passed by the Court in which the suit is pending, or until the claim in the pending suit has finally been determined. The material facts are not in dispute.

The present appellants or their predecessors-in-title obtained a decree in the Court of the Subordinate Judge of Asansole against the respondent for Rs. 10,939-14-0 and costs on the 22nd March 1915. This decree was affirmed on appeal to the High Court on 14th January 1918. On the 18th April 1925 the appellants applied to the Subordinate Judge of Asansole for execution of the decree which they had obtained in the High Court on 14th January 1918 to the extent to which it had not already been satisfied. On the 29th August 1925, the learned Subordinate Judge of Asansole dismissed the appellants’ application upon the ground that it was barred by limitation. Against this order the appellant decree-holders have preferred the present appeal. The appeal is supported upon two grounds : (1) that the present application for execution must be treated as a continuation of a previous execution case (No. 101 of 1919) ; (ii) that an order under O. 21, R. 29 staying the execution of the decree of 14th January 1918 had been passed by the learned Subordinate

Judge of Asansole on the 14th April 1920 ; that the stay order remained in force until the 24th November 1924 ; and that, if the time during which the execution of the appellants’ decree was stayed was excluded from the period during which limitation would run, the application for execution of the 18th April 1925 was not time barred.

Now, it appears that in the execution case No. 101 of 1919 (31st July 1919) Rs. 7,844-4-0 were realized in part satisfaction of the decree, and this case was dismissed on part satisfaction on 30th April 1920. On the 19th May 1920 the appellants again applied for execution of the decree in Case No. 129 of 1920, and on the 23rd June 1920 this execution case was dismissed for default. In these circumstances it cannot reasonably be contended that the application for execution of the 18th April 1925 was in continuation of the former execution cases which had been determined ; and the first contention urged on behalf of the appellants, therefore, fails : *Raghunath Saha v. Lalji Singh* (1) ; *Dukhiram Srimani v. Jogendra Chandra Sen* (2). On the 14th April 1920, however, the learned Subordinate Judge of Asansole had passed the following stay order :

As it appears that the judgment-debtor Jogendra Lal Sirkar and others have instituted a suit for recovery of Rs. 3,170-15-6 for royalties against the decree-holders (in M. Suit No. 58 of 1918), on the petition of the judgment-debtors let the execution be stayed under O. 21, R. 29.

The judgment-debtors’ suit was decreed by the Subordinate Judge of Asansole on the 16th June 1920. Against that decree an appeal was lodged, and the judgment-debtors’ claim against the decree-holders was finally determined by a decree of the learned District Judge of Burdwan of the 24th November 1924. By this decree the learned District Judge of Burdwan awarded the judgment-debtors a sum of Rs. 2,253-14-0 and costs.

Upon these facts the appellants urged that the stay order of the 14th April 1920 remained in force until the claim in the judgment-debtors’ suit was finally decided by the decree of the learned District Judge of Burdwan of the 24th November 1924, and that if the time that elapsed between the 14th April 1920 and the 24th November 1924 is excluded

(1) [1896] 23 Cal. 397.

(2) [1901] 5 C. W. N. 347.

from the period of limitation the present application for execution was presented within the time limited by the statute of limitation. On the other hand, the respondents contend that the stay order remained in force only while the judgment debtors' suit was pending in the trial Court, and ceased to be operative after the decree was passed by the learned Subordinate Judge on the 16th June 1920. The adoption of the literal construction, for which the respondents contend, would provide an easy solution of the problem. But, in my opinion, such a construction would render nugatory the two-fold object which, I think, the legislature had in view when enacting O. 21, R. 29, namely, to prevent: (1) the judgment-debtor being compelled to satisfy the decree by providing the sum due when it might be proved (after his claim against the decree-holder was finally determined) that on balance he owed the decree-holder less than the decretal sum or, it might be, nothing at all; (2) the multiplicity of execution proceedings.

Now, it may well happen, after a stay order has been passed under O. 21, R. 29, that the trial Court might dismiss the suit, while on appeal a sum might be decreed in favour of the judgment-debtor, and on a further appeal he might be awarded a sum larger than that for which the decree-holder had obtained his decree. In that event the result of adopting the construction which the respondents have urged upon us would be that both the objects which the legislature had in mind when enacting O. 21, R. 29, would be defeated: on the other hand, if the view for which the appellants contend is accepted the decree-holder need suffer no hardship by reason of the delay necessarily incident to an appeal by the judgment-debtor, for under R. 29, the executing Court is at liberty to grant a stay of execution upon whatever terms it thinks fit. There is no magic in the words "until the pending suit has been decided" for it is conceded by the learned advocate for the respondents that the executing Court in any case would have jurisdiction under S. 151 to grant a further stay if the judgment-debtor preferred an appeal. In my opinion, the words "until the pending suit has been decided" mean until the claim in the pending suit has finally been decided. The result, therefore, is that the

application for leave to execute the decree of the 14th January 1918, that was preferred on the 18th April 1925, was not barred by limitation; the appeal will be allowed and the order under appeal set aside. It is represented to us that an appeal has been preferred to the High Court from the order of the learned District Judge of Burdwan of the 24th November 1924. The execution proceedings will be returned to the learned Subordinate Judge of Asansole to be disposed of according to law. Whether the learned Subordinate Judge adjourns or dismisses or otherwise determines the present application for execution is a matter that must be left to the decision of the learned Subordinate Judge; and the costs of this appeal will abide the event; the hearing-fee is assessed at two gold mohurs.

Graham, J.—The sole question involved in the appeal is whether the application for execution was time barred or not, and the answer turns upon the proper construction O. 21, R. 29, Civil P. C., and in particular upon the meaning of the words "pending suit has been decided" which occur therein. Do these words merely refer to the suit or do they include an appeal, if any, and mean "finally decided," that is to say, after all rights of appeal have been exhausted. If the former is the case then the plea of limitation must prevail, while if the latter view is correct, then that plea fails.

The learned vakil for the respondents has called our attention to O. 22, R. 11 whereby that order is made applicable to appeals as well as suits and has argued that from the fact that there is no similar provision in the case of O. 21, R. 29 it may be inferred that the word "suit" in the latter rule was not intended to include "appeal." The word "suit" has not been defined in the Code, and it is possible to interpret it in two ways: either as restricted to the suit itself, or as meaning a suit from commencement until final decision, that is to say, as including the period of appeal, if any. On the whole I am of opinion that the better view is that the word was intended to include period of appeal and that "decided" means "finally decided." The adoption of the other view would entail multiplicity of proceedings which it has always been the object of the legislature to avoid.

For these reasons I agree with my learned brother that the appeal must be allowed.

N.K.

Appeal allowed.

* A. I. R. 1928 Calcutta 225

MOOKERJEE AND RANKIN, JJ.

Azizor Rahman Chaudhury—Defendant—Appellant.

v.

Ahidennessa Chaudhurani and others—Plaintiffs—Respondents.

Appeal No. 164 of 1920, Decided on 9th March 1923, from original decree of Dist. Judge, Noakhali, D/- 20th July 1920.

Civil P. C., S. 92—Removal of trustee—Grounds illustrated.

In the case of removal of a trustee the Court should be guided by considerations of the welfare of the trust estate, and before a removal of the trustee is directed, a clear necessity for the intervention of the Court to save the trust property must be established. It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust. A trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust: for example, if he renews a lease for his personal benefit, purchases the trust property, concurs in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate. [P 226 C 1, 2]

Atul Chandra Gupta, Bhagirath Chandra Das and Rama Prosad Mookerjee—for Appellant.

Dwarkanath Mitter and Nurul Huq Chaudhury—for Respondents.

Judgment.—This is an appeal by the defendant against what may be described as the preliminary decree in a suit under S. 92, Civil P. C.

The subject-matter of the litigation is a wakf which was created on the 24th September 1876 by a Mahomedan gentleman of the name of Mahomed Kabil Chaudhury, who died on the 3rd November 1876. He left two sons by two wives namely Manwar Ali and Mazafar Ali who became joint mutwalis. Manwar Ali died in 1895 and thereupon Muzaffar Ali

continued to act as the sole mutwalli till his death in 1906. Thereafter disputes broke out as to the office of mutwalli. Plaintiff 1, who is the daughter of a son of the founder, sued to secure the office of mutwalli. The claim was resisted by the defendant who is the son of a daughter of the founder. After a protracted trial the defendant was appointed mutwalli on the 27th August 1907 by the primary Court. This decree was affirmed by this Court on appeal on the 1st July 1910. Plaintiff 1, thus defeated, instituted a suit in 1914 to set aside the wakf on the ground that it was an illusory endowment. The suit was dismissed by the trial Court on the 19th September 1916. That decree was affirmed in substance by this Court on the 26th April 1917, on the admission of the plaintiff that the wakf was valid and operative in law. Thus, baffled a second time, the plaintiff, along with several other persons, instituted the present suit on the 3rd April 1919, under S. 92, Civil P. C., for the removal of the defendant from the office of mutwalli and for the appointment of a new mutwalli. In the interval, plaintiff 1 had commenced another litigation against the defendant in 1918 for settlement of accounts and for recovery of arrears of maintenance. The hearing of that suit has been stayed pending the conclusion of the present litigation. The defendant contended that there was no reason why he should be removed from the office of mutwalli and that, if the wakf properties have not been managed in strict conformity with the directions of the founder, plaintiff 1, was more to blame than he himself. The District Judge took evidence as to the dealings of the defendant with the wakf estate and came to the conclusion that he was guilty of breach of trust and neglect of duty to such an extent that he should be removed from the office of mutwalli. The District Judge has further directed that a commissioner be appointed to examine the income and expenditure of the wakf estate.

In the present appeal, the conclusions of the District Judge as to the management of the wakf estate by the defendant have been controverted as not supported by the evidence on the record. It has further been urged that some at any rate of the transactions were not such as

would justify an order for removal of the defendant from the office of mutwalli. Emphasis has naturally been laid on the previous history of the wakf estate and the embarrassment necessarily created by reason of the suits mentioned and numerous other litigations which involved an expenditure of large sums of money. We do not consider it necessary for our present purpose to examine the history of each of the instances of mismanagement given by the District Judge. The general impression left on our mind by the judgment of the District Judge is that he has laid undue stress upon matters of relatively small importance and that he should not have formed an opinion upon the question of the removal of the defendant from the office of mutwalli till the accounts of the income and expenditure of the wakf estate had been investigated by the commissioner. The principles which should regulate the action of the Court in cases of this description are well settled. The Court should be guided by considerations of the welfare of the trust estate, and before a removal of the trustee is directed a clear necessity for the intervention of the Court to save the trust property must be established. It is not every mismanagement or neglect of duty which will induce the Court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust. As was observed by Lord Lingsdale, M. R. in *Attorney-General v. Caius College* (1), it is not enough to prove even considerable errors and irregularities in the management of the property or in the distribution of the income or in the conduct and management of the institution. The test is, is this the result of corrupt or improper motives; *Attorney-General v. Clifton* (2). These principles have been generally recognized and applied in cases in Indian Courts; *Srinath v. Radhanath* (3), *Sathappayyar v. Periasami* (4),

Tiruvengadath Ayyangar v. Srinivas Thathachariar (5), *Muhammed Jafar v. Muhammad Ibrahim* (6), *Nates v. Ganapati* (7), *Miyaji v. Ahmed Sahib* (8), *Fakuruddin Sahib v. Acken Sahib* (9), *Subba Naidu v. Gopala Swami* (10), *Ganapati Ayyan v. Savithri Ammal* (11), *Raja of Kalahasti v. Ganapati* (12), *Chintaman v. Dhondo* (13), *Annaji v. Narayan* (14), *Damodar v. Bhogilal Kasandas* (15), and *Girdharlal v. Naranlal* (16). These cases all support the view that a trustee may be removed if he fraudulently misapplies the revenues of the trust property and grossly misbehaves himself in the execution of the trust, for example if he renews a lease for his personal benefit, purchases the trust property, concurs in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate. It is necessary that these principles should be borne in mind by the District Judge when he reconsiders the case.

We are of opinion that, in the circumstances disclosed, this appeal should be allowed and the decree of the District Judge set aside. The case will be remitted to him in order that he may in the first place carefully examine the state of the accounts as disclosed in the report of the commissioner. Both parties will be entitled to take exceptions to that report and to justify the objections they may advance before the District Judge. Meanwhile the defendant will continue to hold the office of mutwalli. The previous history of the endowment leaves little doubt that great embarrassment has been caused by the constant ill-feeling between the plaintiffs and the defendant, and that even a stranger, as receiver, has not found it easy by any means to manage the estate effectively. We accordingly direct that the present receiver be discharged and that the defendant and Khan Saheb Abdul Khaleck, pleader of Feni,

(1) [1837] 2 Keen 150.

(2) [1864] 32 Beav. 596=9 L. T. 136=9 Jur. (N.S.) 939.

(3) 12 C. L. R. 370.

(4) [1891] 14 Mad. 1.

(5) [1899] 22 Mad. 361.

(6) [1901] 24 Mad. 243.

(7) [1891] 14 Mad. 103.

(8) [1909] 31 Mad. 212=18 M. L. J. 205.

(9) [1878-80] 2 Mad. 197.

(10) [1905] 15 M. L. J. 185.

(11) [1893] 21 Mad. 10.

(12) [1918] M. V. N. 555=48 I. C. 897.

(13) [1891] 15 Bom. 612.

(14) [1897] 21 Bom. 556.

(15) [1898] 22 Bom. 493.

(16) [1912] 14 Bom. L. R. 1145=17 I. C. 779.

be appointed joint receivers. They will not be called upon to furnish security, but the District Judge will direct that all collections be brought into Court periodically so that the risk of waste may be minimized. The District Judge will also draw up an ad interim scheme for the management of the trust property. We are convinced that a new scheme for management of the trust estate must ultimately be framed for the management of the institution; economic conditions have changed considerably since the day when the founder created the endowment and alterations are manifestly needed in the scheme, if the wishes of the founder are to be carried out effectively. It has been represented to us that persons entitled to annuities have not received payment for a considerable time. Upon application made to the District Judge, he will give such directions in respect of these as also other matters as may be justified by the circumstances.

Each party will pay his costs in this Court; but the defendant will be entitled to pay out of the estate the costs he has actually incurred.

D D

Appeal allowed.

A. I. R. 1928 Calcutta 227

DUVAL, J.

Kasiraddin Paramanik — Plaintiff—Petitioner.

v.

Kasir Mandal—Defendant—Opposite Party.

Civil Rule No. 919 of 1927, Decided on 16th November 1927, from order of Sub-Judge, Bogra, D/- 23th April 1927.

Practice—Procedure of putting both parties in the witness-box without putting them on oath is irregular.

The procedure of putting both parties in the witness-box after the case has been closed without putting them on oath and let each talk to the other is not warranted by law and vitiates the whole trial. [P 227 C 2]

Nasim Ali—for Petitioner.

M. Nuruddin Ahmed and *M. Amiruddin Ahmed*—for Opposite Party.

Judgment.—In this matter the plaintiff sued to recover Rs. 500, the balance due on a certain jute transaction. The defendant, in his written statement, stated that the case was false, but, on the other hand, he was entitled to a certain amount from the plaintiff. He did not

mention in his written statement in the suit that he had sued in the Court of the 2nd Munsif for his counter-claim, the suit which was dismissed a little over a month after the present suit before the Small Cause Court Judge was disposed of. The case came on for hearing. The Judge heard the plaintiff and his witnesses, the defendant and his witnesses and arguments on both sides. It then appears that he took the ordinary noon-day adjournment and, on coming back to the Court, it is admitted by him in the explanation he furnished, he put the plaintiff and the defendant both in the box to confront each other and note their demeanour and did not swear them but heard them argue in support of their cases. It appears that they said nothing more than what they stated in evidence. He then let them leave the box and passed judgment dismissing the suit.

This Rule has been obtained on the ground that the procedure in putting those two parties in the box without putting them on oath, and let each talk to the other is not warranted by law and has vitiated the whole trial. No doubt, in his explanation, the learned Judge says that he decided on the evidence, but he had to decide on that evidence considering the probabilities of the case, and it is difficult to believe, in deciding as to who was more likely to speak the truth, that what occurred after the lunch did not weigh with him in some way, even though he does not think that he did and it is clear that this method of putting the two men into the box after the case had been concluded, excepting for judgment, is not warranted by law. I am, therefore, compelled in the circumstances to set aside the decree in the case and remit the case for a rehearing. The case must be tried by some other Judge with the necessary powers, and if there is none in the Civil Division of Pabna and Bogra it will be transferred to a Judge exercising such Small Cause Court jurisdiction in the District of Rajshahi.

In the circumstances, I pass no order as to costs.

N.K.

Case remitted.

A. I. R. 1928 Calcutta 228

C. C. GHOSE AND CAMMIADE, JJ.

Superintendent and Legal Remembrancer—Appellant.

v.

Jahey Sheikh and another—Respondents.

Government Appeal No. 4 of 1927, Decided on 24th August 1927, against order of 1st Addl. Sess. Judge, Mymensingh, D/- 9th March 1927.

Criminal P. C., S. 302—Jury unanimous—Proceeding to charge them again is illegal—Retrial was ordered.

Where the jury at first brought in a unanimous verdict of guilty against the accused, but the Judge apparently being of a contrary opinion proceeded to charge the jury again and after the second charge was finished the jury retired again and returned the verdict of not guilty.

Held: that the procedure adopted was one which was entirely opposed to the procedure laid down in the Criminal Procedure Code and was one for which there is no warrant anywhere in the law obtaining in British India and the verdict of the jury cannot be allowed to remain. [P 228 C 2]

Khundkar, Deputy Legal Remembrancer— for Appellant.

Sachindra Kunwar Roy— for Accused.

Judgment.—This is an appeal by the Local Government under the provisions of S. 417, Criminal P. C. against an order of acquittal passed by the First Additional Sessions Judge of Mymensingh in a case in which the two accused before us were charged before him and a jury under S. 395, I. P. C. The case is in many ways an extraordinary one, and it is desirable, therefore, to set out the facts briefly.

The two accused, Jahey Sheikh and Katua alias Javed Ali, were charged with having committed an offence punishable under S. 395, I. P. C. They were duly committed to take their trial in the Sessions Court. The first Additional Sessions Judge of Mymensingh, Mr. N. V. H. Symons, tried the case with the aid of a jury. On the 9th March 1927 the trial was concluded and the jury were directed to retire and bring in their verdict. What happened thereafter is set out below as appears from the record:

Q. As regards both accused are you unanimous.

A. Yes.

Q. What is your verdict?

A. Guilty under S. 395, I. P. C.

Q. Did you find that Ismat mentioned Katua's name immediately after the occurrence?

A. We thought it unlikely that the family could have made up the story so soon, and we

did not think that the explanations of the accused about enmity were sufficient to enable Abdul to bring a false case.

The jury is then charged again on the matter concerned in the last question. They retired at 3-53 p. m. and returned at 4-30 p. m.

Q. Do you find that Ismat mentioned Katua's name immediately after the occurrence?

A. No, we find that he did not.

Q. Does the jury wish to make any statement about their verdict of guilty?

A. We did not follow the meaning of "fair complexion," nor did we understand fully the importance of the passage in the ejahar, and the evidence of the independent witnesses. We now see that Katua is a dark man, and that Ismat could not have mentioned his name as he has said that he only knew him by sight. We wish to amend our verdict and return a unanimous verdict of not guilty.

As will be seen from the above the jury at first brought in a unanimous verdict of guilty against the accused under S. 395, I. P. C. The learned Additional Sessions Judge apparently was of a contrary opinion and he proceeded to charge the jury again. After the second charge was finished the jury retired again and returned at 4-30 p. m. What the learned Additional Sessions Judge stated to the jury in the course of the second charge does not appear from the record. But it appears from the record that he had previously anticipated the jury's bringing in, in the first instance, a verdict of guilty against the accused and that he had intended to refer the case to this Court for final orders. With that view he had written out a letter of reference and signed the same, but it appears that having regard to the events which subsequently happened he placed the letter of reference on the record though he had not dispatched the same to this Court. The procedure adopted by the learned Additional Sessions Judge is one which is entirely opposed to the procedure laid down in the Criminal Procedure Code and is one for which there is no warrant anywhere in the law obtaining in British India.

In this view of the matter we cannot allow the verdict of the jury to remain. We must set aside the verdict of the jury and set aside the order of acquittal, dated 9th March 1927, and direct that the matter be sent back in order that the accused may be retried in accordance with law before the Sessions Judge of Mymensingh.

N.K.

Case remanded.

A. I. R. 1928 Calcutta 229

MOOKERJEE AND RANKIN, JJ.

Brindarani Dassya and another—Defendants—Appellants.

v.

Narendra Nath Mitra—Plaintiff—Respondent.

Appeal No. 139 of 1921, Decided on 26th June 1923, against original decree of Sub-Judge, Second Court of Backergunj, D/- 21st March 1921.

Contract Act, S. 60—The debts for which sums are applied must be proved to have lawfully existed.

When the creditor invokes the aid of S. 60, it is incumbent upon him to establish that there was a lawful debt actually due and payable to him from the debtor for the satisfaction of which the sums paid have been applied by him: *Cory Bros & Co. v. Mecca*: (1897) A. C. 286; 37 M. L. J. 397, *Foll.* [P 229 C 2]

Dwarka Nath Chakraborty and Kalinkar Chakraborty—for Appellant.

Narendra Chandra Bose and Satyendra N. Mitter—for Respondent.

Mookerjee, J.—This is an appeal by the defendants in a suit for arrears of rent. The plaintiff claims rent from the defendants at the rate of Rs. 4,794-4-6, annually with cesses and damages in respect of two years (Bhadra 1324 to Bhadra 1326). The defendants resist the claim on the ground, amongst others, that the payments made by them from time to time wiped out the debt. The Subordinate Judge has overruled this contention and decreed the suit in part. On the present appeal the defendants have argued that the Subordinate Judge has not really investigated the points urged in defence.

It is admitted that the defendants hold 19 distinct tenancies under the plaintiff and that from time to time they paid to the plaintiff Rs. 61,889 on account of rent and cesses. The defendants urge that this sum has wiped out all the arrears due in respect of all the 19 tenancies held by them. The plaintiff contends, on the other hand, that he has applied the sums paid in satisfaction of the arrears due on the other 18 tenancies, and that, after the balance has been appropriated in partial satisfaction of the arrears due in respect of the tenancy now in suit, a substantial sum is still recoverable.

It is not disputed that at the time the alleged payments were made the defen-

dants did not direct how the sums were to be appropriated. Consequently the rule enunciated in S. 60, Contract Act, became applicable. That section is in these terms:

Where the debtor has omitted to intimate and there are no circumstances to indicate, to which debt the payment is to be applied, the creditor may apply it at his own discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

When the creditor invokes the aid of this principle, it is incumbent upon him to establish that there was a lawful debt actually due and payable to him from the debtor for the satisfaction of which the sums paid have been applied by him: *Cory Bros. & Co. v. Owners of Turkish Steamship Mecca* (1), *Munisami Mudali v. Perumal Mudali* (2). The Subordinate Judge was accordingly not correct when he said that "the present suit in respect to a different tenancy," that is, a tenancy different from the 18 tenancies mentioned, "cannot be converted into an account suit." The question whether the sums alleged to have been appropriated by the plaintiff in satisfaction of arrears due on the 18 tenancies had been lawfully applied, must be investigated, before it can be held that the sum credited to the claim now in suit was correctly determined.

It may appear at first sight that this is a question free from complexity and obscurity. Unfortunately for the plaintiff, however, there are peculiar circumstances which have placed him in a situation of some embarrassment. It had so happened that in respect of 10 out of 19 tenancies lands accreted by the recession of a public navigable river and the Secretary of State for India in Council took steps for the assessment of the additional land with revenue. This proceeding culminated in an order of 27th April 1914, whereby the Board of Revenue determined, contrary to the contention of the plaintiff, that the crown had a right to assess the land under Act 9, 1847. Thereupon on 27th July 1915, the plaintiff instituted a suit against the Secretary of State for India in Council for declaration that the assessment had been made without jurisdiction, because the lands, which

(1) [1897] A.C. 286=45 W.R. 667=8 Asp. M. C. 266=76 L.T. 579=66 L.J. P.C. 86.

(2) [1919] 37 M.L.J. 367=52 I.C. 950=10 M. L.W. 329.

were alleged to be additional lands, were in fact comprised within his permanently settled estate. The plaintiff was successful in the Court of first instance, and on 6th October 1917, the Subordinate Judge made a declaration in his favour that the assessment was, *ultra vires*. There was an appeal to this Court which was heard in the first instance by a Division Bench and ultimately came up for disposal before a Bench of three Judges under Cl. 15, Letters Patent : *Secretary of State v. Narendra Nath* (3). The final decree of that Court was made on 30th August 1920. The result of that decision was that the assessment by the Crown was held to be *ultra vires* in part : in other words in respect of a portion of the disputed land the Crown was held not competent to assess the land with revenue under Act 9, 1847. It was during the pendency of that litigation that on 23rd December 1919, the plaintiff commenced the present action for recovery of rent of the tenancy now in suit for the years 1917-1919. It has been stated before us that there is no question of accreted lands so far as the present tenancy is concerned.

But as we have already explained, in the application of S. 60, Contract Act, to the facts of this litigation, it becomes necessary to consider what was the amount recoverable by the plaintiff from the defendants in respect of the other 18 tenancies. Ten of those tenancies comprised accreted lands. If the assessment made by the Crown is *ultra vires* in part, the question must consequently arise on what basis is the plaintiff entitled to recover rent from the defendants in respect of the so-called additional land. It has further been urged before us that in the contingency which has happened, if the plaintiff is not entitled to realize rent on the basis of the entries made in the settlement by the Government, he would, in any event, be entitled to rent on the basis of the contract between the parties. That is a question which cannot be determined on the materials before us. There is thus no escape from the position that the decree made by the Subordinate Judge in favour of the plaintiff cannot be affirmed because it is based on an assumption which has not been established and cannot, on the materials before us, be ac-

cepted as well founded. That assumption is that the plaintiff has correctly appropriated sums paid by the defendants with regard to his dues in respect of the other tenancies.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remitted to him in order that it may be retried on the lines indicated. Upon retrial the defendants will not be entitled to succeed to the extent of more than the sum at which the present appeal has been valued, namely, Rs. 5,500. The appellants are entitled to their costs in this Court, but the costs of the trial in the lower Court both before and after remand, will be in the discretion of the lower Court.

Rankin, J.—I agree.

R D.

Case remanded.

A. I. R. 1928 Calcutta 230

RANKIN, C. J. AND BUCKLAND, J.

Doat Ali alias Sheik Deoat Ali Sarkar and others—Accused—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revn. Case No. 923 of 1927, Decided on 16th December 1927.

Criminal Trial—Joint trial of two separate appeals though by the same accused is bad.

There were two separate cases in each of which the accused was convicted by the trial Court. An appeal was brought in each case. The appellate Court tried the two appeals together as one case and he allowed one of the appeals and dismissed the other.

Held : that the procedure followed was bad.
[P 230 C 2 ; P 231 C 1]

Sures Chandra Taluqdar and Mahendra Kumar Ghose—for Petitioners.

Rankin, C. J.—In this case it appears that there were two separate cases in each of which the accused were convicted by the trial Court. An appeal was brought in each case by the convicted persons and they came before the learned Additional Sessions Judge of Dacca. His procedure was this: He tried the two appeals together as one case and made up his mind that there were two contradictory stories. Having found which of the two stories was true and having found that the other was untrue, he allowed one of the appeals and dismissed the other. It seems reasonably plain that the duty of the learned Judge was to keep each appeal absolutely separate and to deal

with it on its merits, confining himself to the evidence given in that case and in that alone. As one of these appeals has been allowed and the persons have been acquitted that matter is not before us; but as regards the parties whose appeal has been dismissed this application is brought. In our opinion, the rule should be made absolute. The appeal in this case must be heard again, and we direct that it be heard by a different learned Judge to be nominated by the Sessions Judge. The petitioners will remain on bail to the satisfaction of the District Magistrate pending the rehearing of the appeal.

Buckland, J.—I agree.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 231

MUKERJI, J.

Madhab Chandra Dutta — Defendant
— Petitioner.

v.

Jainoo Ram and others— Plaintiff and
pro forma Defendants—Opposite Party.

Civil Rule No. 832 of 1927, Decided
on 29th November 1927, from order
of Small Cause Court Judge, Barpeta,
D/- 31st March 1927.

Tort—Malicious proceedings—Wilful wrong
— Defendants falsely claiming paddy as his own
— Proceedings taken under S. 107, Criminal
P. C.—Paddy taken by police and handed over
to a third person for safe custody — Damages
caused—Defendant was held responsible.

Plaintiff claimed damages from the defendant on the allegations that certain crops which had been grown by him were attached at the instance of the defendant and that subsequently the land was given back to the plaintiff, but that the crops which had been attached were damaged and in consequence thereof, the plaintiff alleged he was entitled to recover damages. Defendant pleaded that there was a petition filed by the defendant for proceedings taken against the plaintiff under S. 107, Criminal P. C., and that while the said proceedings were either pending or under contemplation, the paddy standing on the land was attached by the police and kept in the custody of a third person and that the damage that had been caused to the paddy was caused during the time that it was in such custody. Defendant was unable to establish that any Court was in possession of the said property.

Held: that the plaintiff was entitled to recover damages from him: A. I. R. 1926 Cal. 762; *Smith v. L. & S. W. Ry.* (1871) 6 C. P. 14; 7 Bom. 427; and 3 Bom. 74, *Rel. on*: *Peruvian Guano Co. v. Dreyfus*: (1892) A. C. 166, *Ref.* [P 231 C 2]

Manmathanath Roy—for Petitioner.

Satindra Nath Roy Chowdhury — for
Opposite Party.

Judgment.—This Rule has been issued to show cause why the decree passed by the Small Cause Court Judge of Barpeta, dated 31st March 1927, should not be set aside. The rule has been issued at the instance of the defendant in a suit. The plaintiff claimed damages from the defendant on the allegations that certain crops which had been grown by him were attached at the instance of the defendant and that subsequently the land was given back to the plaintiff, but that the crops which had been attached were damaged and, in consequence thereof, the plaintiff alleged, he was entitled to recover damages. The defence of the defendant, so far as it was necessary for the purpose of the argument that had been advanced on his behalf was that there was a petition filed by the defendant for proceedings being taken against the plaintiffs under S. 107, Criminal P. C., and that, while the said proceedings were either pending or under contemplation, the paddy standing on the land was attached by the police and kept in the custody of a third person named Ranjit Ram Keot and that the damage that had been caused to the paddy was caused during the time that it was in such custody. The defendant states in his petition to this Court that the said attachment was apparently made under the provisions of S. 146, Criminal P. C. It may be stated, however, that the materials on the record are wholly insufficient for the purpose of arriving at a definite conclusion as to the circumstances under which and the provisions of the law in consonance with which the said order of attachment was made. All that appears from the record is that the paddy was attached by the Police and kept in the custody of Ranjit Keot and that an order was passed by the criminal Court, on the 16th March 1926, which ran in these words:

This primarily is a matter for the civil Court to decide as to who should get the paddy. If the claim is decided here, it will not be final. Proceedings struck off.

The Munsif gave the plaintiff a decree for Rs. 54, that is to say, the price of 27 maunds of paddy calculated at the rate of Rs. 2 per maund.

The substantial contention that has been urged in support of the rule is to the effect that inasmuch as the paddy was not in the custody or possession of

the defendant, but that the police had made it over to a third person named Ranjit Ram Keot, it should be taken that such attachment was made under some sort of order legally passed by a Court of competent jurisdiction as a presumption should always be made in favour of the validity of an act done by a public servant, and, if that view be taken, the petitioner cannot be held responsible for any damages that may have been caused to the paddy. In support of this contention reliance has been placed upon the decision in the case of *Peruvian Guano Co. v. Dreyfus* (1) and a passage in *Mayne on Damages*, 10th Edn. p. 394, where the principles laid down in that case have been discussed. Broadly stated, the principle laid down by the House of Lords in that case was that, where the possession of some property becomes the possession of the Court, a person, at whose instance the rightful owner may have been deprived of his possession in respect of property no longer remains liable for any damages that may be caused to it.

To apply that principle to the present case it will be necessary to find such as was found in that case, that the paddy passed into the custody of the Court—a fact with regard to which there is absolutely no evidence and no attempt even appears to have been made on behalf of the petitioner to establish that it was really under the order of the Court that the paddy was taken possession of or that the possession of Ranjit Keot could in any sense be construed as being the possession of the Court. If the attachment that was made by the police was made in the exercise of those powers which the police have for the prevention of a breach of the peace, either with or without reference to a Magistrate, the latter not acting in his judicial capacity, it stands to reason that the attachment cannot be said to have been made under an order passed by a Court of competent jurisdiction and the person in whose custody the property is kept can hardly be said to be in possession on behalf of the Court. If the attachment was made under an order of the Magistrate under S. 146, Criminal P. C., of which, however, there is no evidence, it may be

said that the property was custodia legis and for certain purposes the possession of the Court will have to be treated as being the possession of the rightful owner for instance, as regards the question of limitation, such as was held in the case of *Abinash Chandra v. Tarini Charan* (2). So long, however, as the defendant is unable to establish that the Court was in possession it is obvious that he remains liable for all the damages that may have been caused to the property in respect of which he has wrongfully put the plaintiff out of possession. The principle was very well stated in the case of *Smith v. L. & S. W. Ry.* (3), where it was stated that in a case originating even in negligence :

the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

The principle applies with greater force to a case where it is not merely negligence but a wilful wrong that is committed. Such a person remains liable much more for the consequences,—at least for the natural consequences—of his wilful wrong. The facts that false allegations were made to the effect that the defendant himself was the owner of the paddy, having grown the same, and that upon the basis of such false allegations proceedings under S. 107, were sought to be instituted and that the plaintiff was kept out of possession of the paddy which really belonged to him, the paddy being taken by the police and made over to a third person for safe custody, these facts, taken together establish a case of wilful wrong as against the defendant and unless he is able to show that there are circumstances which would justify the Court in passing the order which would have the effect of enabling him to escape from the responsibility for the natural consequences of his act I think the plaintiff is entitled to recover damages from him. That an action of this description based on grounds such as appear in the present case is maintainable is apparent from the cases of *Mudvirapa Kulkarni v. Fakirapa Kenardi* (4) and *Goma Mahad v. Gokaldas Khimji* (5), and other cases which need not be specifically mentioned. I

(2) A. I. R. 1926 Cal. 782.

(3) [1871] 6 C. P. 14 (20)=40 L. J. C. P. 21=19 W. R. 230=23 L. T. 678.

(4) [1883] 7 Bom. 427.

(5) [1878] 3 Bom. 74.

(1) [1892] A. C. 166=66 L. T. 536=61 L. J. Ch. 749=7 Asp. M. C. 225

am accordingly of opinion that there is no reason to interfere with the decree that has been passed in this case and that, therefore, the Rule should be discharged.

The rule is accordingly discharged with costs one gold mohur.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 233

WALMSLEY AND MUKERJI, JJ.

Emperor

v.

Komoruddin Sheikh and others—Accused.

Jury Reference No. 24 of 1924, Decided on 24th July 1924.

(a) *Evidence Act, S. 114—The evidence of an accomplice must be viewed with all the suspicion which ordinarily attaches to it.*

Where the accomplice makes his confession and sticks to it, and he actually allows himself to be convicted upon it, no doubt to that extent, there is some sort of guarantee of its truthfulness, but he remains an accomplice with all the suspicion attaching to an accomplice, and his evidence must be viewed with all the suspicion which ordinarily attaches to the evidence of an accomplice. [P 234 C 1]

(b) *Criminal P. C., S. 307—Jury returning their unanimous verdict of guilty in spite of warning by the Judge—It was held to be a proper case for reference.*

Where the learned Judge, in delivering his charge placed before the Jury all the evidence and pointed out the grave defects in the case for the prosecution, and where, in spite of his warning, the jury were unanimous in finding all the accused guilty:

Held: that reference under S. 307, was proper.

A. K. Basu—for the Crown.

Krishna Kamal Moitra—for Complainant.

Walmsley, J.—This is a reference made under the provisions of S 307, Criminal P.C., by the Sessions Judge of Rajshahi. Four persons, Komoruddin Sheikh, Kadar Mandal, Majidullah Biswas and Jahir Mandal were placed on their trial upon a charge framed under S. 395, I.P.C. The story briefly was as follows: These men and others attacked the house belonging to one Iswar Chunder Ghose on the night of 28th July last year. Iswar Ghose fired a gun injuring one of the men who died in his court yard. The other men got away. It is said that the in-

jured man was one Mohamed and that he named several of his accomplices. One Enaz was subsequently arrested and, immediately after his arrest, he made a confession and, upon his plea of "guilty," he was convicted by the learned Judge. He afterwards gave evidence in this case. The present accused were arrested before Enaz, and the enquiry before commitment was taken up by one Magistrate and finished by another. Then apparently Iswar Chunder Ghose was placed on his trial in regard to the shooting of the man who was shot in his court yard. He was discharged in January and the present case came on for trial in March.

The trial occupied some days, over twenty witnesses being examined. The learned Judge, in delivering his charge which I think was extremely fair, placed before the jury all the evidence and pointed out the grave defects in the case for the prosecution. In spite of his warning the jury were unanimous in finding all the accused guilty. The learned Judge thinks that that verdict is wrong and feels unable to accept it and, in consequence, he has made this reference under S. 307, Criminal P. C.

Now, with regard to the occurrence of the dacoity, I do not think it necessary to express any opinion. It is enough to say in passing that there are many features in the story for the prosecution which give rise to considerable suspicion. The real question in the case is whether these four men were actually identified as taking part in the dacoity. I cannot but think that if more attention had been paid to this branch of the matter in the lower Court by those who represented the accused, the verdict might have been different.

Now, the evidence against the accused persons may be considered as of four kinds. First, there is the evidence of two witnesses who say that they saw some of these men going away shortly after the occurrence. The witnesses who say so are Mohesh Chunder Ghose and Panchananda Ghose. The former says that he recognized Raisuddin who was not on his trial and Jaher. The latter says he recognized Kader, Komoruddin and Enaz. Now, the difficulty about accepting this evidence is: first, that the Sub-Inspector says that those witnesses told him nothing of the kind; and, secondly, that the evidence of the other

persons who gathered at the house shows that there was nothing said by those men about the recognition of the dacoits when they came to the house.

The next piece of evidence is the evidence derived from the injured man Mohamed. It is said that, as he lay dying, questions were put to him as to who were the persons who accompanied him and he gave several names. The names, according to the witnesses, are Kader, Komoruddi, Raisuddi and Nager. The chowkidar of the house Krishna Tirandaz adds another one Majit. But his evidence is extremely unsatisfactory. Now, the difficulty about accepting this evidence, as a statement made by Mohamed, is great. The first point is that, although the witnesses all say that the injured man was Mohamed, the first case set up by the prosecution was that nobody knew who he was and a witness was actually produced in the Sessions Court from another village to say that the man he found lying in the court yard was identified by him as Mohamed. Further, the evidence about the questions that were put to him and the persons who were present when the questions were put and the answers given is very unsatisfactory.

The next piece of evidence is the statement of Enaz. This man was arrested on 4th November. He made his confession the next day, 5th November. It is true that he stuck to it and he actually allowed himself to be convicted upon it. To that extent there is some sort of guarantee of its truthfulness, but he remains an accomplice with all the suspicion attaching to an accomplice. In cross-examination he says that he made this confession in the hope of being pardoned, which I take to mean "in the hope of being made an approver," and it is quite possible; but there is no evidence to that effect that some hope was held out to him in that respect. Whether that is so or not he is an accomplice and his evidence must be viewed with all the suspicion which ordinarily attaches to the evidence of an accomplice.

The last piece of evidence is the statement made or said to have been made by Jahir to his father's landlord, Solomon, shortly after the occurrence. It seems to me very strange that a person who has committed a dacoity should, before anybody has begun to suspect him go and say

that he has committed the dacoity and ask what is to be done and tell his landlord all about it. Jahir says that he did not make this statement and it is difficult to believe the story told against him.

This is all the evidence against the accused except a few fragments which have been placed before us by the learned counsel appearing for the Crown. He has pointed out that Komoruddir was seen with Enaz shortly after the occurrence; that Kader told one of the witnesses about the affair on the following morning before news of it from other sources reached the neighbourhood; and that Majidulla who is a cultivator, was reported absent by the chowkidar on the night of the occurrence. These are very slender pieces of evidence. Taken on the whole, I think the learned Judge's comments, as contained in his letter of reference on the evidence connecting those accused persons with the crime, are correct and show a proper estimate of their value. In my opinion, therefore, the view taken by the jury is contrary to the evidence and ought not to be accepted and I agree with the learned Judge in thinking that the accused are entitled to a verdict of not guilty. The result is that, in my opinion, the reference ought to be accepted, the accused acquitted and set at liberty.

Mukerji, J.—I agree.

R.D.

Reference accepted.

A. I. R. 1928 Calcutta 234

PAGE AND DUVAL, JJ.

Jyotish Chandra Sen—Defendant 1—Appellant.

v.

Har Chandra Saha and others—Plaintiffs—Respondents.

Appeal No. 1415 of 1925, Decided on 16th December 1927, from appellate decree of Addl. Sub-Judge, Noakhali, D/- 13th March 1925.

Civil P. C., O. 38, Rr. 9 and 11—Attachment ends when suit abates.

When a suit abates and comes to an end on the death of a party, the attachment before judgment dies with it : 13 C. L. J. 243 and 45 Cal. 780, *Foll.* [P 235 C 1]

S. C. Basak, Chandra Sekhar Sen and Gopendra Nath Das—for Appellant.

Upendra Kumar Roy—for Respondents.

Page, J.—The decree in this suit cannot stand. The dispute has arisen in this way. The plaintiff-respondent brought a suit for money against one Uma Charan who was the owner of the property in dispute and before judgment obtained an order for attaching the property on 31st August 1915. On 11th November 1915 he obtained an ex-parte decree against Uma Charan. It is common ground, however, that between the date of attachment and the date of the decree Uma Charan died, the result being that as against him the decree was a nullity. As an application was not made for substituting the heirs within the time limited by law, the suit abated and died. In August 1916, after the suit had come to an end, Uma Charan's heirs sold the property in dispute to defendant 1 who alone contested the suit, the other defendants being impleaded merely as pro forma defendants. Subsequently, on 5th January 1918, an application was made on behalf of the plaintiff to set aside the heirs in place of Uma Charan. This application was granted, and, on 5th April 1918, the plaintiff obtained a second ex-parte decree against the heirs of Uma Charan. Thereafter he issued execution and, on 1st November 1919, purchased the property in dispute at the execution sale. As defendant 1 who had purchased the property in the manner which I have stated from Uma Charan's heirs, was not prepared to give the plaintiff possession, the present suit was lodged for khas possession and a declaration of the plaintiff's title to the property. Both Courts have decreed the plaintiff's suit.

But for the fact that the two Courts have passed a decree in favour of the plaintiff I should have thought that the plaintiff's case was unarguable. It depended upon the attachment before judgment being in existence actually or constructively until after the second ex-parte decree was obtained. But when the suit abated and came to an end on the death of Uma Charan the attachment died with it. In my opinion the appeal is concluded against the respondent both upon principle and by *Sasirama Kumari v. Meherban Khan* (1) and *Abdul Rahman v. Amin Sharif* (2). The learned vakil, on behalf of the respondent, sought to

distinguish these cases upon the ground that in these two cases the suit came to an end because it was dismissed and a suit which is dismissed differs from a suit which abates. True, the cause of its death is different, but in either case, it is equally dead, and, if it is dead the attachment before judgment dies with it. The second point which is taken is that the effect of the order setting aside the abatement and restoring the case was to revive also the attachment before judgment. These two cases to which reference has been made are authorities to the contrary. There is no substance in the plaintiff's case. The appeal, therefore, will be allowed, the decree of the appellate Court and the decree of the Court of first instance set aside and the suit dismissed with costs in all the Courts.

Duval, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 235

GREAVES AND CHOTZNER, JJ.

Gobinda Chandra Roy — Accused — Petitioner.

v.

Abdul Rashid — Complainant — Opposite Party.

Criminal Reven. No. 1023 of 1923, Decided on 31st January 1924.

Penal Code, S. 478—Goods subject of the mark in question must be proved to be manufactured by complainant and to be reputed to be his manufacture alone.

Under S. 478 complainant has to prove that the goods which are the subject of the mark are manufactured and sold by himself and that goods are known in the market as being of his manufacture alone. [P 236 C 2]

Where the article bearing the mark was proved to have been manufactured and sold by both the complainant and the accused on a large scale and there was no sufficient evidence to support the view that the article was reputed to be the complainants' exclusive manufacture:

Held: no offence was committed. [P 237 C 2]

P. L. Roy and Satindra Nath Mukherjee—for Petitioner.

K. N. Chowdhury and Probodh Kumar Das—for Opposite Party.

Judgment.—The accused Gobinda Chandra Roy has been convicted in this case by an-Honorary Presidency Magistrate under the provisions of Ss. 482 and

(1) [1911] 13 C. L. J. 249=9 I. C. 918.

(2) [1918] 4 Cal. 780=44 I. C. 229=22 O. W. N. 927.

486, I. P. C. The conviction took place on the 31st August of last year and the accused was sentenced to pay a fine of Rs 50 in respect of the conviction under S. 486 and to pay a similar fine for the offence under S. 482. It appears that since the year 1918, or 1920 as the petitioner alleges, the complainant Abdul Rashid has sold on the market in Calcutta soap on which appears on the front a picture of Mr. Gandhi, at the top of which picture appears the word "Mahatma" and at its foot the word "Gandhi." On the back appear the letters "A. R. M. Ishaq" and the words "sole agent" and the letters "A. S. F." also appear which mean "American Soap Factory." The accused has been recently selling on the market soap similar in shape and colour, and bearing on the front a picture of Mr. Gandhi somewhat alike, but not indentical with the picture on the complainant's soap, and beneath the picture appears the name of Mr. Gandhi. On the back are the words "Indian Soap Company." Now the learned Magistrate has propounded three questions for consideration. : Firstly, "Whether the complainant has the exclusive right to the trade mark used on his soaps which formed the subject-matter of the charges." Secondly "Has the right of the complainant been infringed by the accused"; thirdly, "are there circumstances to show that the accused is protected under the exception under Ss. 482 and 486"? He has found that the complainant has proved the user of the trade-mark and that soap manufactured by the complainant is known in the bazar as "Gandhi Brand Soap." He further found that there was satisfactory evidence to show that the complainant's "Gandhi Brand" soap had extensive sales in the market both in Calcutta and in the mofussil, and he further found that, having regard to the warning given to the accused and to his continuance of sales after such warnings, he did not act innocently and that he was not protected by the exception.

First of all, we have to see, before considering the sections themselves, what is the evidence which was before the Magistrate upon which he convicted the accused. There was a considerable volume of evidence to show that the complainant made extensive sales of the Gandhi mark soap in the markets. Abdul Rashid him-

self says that his factory was established in about 1918 and that his Gandhi mark soap had extensive sales in the markets in Calcutta and in the mofussils. The witness Abdul Samad stated that the Gandhi mark soaps had extensive sales. Witness Abdul Latiff stated that he used to purchase 50 or 60 cases of Gandhi mark soaps daily and to the value of Rs. 7,000 or Rs. 8,000 a year. He does not specifically state that his purchases were from the complainant, but I think that there is no doubt that this is what he meant. Abdul Majid stated that Gandhi brand soap belonged to the complainant's factory and that from last year he had purchased such soaps from the complainant's factory. Abdul Aziz stated that since 1927 he had been buying Gandhi brand soap from the complainant's factory and that he had been making large purchases of such soaps. Witness Mofizuddin stated that in the market Gandhi brand soap was known as the complainant's brand.

It seems to me that this evidence is not sufficient to establish what it is necessary for the complainant to establish having regard to the provisions of S. 478. Under that section he has to prove that the goods which are the subject of the mark are manufactured and sold by himself and that such goods are known in the market as being of his manufacture alone, and it seems to me that the evidence to which we have referred is not sufficient to support the claim put forward on the complainant's behalf, namely, that in the market Gandhi brand soap is known as being of his manufacture and of his manufacture alone. But when we consider the evidence given on behalf of the accused the complainant's evidence is of very little value. Witness Jogesh Chandra Ghosh, who was called on behalf of the accused, stated that since the year 1918 the National Soap Factory Company had been making and selling Gandhi brand soap in considerable quantity, and this is supported by the evidence of Ershad Ali Mallick who stated that his firm had been publicly selling Gandhi brand soap in the bazar for more than a year. Witness Roza Meah stated that Gandhi mark soap had been on the market for years and that he had been selling the accused's Gandhi brand soap for about four years. The evidence of

Prosanno Kumar Dutta is to the same effect and so is that of Santosh Kumar Das Biswas. Lastly, witnesses Jogendra and Pran Bandhu stated that by Gandhi brand soap no soap of any particular company is meant. We think, having regard to the evidence put forward for the prosecution and the evidence put forward for the accused that it has not been sufficiently or satisfactorily established that Gandhi brand soap is generally known in the market as soap manufactured by the complainant. We think that there is abundant evidence that there have been sales of Gandhi brand soap by the National Soap Factory and others for a considerable period, and we do not think that the reputation established by the complainant according to the evidence would justify a conviction under Ss. 482 and 486. This, we think, is sufficient to dispose of this matter because the conclusion that we have come to upon the evidence is that the complainant has not proved that he has established in the market such a reputation as to justify him in claiming for his soap, exclusive use of Gandhi's portrait as a trade-mark in respect of his soap.

It is not necessary to refer to several other matters that were urged before us on behalf of the petitioner, namely, the fact that the declaration made on behalf of the National Soap Factory in respect of their Gandhi mark soap was made some three weeks prior to the declaration made on behalf of the complainant, nor I think is it necessary to deal with what is stated to be a wrong conclusion by the Magistrate, that the complainant started making soaps in the year 1918, nor to the mistake which the Magistrate has made with regard to Ex. (8) which he states is the complainant's stock-book whereas it is evidently the stock-book of the accused.

The result is that we do not think that there was before the Magistrate sufficient evidence to justify him in finding that the complainant's soaps were entitled to the exclusive user of the portrait of Mr. Gandhi or sufficient evidence to show that the soap bearing that impression was known in the market as the soap of the complainant and of no other maker. There is abundant evidence, we think, that the use of the Gandhi's portrait upon the soap has been common for four or five years in the bazar

and that no manufacturer has established any exclusive rights of user of the Gandhi's portrait or name in respect of soap.

Having regard to the conclusion at which we have arrived the conviction is clearly bad and must be set aside, and we accordingly make the Rule absolute and direct that the fines, if paid, will be refunded.

D.D.

Rule made absolute.

A. I. R. 1928 Calcutta 237

RANKIN, C. J., AND CHOTZNER, J.

Kanai Lal Saha—Appellant.

v.

Makhan Lal Saha and another—Respondents.

Criminal Appeal No. 585 of 1927, and Civil Revn. Petn. No. 11 of 1927, Decided on 24th Nov. 1927, from order of Dist. Judge, Faridpur, D/- 25th June 1927.

Civil P. C., S. 115—Munsif holding that he had no jurisdiction to direct a complaint to be made under S. 476, Criminal P. C.—Appellate Court not deciding the question of jurisdiction but itself acting under S. 476-B—Procedure is irregular.

Where a Munsif, under S. 476, refused to direct a complaint to be made on the view that he had no jurisdiction in the matter, and an appeal was taken to the District Judge under S. 476-B, who, without deciding the question whether the Munsif had jurisdiction or not, purported to act under the section :

Held: that the District Judge erred in holding this view. It was also an error with respect to procedure. It is a material irregularity and the High Court should interfere in such a matter under S. 115. [P 238 C 1, 2]

Suresh Chandra Talukdar—for Appellant.

Khundkar—for the Crown.

Rankin, C. J.—In this case the learned District Judge of Faridpur has made an order directing that a complaint should be made against the appellant for an offence under S. 195 (i) (c), Criminal P. C., in respect that he forged a receipt and used that document in evidence in a certain suit before the Court of the 2nd Munsif of Goalundo knowing it to be forged.

The Munsif in the suit found that the receipt was a forgery and the two defendants applied to the Munsif for an order directing that a complaint should be made to a Magistrate against the present appellant. Before that application was

disposed of the judicial officer in question was transferred and the case was by the order of the District Judge transferred to the Court of the first Munsif of Goalundo. That learned Munsif of Goalundo when the matter came before him under S. 476, Criminal P. C., refused to direct a complaint to be made on the view that he had no jurisdiction in the matter, he not being the Court referred to in S. 476 in respect that the alleged offence had not been committed in or in relation to a proceeding in his own Court but had been committed, if at all, in relation to proceeding in the Court of the Second Munsif of Goalundo who had tried the case. That being his view the learned First Munsif thought that he had no jurisdiction.

An appeal was taken to the District Judge under S. 476-B, and the first thing that the learned Judge had to decide was whether the view as to jurisdiction taken by the Court from whose order an appeal was being brought to him was right or wrong. If the learned First Munsif of Goalundo had no jurisdiction to make a complaint, and had rightly refused to make a complaint, the appeal should have been dismissed upon that ground. On the other hand, if the learned District Judge took the view that the learned First Munsif of Goalundo had jurisdiction, but had wrongly held that he had no jurisdiction then he would be entitled to make a complaint under S. 476-B. Upon the former view that there was no jurisdiction in the First Munsif of Goalundo, it might or might not have been proper for the learned District Judge to entertain an application if made under S. 476-A, and in that event, whether he granted the application or refused the application, an appeal would lie to this Court. This Court has already held that no appeal lies from an order made by a superior Court in its appellate powers under S. 476-B. It is entirely wrong, however, for the learned District Judge to think that whether or not the First Munsif of Goalundo had jurisdiction under S. 476, he, the learned District Judge, on an appeal therefrom, could make a complaint which the learned First Munsif could not have made. It seems to us, therefore, that the order before us is wrong in the sense that the learned District Judge has proceeded irregularly without enquiring properly into the correctness of the view

taken by the First Munsif of Goalundo to the effect that there was no jurisdiction in his Court to entertain this particular application for complaint.

We cannot interfere with the order, however, as a matter of appeal, but it does seem to us that the error committed by the learned District Judge falls within S. 115, Civil P. C. It was an error with respect to jurisdiction. It is also an error with respect to procedure. It is a material irregularity and the view taken by the learned District Judge may operate to deprive the present appellant of a right of appeal. If the true view be that the learned District Judge's only power to make a complaint was, in the circumstances, under S. 476-A, it is quite clear that the erroneous procedure adopted in this case has deprived the appellant of a right of appeal. In these circumstances we must make an order sending this matter back to the learned District Judge in order that he may decide whether or not the Court from which the appeal was brought, rightly or wrongly, held that it had no jurisdiction. If it rightly so held then the appeal should be dismissed. It may or may not then happen that an application will be made to the learned District Judge under S. 476-A. We say nothing to limit the discretion of the learned District Judge in that event. On the other hand, if the learned District Judge takes the view that the First Munsif of Goalundo had jurisdiction to order a complaint, and had wrongly refused to do so, then it would be possible for him to make a proper order under S. 476-B, directing that a complaint should be lodged.

The appeal is dismissed, but an order is made, as stated, under S. 115, Civil P. C.

Chotzner, J.—I agree.

N K.

Appeal dismissed.

A. I. R. 1928 Calcutta 238

RANKIN, C. J., AND CHOTZNER, J.

Karma Urang—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 534 of 1927, Decided on 2nd December 1927, from order of Sess. Judge, Sylhet-Cachar, D/-11th May 1927.

Penal Code, S. 84—Test of insanity given.

To ascertain a person is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law, a very common test is to ask, in the circumstances, whether the man would have committed the act if a policeman would have been at his elbow.

[F 240 C 1]

Suresh Ch. Talukdar and Parimal Chandra Guha—for Appellant.
Khundkar—for the Crown.

Rankin, C. J.—The appellant in this case has been tried for the murder of his father on the 12th December 1926 in the morning before 8 o'clock. He has been convicted and sentenced to transportation for life and the real question in this appeal is whether or not he ought to be dealt with under the provisions of the law which apply to a person who, at the time of doing the act, by reason of unsoundness of mind, was incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. That is the test laid down by S. 84, I. P. C.

The story is a most extraordinary one. The appellant, his brother and his father were living together and the appellant and his father have been proved to have been on the best of terms. The brother's story is that on the morning in question when he woke up his father and his brother had gone out and it seems clear that soon after leaving the house the appellant with a dao cut off his father's head. He thereupon picked up the head wrapped it in something and was proceeding along the road to Silchar Court. He was seen by witness Saiyad Ali about the time he had passed the thana. Saiyad Ali having gone and reported to the thana what he had seen, constables overtook the accused who was walking quite in an ordinary way and persuaded him quietly to come back to the thana and to tell his story to the Assistant Sub-Inspector. The story he told was that he had a dream and that in that dream goddess Kali appeared to him and told him that either he would have to kill his father or his father would kill him. It would seem that this dream contained other elements; in particular, it contained the element that his father was a descendant of the goddess Kali and also that his father's tongue was black and that he was to take the head to the Court at Silchar.

When the story was first told to the

Assistant Sub-Inspector the appellant was taken back to the house. He was taken to the threshing ground where his father's body lay, and the tea garden doctor who has given evidence saw him on that occasion. The accused told him that

the previous night he had dreamt that if he did not kill his father his father would kill him. He said that Kali told him so in his dream. Kali said to him that his father's tongue was black and that his father was a descendant of the goddess Kali. He told me that his father would have killed him and so he killed his father. He told me that he dreamt that he had taken the head of his father to Silchar Court. He said that when he was bringing the head to Silchar he was stopped on the way and could not bring it. He said that his dream could not be realized as he could not take the head to Silchar. He told me this at the threshing floor. He was excited and his eyes were blood shot.

On the 13th December, i. e., the day after the occurrence the appellant made a confession before a Magistrate in which he said that unless he killed his father, he would die. He was under the observation of the Civil Surgeon for a considerable time because the occurrence having taken place in December the Magisterial enquiry was in March and the trial was in May. The Civil Surgeon said that the appellant had definite delusion, which passed off after a couple of months, that he could not tell right from wrong, that he was definitely insane and said that he wanted to dedicate his father's head to the goddess Kali. The Civil Surgeon said that from the story told to him he got the impression that the accused thought that he was ordered by Kali to kill his father. Witness Fagu the appellant's brother said that when the accused was brought to the threshing ground on 12th December he said: "I offer my father to the goddess Kali."

Now, on such facts as these a question arises which is a very difficult one; but the main ground of the decision of the learned Judge is that he does not think that it is proved that the appellant was under the impression that he was ordered to kill his father. He thinks the position merely is that the man was under a delusion that unless he killed his father his father would kill him; and accordingly, of the three assessors two for that reason, take the view that he was not insane and the learned Judge agrees with that view.

It is no doubt plain enough that under the doctrine in McNaughten's case there may be cases where the correct application of the law is to hold a man amenable for his action assuming merely that his particular delusion is true; but the proposition which governs the present case in the first instance is that contained in S. 84, I. P. C. We have to see whether this man is shown to have had no knowledge of the nature and quality of his act or, as the statute says:

incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

A very common way of applying that test is to ask, in the circumstances, whether the man would have committed the act if a policeman had been at his elbow. Examining this case from that point of view I think it is very noticeable that this man having committed the deed, immediately picked up the head of his father and was proceeding to Silchar Court. The witness Saiyad Ali, who saw him first, said that he was not running. He did not proceed to run, but when the constables overtook him he came quietly back to the thana. He explained that he was going to Silchar Court and why he was going to Silchar Court, namely because of a dream which he had on the previous night. That seems to me to be the best evidence in this case upon the question whether he knew that what he was doing was "wrong or contrary to law"; and in view of that evidence, which is supported by other evidence in the case, particularly by the very strong evidence of the Civil Surgeon who is not only more competent to give but had far more opportunity than anyone else of forming a correct opinion, in my judgment this appeal should be allowed, the conviction and sentence should be set aside, and we should send this case back to the learned Sessions Judge of Cachar with a direction to deal with it under S. 471, Criminal P. C. on the basis that this man was not at the time of doing the act, by reason of unsoundness of mind, capable of knowing the nature of the act, or that he was doing that was either wrong or contrary to law. We come to the finding as required by S. 470, Criminal P. C., that he did the act, but that he was of unsound mind in the sense explained at the time. We accordingly direct that he be detained in safe

custody in the Mental Hospital at Tezpur. We direct the Sessions Judge to take the action required by R. 54 of Assam Government Rules relating to lunatics.

Chotzner, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 240

GREAVES AND PANTON, JJ.

Chaito Kalwar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 822 of 1923, Decided on 8th January 1924.

Criminal P. C., S. 403—Trial under Ss. 407, 411 and 414, Penal Code — Subsequent trial under S 54-A, Calcutta Police Act—Goods forming the subject in both cases identical—Second trial was held bad.

Where the goods which formed the subject of a charge under Ch. 17, Penal Code, and of a charge under S. 54-A, Calcutta Police Act were identical.

Held: that the accused should have been tried for all these offences at one trial and should not have been subjected to two trials in respect of his possession of the same goods.

[P 241 C 1]

Manmotha Nath Mukherjee and Herambo Chandra Guha—for Petitioner.

Manindra Kumar Banerjee — for the Crown.

Panton, J. — This rule is directed against the petitioner's conviction under S. 54-A, Calcutta Police Act. The police charged him and other persons under Ss. 407, 411 and 414, I. P. C. There was also a charge against him under the section just mentioned. An Honorary Presidency Magistrate tried these persons on 3rd May last and on that date recorded an order:

There is no good evidence against the accused. They are discharged under S. 253, Criminal P. C.

It appears that the petitioner was then again placed before the Honorary Magistrate to be tried for the offence under S. 54-A, whereupon the Magistrate made the following order

Put up before the Chief Presidency Magistrate. I do not wish to try this case as I have tried the connected case and this may be sent to some other Magistrate.

On this Mr. Wajid Ali, exercising apparently the powers of the Chief Presidency Magistrate, recorded the order

"To my file" and adjourned the hearing to 16th May. On that date the petitioner appears to have raised an objection to his trial but the hearing was further adjourned to 29th May when a written petition was put in on his behalf claiming that he had already been acquitted of the charge on which he was then being tried. The Magistrate's order on this was

Filed. I think the case under S. 54-A, Act 4, 1866 may proceed

and proceed it did and resulted in the conviction which is the subject of this rule. It is not clear from an examination of the record whether it was intended to exclude the charge under S. 54-A from the first trial; any way, the Honorary Magistrate, by speaking of it as a "connected case," seems to have been under the impression that this charge had not been before him, an impression which resulted, I suppose, from the charge not having been pressed at the trial.

We think that in the present case, when the goods which formed the subject of the charge under Ch. 17, I. P. C., and of a charge under S. 54-A, Calcutta Police Act, were identical, the petitioner should have been tried for all these offences at one trial and should not have been subjected to two trials in respect to his possession of the same goods. We are of opinion that for this reason the second trial was bad and that the conviction in it must be set aside.

The rule is accordingly made absolute. The goods if still in existence, will be returned to the petitioner. The petitioner will be discharged from bail.

Greaves, J.—I agree.

R.K. *Rule made absolute.*

A. I. R. 1928 Calcutta 241 (1)

SUHWARWADY AND PANTON, JJ.

(*Sheikh*) *Khairat Ali and others*—Petitioners.

v.

Wahed Ali—Opposite Party.

Criminal Revn. No. 394 of 1925, Decided on 10th July 1925.

Criminal P. C., S. 439—Party 'in contempt—Practice.

Party who was in contempt of Court, was not heard in revision. [P 241 C 2]

Probodh Chandra Chatterji—for Petitioners.

Sajindra Nath Mukherji — for Opposite Party.

Judgment.—It appears from a perusal of the record that warrant has been issued against the petitioners by the trial Court. The petitioners without appearing before the trial Court filed a petition of motion before the Sessions Judge and prayed for an order for stay of further proceedings. That application having been dismissed they moved this Court on 25th May last but have not obeyed the summons issued in the meantime by the Magistrate for their appearance on 27th May 1925. We are told, and it is not denied, that they have not yet entered appearance. As they are in contempt we are not prepared to hear this rule. Rule accordingly discharged.

R.K.

Rule discharged.

A. I. R. 1928 Calcutta 241 (2)

GREAVES AND GRAHAM, JJ.

Sultan Hasan Mirza—Judgment-debtor—Appellant.

v.

Srimati Nanki Bibi—Decree-holder—Respondent.

Appeal No. 193 of 1922, decided on 20th June 1924, against order of Sub-Judge, 1st Court of Zillah 24 Pergannahs, D/- 18th March 1922.

(a) *Civil P. C., O. 21, R. 22—No notice is necessary where proceedings are in continuation of previous execution.*

Where the proceedings are in fact proceedings in continuation of the prior execution cases no notice is necessary to the judgment-debtor under the provisions of O. 21, R. 22.

[P 242 C 2]

(b) *Civil P. C. S. 48—Application within three years of previous proceedings but after 12 years from the decree asking for a new relief by attachment and sale of moveables is barred under S. 48.*

Where an application for execution was made within three years of the previous execution proceedings for rateable distribution but after 12 years from the decree wherein the decree-holder asked that the heir of the judgment-debtor should be brought on the record and that notice should go to him under the provisions of O. 21, R. 22, and further asked that the amount due should be realized by the attachment and sale of the judgment-debtor's moveables and that the petition should be put up with the records of the previous execution cases and that execution proceedings might be carried on in continuation thereof:

Held: that the proceedings should be treated as an application in continuation of the previous execution cases and prayer to bring the heir on the record and issuing notice to him would not make it a new application, but the ap-

plication, in so far as it sought to attach the moveables, was a new application for execution within the provisions of S. 48 and was clearly barred by time. [P 242 C 2 P 243 C 1]

Basak and A. S. M. Akram—for Appellant.

P. C. Mitter, Ambika Pado Choudhury, Surendra Madhab Mullick and Satyendra Kumar Ray Choudhury—for Respondent.

Judgment.—This is an appeal by the judgment-debtor in execution proceedings. The point urged before us is that under the provisions of S. 48, Civil P. C., the decree-holder's claim is barred by limitation. The material facts which it is necessary to state for the purpose of understanding the point which arises in this appeal are as follows :

The decree-holder obtained his decree on 30th May 1901, and in execution of that decree some decree of the Judicial Committee was attached in execution. There seem to have been various proceedings from time to time in execution in various years down to 1913 and 1914. In 1914 there was an appeal to this Court in respect of an order that had been made in favour of the decree-holder. The contention raised in that appeal was a similar contention to what is now raised before us, namely, that the decree-holder's rights were barred under the provisions of S. 48. The judgment of this Court was delivered in the year 1916 and it was there held that S. 48 had no application inasmuch as various proceedings that had been taken were not fresh proceedings in execution, but merely proceedings in continuation of a prior execution. Then, in 1918, a further application was made by the decree-holder to this Court. In that application the decree-holder asked that the proceedings should be treated as continuation of the execution cases which were therein mentioned and that an order should be passed for rateable distribution of the amount that might be realized from the decree of the Privy Council that had been attached. The order that was made on that application was passed on 10th September 1918 dismissing the application. The proceedings, as I have already stated, were for rateable distribution of the amounts received in respect of the decree of the Judicial Committee, and it seems to us that the reason for the order of 10th September 1918, and for the statement of the vakil who appeared for the

decree-holder, namely, that no further steps remained to be taken, was the fact that at that time there was no fund available for rateable distribution realized by execution of the decree of the Judicial Committee. So far as the proceedings of 1918 are concerned one point has been made on behalf of the appellant, that these proceedings really are of no effect inasmuch as no notice of the proceedings was given to the judgment-debtor; but we think that there is nothing in this point because, as they were in fact proceedings in continuation of the prior execution cases, no notice was necessary to the judgment-debtor under the provisions of O. 21, R. 22. The provisions of that order only provide that notice should be given if an application is made more than a year after the decree or if it is made against the legal representative of a party to the decree and, therefore, if the proceedings of 1918 are to be treated as merely a continuation of the previous execution proceedings no notice to the judgment-debtor is necessary under the provisions of O. 21, R. 22, and, in our opinion, the proceedings of 1918 were not fresh proceedings in execution but were proceedings in continuation of the previous execution cases.

Then we come to the present application against the order in respect of which this appeal has been presented. That application was made on 27th June 1921; that is to say, within three years of the 1918 proceedings. The application of 27th June 1921 states that the receiver who had been appointed in respect of the decree of the Judicial Committee was dead and that there was no other receiver. The decree-holder asked that the heir of the judgment-debtor should be brought on the record and that notice should go to him under the provisions of O. 21, R. 22. He further asked that the amount due should be realized by the attachment and sale of the judgment-debtor's moveables. He also asked that the petition should be put up with the records of the previous execution cases and that execution proceedings might be carried on in continuation thereof. The order against which this appeal is presented was passed on 18th March 1922 and the order is that the proceedings should be treated as an application in continuation of the previous execution cases and the learned Judge holds that on this basis

the application was within time. He declined to make any order with regard to the moveables and he stated that the pleader for the decree-holder said that he would not press for the attachment of the moveables and the learned Judge stated that clearly the applicant was not entitled to realize the decretal amount by attachment of the moveables. Now it seems to us that the application of 27th June 1921, in so far as it sought to attach the moveables, was a new application for execution within the provisions of S 48, Civil P. C., and was clearly barred by time, and the only point we have got to decide is whether the application, so far as the second part of it is concerned, can be treated as being in continuance of the previous execution cases, and the conclusion we have come to is that we ought to so treat it and we think that the Court below has rightly decided the point.

One further point remains, namely, with regard to the application for notice to the heir of the judgment-debtor. I have felt some little doubt that but the conclusion I have come to is that that application does not necessarily make it a new application for execution within the provisions of S. 48. The result, therefore, is that we think that the Court below was right in treating the application as one in continuance of the previous execution cases and that the appeal accordingly fails.

It is, of course unfortunate that these execution proceedings should be so long protracted and the decree obtained so long ago as May 1901 should still be unsatisfied and still be incapable of being put in execution. But we can only take the provisions of the law as we find them, and, for the reasons as already stated, we think that the order of the Court below is quite correct and that, despite the lapse of time, it is still open to the decree-holder to execute his decree in the manner in which execution is sought, that is to say, in continuance of the prior proceedings. The respondent is entitled to his costs in this appeal. Hearing-fee, two gold mohurs.

R D.

Appeal dismissed.

* A. I. R. 1928 Calcutta 243

MUKERJI, J.

Lalji Ram—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 708 of 1924, Decided on 18th September 1924.

* (a) *Criminal P. C., S. 244—No admission of guilt—Procedure under S. 244 adopted—Magistrate cannot afterwards take the plea of guilty from the accused.*

Where a Magistrate adopts the procedure prescribed by S. 244 on the footing that there was no admission of guilt on the part of the accused person, he is not competent to take a further plea from the accused person of guilty and relieve himself of the duty of examining other prosecution witnesses. [P 244 C 2]

* (b) *Criminal P. C., S. 242—Provision of law must be strictly followed.*

The law enjoins, and that for a very good reason, that the admission shall be recorded as nearly as possible in the words used by the accused. Omission to comply with the law in this respect cannot be countenanced as it invariably leads to complications. [P 244 C 2]

(c) *Calcutta Municipal Act (1923), S. 424—Scope.*

Where the procedure prescribed by S. 424 of the Act was not followed, conviction under S. 412 was set aside.

Rajendra Bhusan Baksi — for Petitioner.

Judgment.—This Rule has been issued to show cause why the conviction and sentence of the petitioner under S 412, Calcutta Municipal Act of 1923, should not be set aside. The Rule has been issued on three of the grounds stated in the petition. In answer to the Rule the learned Magistrate has submitted an explanation to this Court in which the grounds upon which the Rule has been issued are not attempted to be met. He relies upon the record which he made of what was supposed to be an admission of guilt on the part of the petitioner. The learned Magistrate says this in his explanation:

I have no personal recollection of what took place at the hearing, but it is impossible that I should have recorded the admission of the defendant who appeared without his having done so. On the charge being explained Lalji Ram admitted and pleaded guilty and thereupon I found him guilty and fined him Rs. 60, in default two months imprisonment.

The petitioner, in his petition to this Court, alleged that he did not plead guilty. He says that when he was called upon to plead he only said that the bottles had been taken from his shop and he remained silent and he apprehends that

his silence was construed by the learned Magistrate as an admission of his guilt.

Of late several cases have come up to this Court from the Court of the learned Municipal Magistrate in which convictions were passed by him upon records of pleas as to admission of guilt on behalf of accused persons, and after such convictions this Court has been moved on the ground that there was no plea of guilty. It always becomes difficult in such cases to determine what exactly happened, unless the provisions of the law as to procedure are strictly followed. The present case was one under S. 412, Calcutta Municipal Act. It was a summons case and the procedure to be adopted for the trial of this case is what is laid down in the Code of Criminal Procedure with regard to the trial of summons cases. It appears that summons in this case was issued on 30th May 1924, and the date fixed for the case was 20th June 1924. On that day the petitioner was not present and the case was adjourned to 18th July 1924. On 18th July, presumably in the presence of the petitioner who had by that date appeared, the Food Inspector, Mr K. D. Banerjee, was examined as a witness on behalf of the prosecution and the case was thereafter adjourned to 25th July for further evidence. On 25th July the following note was made by the learned Magistrate:

Lalji admits and pleads guilty and I fine him Rs. 60; in default two months imprisonment.

It is difficult to see what was the procedure that was being adopted by the learned Magistrate in connexion with the trial of this case. In a summons case to which the provisions of Ch. 20 of the Code are applicable under S. 242, Criminal P. C., when the accused appears, or is brought before the Magistrate the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted. Under S. 243 if the accused admits that he has committed the offence of which he is accused his admission shall be recorded *as nearly as possible in the words used by him*, and if he shows no sufficient cause why he should not be convicted the Magistrate may convict him accordingly. Under S. 244, if the Magistrate does not convict the accused under S. 243, or if the accused does not make such admission the Magistrate should proceed to hear the

complainant and take *all such evidence* as may be produced in support of the prosecution and also to hear the accused and to take all such evidence as he produces in his defence. On 18th July the learned Magistrate examined the complainant in the case and it would, therefore, appear that he was proceeding under S. 244, Criminal P. C., and not under S. 243, which would apply if there was admission by the accused that he had committed the offence for which he was being tried. Having adopted the procedure prescribed by S. 244 on the footing that there was no admission of guilt on the part of the accused person the learned Magistrate was not competent to take a further plea from the accused person of guilty and relieve himself of the duty of examining other witnesses who could be called on behalf of the prosecution for the purpose of proving the case. The result has been that in this case there has been really no evidence upon which there could be a conviction of the petitioner, and I am not prepared to hold that there was a plea of guilty with regard to the offence upon the basis of which the petitioner could have been convicted by the learned Magistrate. The law enjoins, and that for a very good reason, that the admission shall be recorded as nearly as possible in the words used by the accused. Omission to comply with the law in this respect cannot be countenanced as it invariably leads to complications.

Turning now to the grounds on which the Rule has been issued: it seems to me that the evidence that has been adduced in this case is not at all sufficient for the conviction. S. 412, Calcutta Municipal Act, makes it punishable to sell, store for sale, expose or hawk about for sale, or keep for sale food which is unsound, unwholesome or unfit for human food. The act itself provides for the method that has got to be adopted for the purpose of determining whether the food is unsound, unwholesome or unfit for human food. Of course there may be cases where it will not be necessary to send the objectionable article—I mean the food in respect of which the prosecution is started—for examination by a Public Analyst. But this was not a case of that description. It was thought necessary by the Food Inspector to send the bottles of aerated water to the Public Analyst for analysis. He states in his evidence this:

I found in the bottles of aerated water foreign particles floating inside. I showed it to the man who gave his name as Lalji Ram. I told him I am sending these four bottles to the laboratory for their analysis. Out of four bottles two were declared to be bacteriologically unfit for human food. The matter was reported to the vendor after receiving the report. Four bottles were made over to him. The vendor does not say that they are different bottles.

There is a procedure prescribed in the Act for insuring the examination of the identical food which is seized by the officers of the Municipality and sent for the purpose of analysis. This is laid down in S. 424 (4). That sub-section says that when any sale under sub-S. (1) or sub-S. (2) is completed, or when any food is surrendered under sub-S. (3), the Health Officer or the person authorized by him in this behalf, or any purchaser who wishes to have an article of food analyzed under S. 423, shall forthwith notify to the seller or his agent selling the articles or the person in possession thereof, as the case may be, his intention to have the same analyzed and shall divide the article into three parts, to be then and there separated and each part to be marked and sealed or fastened up in any manner which its nature will permit. Sub-S. (5) says that the Health Officer or the person authorized by him in this behalf, or the purchaser referred to in sub-S. (4), shall deliver one of the said parts to the seller or his agent, shall retain another for future comparison and may send the third to a Public Analyst. This procedure has been prescribed in order that there may be a guarantee of identity as to the article that is examined by the Analyst and the article that is seized by the Food Inspector, and in the absence of any guarantee to that effect it would be difficult for the Court to hold that what was examined by the Analyst was really what was taken from the vendor. In any event such procedure not having been adopted in the present case I am not prepared to hold that the report of the Public Analyst, whatever it was, was in respect of any of the bottles of aerated water which were taken from the shop of the vendor. Furthermore: the Analyst himself has not been examined in the case, though if his certificate had been put in and filed in the case on behalf of the prosecution he need not have been examined. Beyond the statement of the Food Inspector that he sent two bottles to the laboratory and

received a report to the effect that their contents were bacteriologically unfit for human food there is nothing upon which it can be held that the petitioner committed the offence under S. 412.

The conviction of the petitioner therefore seems to be unjustifiable, and in that view of the matter I make the Rule absolute, set aside the conviction of the petitioner and the sentence passed upon him and direct that the fine if paid be refunded.

R.D.

Rule made absolute.

A. I. R. 1928 Calcutta 245

RANKIN AND PAGE, JJ.

Guru Charan Das—Defendant 1—Appellant.

v.

Port Canning and Land Improvement Co. Ltd. and another—Plaintiff and Defendant 2—Respondents.

Appeal No. 1340 of 1921, Decided on 30th November 1923, from appellate decree of Dist. Judge, 24 Pargannas, D/-15th February 1921.

Landlord and Tenant—Rent, suit for—Lease of lands in addition to land in actual possession of lessee and lessor entitled under lease to charge rent for area in actual possession—Suit is not bad for noninclusion of other land, and failure by landlord to give possession of the other land is no defence.

Where the lease was for the land in actual possession of the lessee and it was also provided that the lessor was entitled to charge rent in proportion to land in actual possession.

Held: that a suit for rent was bad not for non-inclusion of other lands, and the landlord's failure to give possession of the other lands was no defence to the suit.

Abinash Ch. Ghose—for Appellant,

Ram Ch. Mazumdar, Rama Prosad Mookerjee and Sisir Kumar Ghosal—for Respondents.

Rankin, J.—In this case the appeal is brought from a decision of the District Judge, 24 Pargannas, whereby he decreed a suit for rent. The arguments that have been very ably urged before us for the appellant arise out of the following facts: It appears that at the beginning, the defendant was a lessee of an ordinary non-permanent jote of some 302 bighas at a rental per bigha of Rs. 1-12-0 per annum. In March 1911 the lessee transferred some 55 bighas to a lady of the name of Bhagabati Dasi. That was a transfer; was not a sub-lease, but a complete transfer, as regards 55 bighas, of the defendant's right and interest. It was a transfer

which the landlord, the present plaintiff, was not obliged to recognize. It appears, however, that in point of fact the landlord did recognize her and did accept rent from the transferee. On 25th February 1914 the landlord granted a permanent settlement to the defendant and, upon the document containing that permanent settlement, the present questions really arise. The document begins by saying:

Whereas the lessee is in possession under garkaini or temporary and nontransferable right of a holding of 302 . . . and whereas the said lessee has proposed to take a permanent maurasi mokarari settlement of the same at a rental of Rs. 2-4-0 per bigha, and whereas the landlord has accepted the lessee's proposal this pattah is granted to the lessee on the terms and conditions mentioned below.

It says the selami is Rs. 1. It says the boundaries of the aforesaid land are given in the schedule below. It says the annual rate of rent, and then it goes on by Cl. 7 to say that the

company shall have full power to survey or measure the land held by the said lessee by virtue of this lease from time to time and the company shall have full liberty to increase or decrease the rent according as the land is found to be more or less than the area mentioned in this pattah at the abovementioned rate of Rs. 2-4-0 per bigha.

Now, it appears that some three years after the rent of this lease Bhagabati applied for mutation of name in the landlord's sherista and her application was granted. In this suit the defendant was sued for rent from 1322 to 1324 under the pattah of 25th Feb. 1914. The area for which he is sued is limited to the area in his own actual occupation and enjoyment.

In these circumstances he takes two defences before us. First of all that when the pattah of 1914 was given, that comprised the 55 bighas which he had previously transferred to Bhagabati. He says that, as regards this 55 bighas, he has become by his new pattah an intermediate tenure-holder and Bhagabati is obliged to attorn to him. In these circumstances he says that he has a holding of the whole 302 bighas, and that if his landlord sues him for rent for only a part of that holding then that rent suit is not a properly constituted rent suit. In the second place he says that he has never got possession under the new pattah of the 55 bighas transferred to Bhagabati and that the landlord, by granting her prayer for mutation of name, has so interfered with his enjoyment as to amount to an eviction entail-

ing the consequence of an entire suspension of rent.

It will be observed that in this suit the defendant by these defences is really endeavouring to litigate the question which may be of some importance and difficulty and which affects his landlord on one hand and Bhagabati on the other hand—the question, namely, whether under the pattah of 1914 it was ever intended that he should be given moursi mokarari right in the land which he had previous thereto transferred to somebody else. However, if we are obliged to determine that question in view of the present defence we should have to do so. But, in my opinion, we are not obliged to determine that question; and, apart from determining that question, these two defences should be disallowed.

It is perfectly plain, to take the eviction point first, that this lease was intended on the footing that the lessors were granting to the lessee the land of which he was in possession. He takes that lease on that footing. He wants to turn round now and says:

I did not have possession, you have never given me possession under the lease, of 55 bighas and, therefore, I am not obliged to pay you any rent at all.

On the face of this document, in my opinion, the contention as regards eviction is unsound. If it be the case then, on the execution of that document Bhagabati became obliged in law to attorn to the lessee and to pay her rent to him, and, if she did not do so, the lessee has ample remedy against Bhagabati. But why, because she took one view of her rights in that respect, the landlord should be obliged to suffer an entire suspension of rent for having granted to his lessee a lease intended to give him only a higher right in what he possessed already, I fail altogether to see. I think the decisions with regard to suspension of rent upon eviction are entirely inapplicable, in the circumstances, to this case.

The next question is whether the defendant is entitled to take the technical defence that this suit, as it is not brought for the whole 302 bighas, is in form bad and should be dismissed. A case (*Raheemuddy Akan v. Poorno Chander Roy Chowdhury*) has been cited from 22 W. R. 336. That is an old case, and I have no doubt at all that it was rightly decided. It was a case where there being

some four holdings the landlords had purported to cut up the four holdings so as to make five holdings altogether, interfering with the area held by each individual tenant; and when they brought five rent suits on that footing the whole five suits were dismissed with costs. That seems to me to be very sound and reasonable. But the present case is not a case to which that can, in my opinion, apply. Because, apart from the fact that the land is described *inter alia* by a reference to the defendants' possession, Cl. 7 says that, at any rate for some consideration, the parties agreed that the company should be at liberty to find out the exact area of which the lessee was to be in occupation and should be entitled to charge him for rent calculated upon that area, be it less or more than the area mentioned in the patta. I think that Cl. 7 is sufficient answer to this technical objection and for that reason this appeal fails.

I would repeat that in my opinion we are unable to arrive at this result without finally deciding here and now what the exact state of right is as between the plaintiff company on the one hand, Bhagabati on the other and this lessee on the third part.

In my opinion, in any view, the present suit is entitled to succeed and this appeal is dismissed with costs to the plaintiff respondent.

Page, J.—I agree.

D. D.

Appeal dismissed.

A. I. R. 1928 Calcutta 247

DUVAL, J.

Sambhunath Basak and another — Plaintiffs 2 and 3—Petitioners.

v.

Abdul Kader and others — Defendants — Opposite Parties.

Civil Rule No. 946 of 1927, Decided on 16th November 1927, from order of Sub-Judge and Asst. Sub-Judge, Dacca, in T. Suit No. 666 of 1925

Civil P. C., O. 32, R. 7—Compromise on behalf of minor—Court postponing its decision—Compromise not against minor's interests—Permission to withdraw from compromise was refused.

Three plaintiffs, of whom two were minors, sued in ejectment certain defendants. Later the plaintiffs and one of the defendants filed a petition of compromise and a petition by

the guardian for leave to compromise under the provisions of O. 32, R. 7, was also put in. The Court put off decision on the compromise petition. Meantime the three plaintiffs by another petition sought to withdraw from the compromise on the ground that there had been misrepresentation and that the guardian of the minors in fact knew nothing about it. The Court found that there was no misrepresentation and that the compromise was not against the minors' interest and gave a decree in terms of the compromise.

Held: that the Court rightly refused permission to withdraw from the compromise as there was no misrepresentation by defendant and the compromise was not against the minor's interest: 22 *Mad.* 378 and *A. I. R.* 1925 *All.* 570, *Dist.* [P. 248 C. 1]

Atul Chandra Gupta and Deblal Sen — for Petitioners.

M. A. S. M. Akram — for Opposite Parties.

Judgment.—In this case one Harendra Lal Basak and two minors, represented by their mother, sued in ejectment certain defendants. On 14th June 1926, the plaintiffs and defendant 3 filed a petition of compromise and a petition by the guardian for leave to compromise under the provisions of O. 32, R. 7, Civil P. C., was also put in. By the compromise defendant 3 was to pay a certain nazar and get the tenancy of some of the lands. With the other defendants there was no proposed compromise. The learned Munsif did not then consider the petition of compromise because, as he expressed in his judgment, he wished to be satisfied after hearing the case as to whether it was in the interests of the minors. But on 28th August 1926, the three plaintiffs by another petition sought to withdraw from the compromise on the ground that there had been misrepresentation and that the guardian of the minors in fact knew nothing about it. The Munsif during the trial came to the conclusion that there was no misrepresentation by defendant 3 and he found that the compromise was not against the minors' interests and, therefore, so far as the defendant 3 was concerned he gave a decree in terms of the compromise. The other defendants had apparently admitted the plaintiffs' title and decrees were also made as against them. The appeal came before the Subordinate Judge and was rejected.

A rule was then obtained from this Court and it is urged that no compromise on behalf of the minors could be effected except with leave of the Court and that,

therefore, as before the compromise was sanctioned by the Court the guardian who wished to compromise had resiled from it the decree on compromise was illegal at least so far as these minors were concerned. Now, it is argued that, in view of the cases of *Ranga Rao v. Rajagopala Raju* (1) and *Gulab Dei v. Vaish Motor Co.* (2), as the petition for compromise had been followed by another petition for leave to withdraw from compromise before the leave was granted, therefore, the Courts were bound not to accept the compromise as regards these two minors. This case, however, is not similar to those cases. In those cases the next friend of a minor agreed to compromise subject to leave of the Court and withdrew before leave was applied for. In the present case, leave was applied for and the Munsif put off deciding whether he should give leave or not until he knew all about the position of the parties. The action of the Munsif I can quite understand. In the present case leave was applied for and the learned Munsif's decision on the later petition and the decision in appeal had been that this later petition asking to withdraw was not a bona fide one. It is to be noted that the petition was not by the minors alone. It is by all three of the parties and is mainly concerned on whether there was misrepresentation to the major plaintiff. It is only in the last sentence of the petition that it is said that the lady guardian knew nothing about it. The learned Munsif has found that this petition was not a bona fide one but was got up by other interested parties owing to other facts in the suit. I cannot, therefore, say that the learned Munsif and the learned Subordinate Judge were wrong though the Munsif may not have acted strictly in accordance with the words of the Code in not granting leave to compromise on the first day. In this view and especially as the rulings I have referred to are not on the same facts as in the present case I am not prepared to exercise jurisdiction under S. 115 of the Code, and the rule is, therefore, discharged with costs. Hearing-fee one gold mohur.

N.K.

*Rule discharged.***A. I. R. 1928 Calcutta 248**

NEWBOULD AND MUKERJI, JJ.

R. Dorice—Accused—Petitioner.

v.

O. R. Stanislaw—Complainant—Opposite Party.

Criminal Revn. No. 482 of 1924, Decided on 18th July 1924.

Penal Code, S. 497—Letter written by complainant's wife to accused, but not proved to have been received by accused is not sufficient evidence.

Where, in the case of a charge for adultery, the only evidence was a letter written by the complainant's wife, to the accused, which was not proved to have been received nor read by the accused.

Held: that conviction on such evidence must be set aside. [P 248 C 2, P 249 C 1]

J. N. Banerjee and *Satindra Nath Mukherjee*—for Petitioner.

Sasanka Jiban Roy—for Opposite Party.

Judgment.—The petitioner in this case has been convicted of adultery and sentenced to rigorous imprisonment for one month and to pay a fine of Rs. 100 with a further one month's rigorous imprisonment in default of payment.

The case against the petitioner rested on oral and documentary evidence. As regards the oral evidence the learned Chief Presidency Magistrate remarks:

As for the witnesses examined it must be admitted that on their evidence alone it would be difficult to found a conviction.

Then from his judgment it appears that the documentary evidence which had most influence on his decision was a letter Ex. 2. This letter admittedly was written by the complainant's wife. From the terms of that letter it appears that she was writing most affectionately to the accused, and if the letter was really a piece of genuine correspondence between them it would go very far to support a charge of adultery. It appears, however, that this letter was received by the complainant from an anonymous correspondent. There is no evidence that the letter was ever in the possession of the accused or was ever seen by him. This being so we think the learned Magistrate was wrong in treating it as evidence of any value as against the accused. To hold otherwise would put it in the power of any adulterous wife to implicate a third party in order to screen her real lover. The evidence being such as

(1) [1899] 22 Mad. 378.

(2) A.I.R. 1925 All. 570=47 All. 782.

It is we must hold that the conviction was not justified.

We accordingly make this Rule absolute and set aside the conviction of the petitioner and acquit him and direct that the fine if paid be refunded to the petitioner. The petitioner will now be discharged from his bail bond.

R.D.

*Rule made absolute.***A. I. R. 1928 Calcutta 249 (1)**

RANKIN AND PAGE, JJ.

Soneswar (Das) Pandit—Plaintiff—Appellant.

v.

Kanakram and others—Defendants—Respondents.

Appeal No. 1987 of 1921, Decided on 11th December 1923, from appellate decree of Dist. Judge, Assam Valley District, D/- 28th July 1921.

Limitation Act, S. 5.—Construction—Court should exercise its discretion in each case.

In determining whether there is a sufficient cause the discretion of the Court has to be exercised on all the facts in each particular case. No wide and general rule can be laid down.

[P 249 C 1]

Where, from ordinary point of view the mistake had been made without any real excuse:

Held: that there was not "sufficient cause" within S. 5. [P 249 C 1]

Sarat Chandra Basak and Khitish Chandra Chakravarty—for Appellant.

Abinash Chandra Ghose—for Respondents.

Rankin, J.—I think that this appeal must fail. The learned District Judge has made observations in his judgment as to the mistake made by the pleader for the appellant not being bona fide. I do not quite understand that; but my view is, looking at this matter for myself, that what has happened is that from the ordinary point of view the mistake has been made without any real excuse. In these circumstances I am not prepared to hold that there was sufficient cause under S. 5, Limitation Act. I would be very much against laying down a wide and general rule as to the construction of S. 5. I think the discretion of the Court has to be exercised on all the facts in each particular case. With regard to the question whether the learned Judge of the Court of appeal below exercised a discretion entirely free from notice as to

negligence and as to bona fides which might interrupt a fair consideration of the matter. I am not quite sure, but I think that he came to a right conclusion and, therefore, we ought not to interfere with his decision. The appeal is accordingly dismissed with costs.

Page, J.—I agree.

R K.

*Appeal dismissed.***A. I. R. 1928 Calcutta 249 (2)**

GREAVES AND CHAKRAVARTI, JJ.

Abdul Halim and another—Defendants—Appellants.

v.

Abdul Gafur and others—Respondents.

Appeal No. 168 of 1924, Decided on 30th July 1924, against order of Dist. Judge, Tipperah, D/- 15th March 1923.

Civil P. C., Sch. 2, para. 1—All parties not joined in reference—Reference is not valid.

There cannot be a valid reference to arbitration in a suit unless all the parties to the suit join in asking for the reference. [P 249 C 2]

Gunoda Charan Sen and Bepin Chandra Bose—for Appellants.

Nagendra Chandra Chowdhury—for Respondents.

Judgment.—This is an appeal from the District Judge of Tipperah who confirmed an order of the Subordinate Judge of Comilla. The point that arises in the appeal is whether the learned Judge in the Court below was right in the conclusion to which he came: that there could be a valid reference to arbitration in a suit unless all the parties to the suit joined in asking for the reference. The learned District Judge has held that there could be a valid reference to arbitration without all the parties to the suit agreeing to the reference. In our opinion this decision is clearly wrong as S. 1, Sch. 2, Civil P. C., by virtue of which a reference of matter in dispute in a suit can be made, expressly provides for all the parties to the suit agreeing to the reference.

The result is that the decision of the District Judge is, as already stated, wrong as also the decision of the Subordinate Judge which it affirms. In our opinion there was no valid reference to arbitration and the appeal must succeed and the suit must proceed. A question was raised with regard to the form in which

this appeal was filed. The appeal is directed against the judgment and decree passed by the District Judge. This is quite correct, but it is headed as an appeal from an appellate order and the proper Court-fee in respect of the appeal against the decree has not been paid nor have certified copies of the decrees of both the Courts below been filed. But these are matters which can be cured and the appeal itself was properly preferred against the judgment and decree, and accordingly there is nothing in the preliminary objection that was taken as the learned vakil for the appellant undertakes to put in within one week the deficit Court-fee and file certified copies of the decrees.

Subject to this undertaking the appeal, therefore, succeeds with costs, hearing-fee, two gold mohurs. Liberty to apply if the undertaking is not carried out.

R D.

Appeal allowed

* A. I. R. 1928 Calcutta 250

MOOKERJEE AND RANKIN, JJ.

Ambika Prosad Dass—Defendant 1—Appellant.

v.

Annada Prosad Dass and another—Plaintiff and Defendant 2—Respondents.

Appeal No. 70 of 1921, Decided on 29th June 1923, against original decree of Sub-Judge, 4th Court, 24th Pargannahs, D/- 2nd February 1921.

Adverse possession—Vendor having vested right but entitled to possession after the death of a widow having a right of residence—Widow's possession cannot be adverse to the purchaser.

The doctrine of adverse possession is applied to the detriment of a person who is entitled to possession, but is not in possession; it cannot be applied as against a person not competent to claim possession: 44 Cal. 425 and 10 W. R. 15, Ref. [P 252 C 1]

Possession, when adverse, in order that it may extinguish title, must be adequate in continuity, in publicity and in extent. But it does not follow conversely that every possession which is continuous and public is necessarily adverse: A. I. R. 1928 P. C. 118, Ref. [P 252 C 2]

Where the plaintiff took a vested interest subject to the right of residence granted in favour of his mother by his father's will,

Held: that he had no immediate right of possession which remained with his mother during her lifetime and, therefore, the purchaser of the right, title and interest of the plaintiff was in no better position and, there-

fore, the mother's possession cannot be adverse to the purchaser. [P 252 C 1]

Ashutosh Choudhury, Narendra Chandra Bose and Satyendra Nath—for Appellant.

Bimala Charan Deb and Durga Charan Mitter—for Respondent

Mookerjee, J.—This is an appeal by the plaintiff in a declaratory suit.

The subject-matter of the litigation originally belonged to one Digambar Das who made a testamentary disposition on the day of his death, which took place on the 5th July 1888. He left two widows Bindubashini and Birajmohini and two sons, one by each wife namely, Annada Prosad by his first wife Bindubashini; and Ambika Prosad by his second wife Biraj Mohini. In the litigation Annada is the plaintiff and Ambika is a defendant.

The will was proved in due course and in 1893 a suit was instituted by Annada Prosad on the original side of this Court for construction of the will and for partition of the estate. The preliminary decree was made on the 25th June 1894. The commissioner submitted his report on 13th August 1898, which was confirmed on the 7th September 1898.

It appears that Annada Prosad had in the meantime mortgaged his interest in the estate of his father, with the result that his right, title and interest was brought to sale in execution of a decree made in the original side of this Court. On 8th July 1899, Prince Qamar Quadir, of the family of the King of Oudh, purchased the property now in suit, and on 14th December 1917, defendant 1 took a conveyance of the property from him. On 9th August 1918 the plaintiff instituted the present suit for declaration that at the time of the conveyance in favour of defendant 1 by the execution purchaser, there was no subsisting interest which could be transferred, inasmuch as the interest acquired by him had been extinguished by adverse possession. The Subordinate Judge has decreed the suit.

The property in dispute is a house which was assigned to the mother of the plaintiff under the decree made in the suit for construction of the will and for partition of the estate. The relevant clause of the will is in these terms:

It is further declared that my elder wife shall have right of residence for the term of her natural life in the three-storied portion

and my younger wife in the two-storeyed portion of my house No. 35, Ram Kamal Mookerjee Street. I direct my executor to pay into the hands of Shama Charan Bose the sum of Rs. 3,000 to complete the unfinished portion of the three-storeyed portion of my said house No. 35, Ram Kamal Mookerjee Street.

In the decree made on 25th June 1894 it was declared that subject to the right of residence of Sreemutty Bindubashini Dassi, the mother of the plaintiff, and Sreemutty Birajmohini Dassi, the mother of defendant 1, and subject to provision being made for the legacies, annuities and bequests made by the said will, the plaintiff is entitled to a moiety or one equal half part of share of the said testator's estate, and that, subject as aforesaid, the defendant Ambika Prosad is entitled to the other moiety or remaining one equal half part or share thereof. The report of the commissioner made on 13th August 1898, stated that the three storeyed or eastern portion of the house had been set apart for the elder widow and the two-storied portion for the junior widow for the purpose of residence during the terms of their natural lives. The report further stated that subject to the right of residence of the widows in the portions mentioned in the map annexed, the remainder of the property had vested in the sons as directed by the will. This was confirmed by the decree of Court made on 7th September 1898. The right, title and interest of the plaintiff was thereafter sold in execution of the mortgage decree on 8th July 1899 and became vested in the prince. The sale certificate, which shows that the sale was duly confirmed, makes it clear that what was sold was the right, title and interest of the mortgagor, subject to the right of residence of his mother during her life. The position, consequently, was that the execution purchaser acquired the right, title and interest of the judgment-debtor subject to the right of residence of the lady.

It is now urged on behalf of the plaintiff that it was incumbent upon the auction-purchaser to obtain delivery of possession and that inasmuch as he did not take steps in that behalf, the title he had acquired was extinguished by lapse of time. This view has commended itself to the Subordinate Judge and he has given the plaintiff a declaration that at the time when the prince executed the conveyance in favour of defendant 1 he had no subsisting interest in the property

to transfer. We are of opinion that this view cannot possibly be sustained.

It is a well-settled rule of construction that where words describing an interest refer only to right of possession personal to the donee, *prima facie*, life-interest only is created. In support of this proposition Sir Asutosh Chaudhury has relied upon the principle enunciated by the House of Lords in *Coward v. Larkman* (1), which affirmed the judgment of the Court of appeal in *Coward v. Larkman* (2), modifying the decision of Mr Justice Kay in *Coward v. Larkman* (3). In that case the testator gave his wife free use and occupation of a house. Lord Halsbury held that, as this gave the widow the free use and occupation of a house in words unqualified and unlimited in time, there was an absolute gift in favour of the widow. In his opinion, this fell within the well-known rule that, if you give the income of real or personal estate, and the gift of the income is absolute and unlimited, the corpus is included in the gift or, as is figuratively put, the gift of the fruit in an unqualified and absolute manner is a perpetual gift of the tree. This principle is embodied in S 159, Succession Act. Lord Watson did not dissent from the view that a gift for use and occupation was governed by the same rule as a bequest of rent and profits. But he held that the terms of the will before them, if taken as a whole, afforded sufficient indication of the intention of the testator to restrict the interest of the widow in the residence for the period of her life. In the case before us no question arises as to whether the widow took an interest for life or in perpetuity, because, in the suit for construction of the will, it has been held that the widow had only a personal right of residence during her life. The position thus is that, subject to such interest, the residue is in the son. Consequently the principle enunciated by the Judicial Committee in *Kewan Pershad v. Mt Radha Beeby* (4) becomes applicable. Dr. Lushington pointed out that where, by a testamentary instrument the testator gave his wife a life-estate and, subject thereto, an interest in favour of his brother and nephew, the latter took a vested interest though the

(1) [1889] 60 L. T. 1.

(2) [1898] 57 L. T. 285.

(3) [1887] 56 L. T. 273.

(4) [1846-50] 4 M. I. A. 132=7 W. R. 35 (P. C.).

actual enjoyment of the expectant interest was postponed till the termination of the life. In the present case the plaintiff took a vested interest subject to the right of residence granted in favour of his mother by his father's will. He had no immediate right of possession which remained with his mother during her lifetime. The purchaser of the right, title and interest of the plaintiff was in no better position. The purchase he made was expressly subject to the right of residence of the widow. It would accordingly have been futile for him to make an application to the Court for delivery of possession.

It has been next contended on behalf of the respondent that the auction-purchaser might have obtained what is called symbolical possession. The Code no doubt distinguishes between symbolical possession and actual possession. Symbolical possession is delivered where the property is in the occupation of a person, such as a tenant, who is entitled to remain in occupation, notwithstanding the sale of the superior interest. Actual possession is delivered where the property is in the occupation of a person whose interest has been sold by the decree of the Court. In the case before us, the Court could not have delivered symbolical possession, because under the certificate the possession was bound to remain with the lady and the purchaser was not entitled to possession till that right had terminated in accordance with the terms of the will. In these circumstances there could be no room for adverse possession. The doctrine of adverse possession is applied to the detriment of a person who is entitled to possession but is not in possession; it cannot be applied as against a person not competent to claim possession. Illustrations of this fundamental rule may be found in various classes of cases. See, for instance, *Priyasakhi v. Bireswar* (5) (dispossession of mortgagor), *Womesh v. Raj Narayan* (6) (dispossession of tenant). We are consequently of opinion that as the execution purchaser could not obtain possession of the property he had acquired, there could be no adverse possession as against him.

We have been finally pressed to hold

that, as the plaintiff occupied the house jointly with his mother, his possession must be deemed adverse to that of the auction-purchaser. There is clearly no force in this contention. His occupation was obviously by leave and license of his mother, and was in no sense adverse to her. But, even if there had been such adverse possession, it could not have affected the auction-purchaser who had purchased subject to the right of residence of the widow herself.

The Subordinate Judge, we observe, has held that, as the possession of the plaintiff was adequate in continuity and publicity, it must be taken to be adverse. He has clearly misapplied the principle of the decision of the Judicial Committee in *Radhamani Debi v. Collector of Khulna* (7). Lord Robertson pointed out that possession, when adverse, in order that it may extinguish title, must be adequate in continuity, in publicity and in extent. But it does not follow conversely that every possession which is continuous and public is necessarily adverse. In this connexion reference may be made to the decision of the Judicial Committee in the case of *Raja Mohamed Momtaz Ali Khan v. Mohan Singh* (8), where Lord Salvesen discussed the elements requisite for possession to be adverse in character, and pointed out that mere assertion of adverse title does not transform permissive or fiduciary possession into adverse possession. We are consequently of opinion that in the case before us the possession of the plaintiff, such as it was, was not adverse possession as against the purchaser and did not affect his title, which passed by the sale to the execution purchaser. The plaintiff entirely failed to prove that he has re-acquired a fresh title by adverse possession as against the purchaser or his transferee.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs both here and in the Court below.

Rankin, J.—I agree.

D.D.

Appeal allowed.

(5) [1917] 44 Cal. 425 (426)=27 C. L. J. 212=81 I. C. 277=21 C. W. N. 177.

(6) 10 W. R. 15.

(7) [1900] 27 Cal. 943=27 I. A. 136=4 C. W. N. 597=7 Sar. 714 (P. C.).

(8) A. I. R. 1923 P. C. 118=45 All. 419=26 O. C. 231 (P. C.).

* A. I. R. 1928 Calcutta 253

CHATTERJEE AND PANTON JJ.

Minnat Ali and another—Plaintiffs—Appellants.

v.

Nabendra Kishore Roy and others—Defendants—Respondents.

Second Appeal No. 2353 of 1921, Decided on 3rd July 1923, against appellate decree of Addl. Dist. Judge, Noakhali, D/- 9th May 1921.

Evidence Act, S. 99—Persons not claiming through settlor can show that waqf was illusory.

A person who does not claim through the settlor is entitled to challenge the validity of a waqf on the ground that it was merely an illusory transaction never intended to be acted upon: 31 *M. L. J.* 431, *Foll.*; 10 *C. W. N.* 449, *Dist. and Expl.*

Purchasers of some portion of the properties alleged to be waqf at a sale for arrears of Government revenue are not persons claiming under the settlor. [P 254 C 1]

Nagendra Nath Bose—for Appellants*Rames Chandra Sen, Jitendra Kumar Sen Gupta and Bankin Chandra Banerjee*—for Respondents.

Judgment.—This appeal arises out of a suit for a declaration of the plaintiffs' title as mutwallis to certain waqf and also for other reliefs.

The Court of first instance gave a decree to the plaintiffs. On appeal that decree was reversed and the plaintiffs have appealed to this Court.

The Court of appeal below found that the waqf was a collusive paper transaction intended to keep the properties covered by the waqfnama safe from the claims of any possible future creditor or other claims of other persons and that

it is clear that the disputed property was never treated as waqf property and it was treated as secular property of Kamarali Patari and after his death it descended to his heirs as secular property and treated by them as secular property.

The learned Judge, in the concluding portion of his judgment observes as follows:

There can be no doubt that the wakfnama created by Kamarali Patari was a sham colourable transaction and it was not intended to be acted upon and it was not given effect to by Kamar Ali or by plaintiffs and they all treated the properties covered by the deed of waqf as their secular properties and enjoyed them as such and not for the upkeep and maintenance of the mosque.

It is contended by the learned vakil for the appellants that under the Mahomdan law it is not open to any person to impugn the validity of a waqfnama once it is executed and registered, pro-

vided that it purports to be an absolute dedication. The learned vakil has relied upon the head-notes in the judgment in the case of *Kulsom Bibi v. Golam Hossein Cassim Ariff* (1), where it is stated that

in a suit for setting aside a waqfnama on the ground that the trusts are illusory and that there has been no substantial dedication to religious and charitable trusts, the question before the Court is whether there was a real intention to give effect to the document as a waqfnama. The intention of the settlor must be gathered from the document itself. If the waqf was formally constituted and perfected and established by its terms a substantial charitable trust it is wholly immaterial whether its provisions were carried out or not, for that is a matter of breach of trust only. Evidence given to show that it was never intended to give effect to the trusts and that in fact they were not given effect to is irrelevant in such a suit. Evidence, however, showing the manner in which the document is related to existing facts, e. g., the value and state of the waqf properties, is relevant.

These general statements, however, should be considered along with the facts of the case. It appears that these observations were made in that case with reference to a person who was claiming under the settlor. At p. 484, the learned Judge (Woodroffe, J.) observes:

Nor in the present case can the evidence be said to be admissible for the purpose of invalidating the documents, for if a waqf executed with the necessary formalities and otherwise validly constituted establishes by its terms a substantial trust in favour of the public, it is not open to the settlor or those claiming under him to say that though the document by its terms evidences an intention to make a trust, he the settlor never intended to carry it out and in fact never did so. So here there is no dispute that the documents were executed and registered and I find that if possession is necessary it was given. If that document creates a trust in favour of the public and if (point with which I will next deal) that trust is the primary object of the settlor and is of a substantial character it appears to be quite beyond the powers of the settlor or those claiming under him to say: "I have said I have made a trust, but I never intended one and thus to wrest from a third party, the public, the benefit which by the express terms of his deed he has bestowed on them. In my opinion, therefore, the evidence given to show that it was never intended to give effect to the trusts and that in fact they were not given effect to is in this case irrelevant. The intention of the settlor must be gathered from the documents themselves.

The observation, therefore, has reference to a case between the trusts and the settlor or persons claiming under him, and in such a case no evidence is admissible to prove that it was not intended to

(1) [1906] 10 *C. W. N.* 449.

be acted upon and the question of intention is to be determined, not upon any extraneous evidence, but upon the intentions as appearing from the document itself. In the case of *Hazi Mahamed Nagor v. Abdul Jalil* the learned Judges observe that

these waqfs have been created by documents, and it seems to us that the language employed in them is not ambiguous. The documents in terms establish religious and charitable trusts and evidence is not, therefore, admissible to show that the settlor had no intention to give effect to the trusts or that the trusts were not in fact given effect to. That was decided in the case of *Kulsom Bibi v. Golam Hossain Cassim Ariff* (1).

In that case also it was the brother of the settlor who was impugning the validity of the waqf. We have not been referred to any authority where it is laid down that a person who does not claim through the settlor is not entitled by reason of any rule of Mahomedan law to challenge the validity of a waqf on the ground that it was merely an illusory transaction and was never intended to be acted upon. In the present case we have seen that the finding of the learned Judge was that

the waqf was a collusive paper transaction intended to keep the properties covered by the waqfnama safe from the claims of any possible future creditor or other claims of other persons.

The defendants in the present case are purchasers of some portion of the properties at a sale for arrears of Government revenue. They do not claim in any way under the settlor. The learned pleader for the respondents has referred to the case of *Mulla Veettil Ussain v. Subramania Aiyar* (2), where the learned Judges referred to the case of *Kulsom Bibi v. Golam Hossain Cassim Ariff* (1) and observed:

With all respect we think that those observations are too broadly expressed. In cases where the question is whether there has been a real dedication, the production of a registered instrument in writing making a transfer of the property would no doubt be strong prima facie evidence of such dedication. But we think it is competent to parties interested in the matter to prove that the instrument was merely nominal and that in fact there was no real dedication.

∴ We do not think that there is anything in the Mahomedan law which permits a Mahomedan to defeat his creditors merely by executing and registering a waqfnama although he never intends to give effect to it as a waqf.

It appears that the defendants purchased the zamindari within which the

alleged waqf property is held as a tenure. The defendants after purchasing the zamindari at a sale held under Act 11 of 1859, brought a suit for annulment of the tenure and obtained a decree for possession against the present plaintiffs 1 and 2. The suit, however, was instituted against them in their personal capacity and not as mutwallis. The suit was decided ex parte. Plaintiff 2 got the ex parte decree set aside and the suit was re-heard. It appears that plaintiff 2 claimed the property as his own having received it in exchange from his brother, plaintiff 1. That suit was again decreed against plaintiff 2 and in execution of the decree for costs some of the properties were sold and purchased by the present defendants. Plaintiff 2 preferred a claim which was disallowed and an application for revision was rejected by the High Court. The present suit was instituted more than a year after the order disallowing the claim, but within one year from the date on which the application for revision was rejected by the High Court. A question was raised whether the suit was not barred under Art. 11, Lim. Act. In the view, however, we have taken of the other question it is unnecessary to consider the point.

The appeal is accordingly dismissed with costs.

D.D.

Appeal dismissed.

A. I. R. 1928 Calcutta 254

MUKERJI, J.

Sh. Daliluddi — Defendant 2 — Petitioner.

v.

Syed Matahar Ali — Plaintiff — Opposite Party.

Civil Rule No 958 of 1927, Decided on 1st December 1927, from order of Dist. Judge, Faridpur, D/- 21st May 1927.

Bengal Tenancy Act, S. 153—No declaration as to amount of rent in the decree — Question as to amount annually payable by tenant actually decided—Exception to S. 153 applies and the order is appealable.

Having regard to the wording of the exception to S. 153, no declaration in the order or in the decree as to the amount of rent that is annually payable by the tenant to the landlord in respect of the jama, is necessary and a case comes within the exception contained in S. 153, even though there is no such declaration in the decree or order if a question as to the amount annually payable has been decided in the de-

crees or order, and an appeal lies from the decision. [P 255 C 2]

Nirmal Chandra Chakravarti — for Petitioner.

Nurudddin Ahmed—for Opposite Party.

Judgment.—This rule relates to a suit for rent which was tried by the Munsif, Second Court, Madaripur. The suit was valued at Rs. 15 odd. The Munsif decreed the suit. The defendant preferred an appeal to the District Judge and the learned Judge held that the appeal was not maintainable in view of the provisions of S. 153, Ben. Ten. Act. He held that the trial Court could not be considered to have decided any question of the amount of rent annually payable. The rule has been issued to show cause why this order of the learned District Judge should not be set aside upon the grounds first,

that the decision of the learned Munsif having decided a question of the amount of rent annually payable, the learned Judge ought to have held that he had jurisdiction to hear the appeal,

and, second

that the Court of appeal below ought to have held that the Court of first instance has also decided a question of title to or interest in 12 acres of land between the plaintiff and the defendants in this case and, therefore, the appeal was competent.

So far as the second of these grounds is concerned, I may say at once that I do not feel pressed by the argument advanced in support of it. As regards the first ground the position seems to be different. The facts relevant for the purposes of that ground are these: The plaintiff claimed rent in respect of this tenancy alleging that it comprised an area of 41 acres and bore a rental of Rs. 3 per year. His case was that originally the jama consisted of 53 acres of land and the rental was Rs. 4, but that afterwards 12 or 13 acres of land were taken out of this jama for digging a tank thereon and the plaintiff paid Rs. 30 for the said quantity that was thus taken; and further that on account of this reduction in the area of the jama the rental was reduced by Re. 1. The defendant's case on the other hand, appears to have been that the area of the jama was 53 and that the rental was Rs. 4 as is evidenced by the settlement khatian, Ex. 4-A. The defendant, besides setting up various other defences, also contended that there ought to be a total suspension

of rent inasmuch as he had been dispossessed from a portion of the lands of the jama. The questions which had necessarily to be determined, amongst others, in order to dispose of this suit were: whether the relationship of landlord and tenant existed between the parties, whether the plaintiff's allegation that the original jama of Rs. 4 was reduced to Rs. 3 in consequence of a portion of the lands of the jama having been taken by the plaintiff for digging a tank and whether the rent at the aforesaid rate, as was alleged on behalf of the plaintiff, was due from the defendant or not. Without determining the question whether the jama bore a rental of Rs. 3, as was the case put forward on behalf of the plaintiff, or it bore a rental of Rs. 4 and consisted of additional lands in which case the plaintiff perhaps would not have been entitled to a decree, no decision could be arrived at on the merits of the plaintiff's claim. It is true that there is no declaration in the order or in the decree as to amount of rent that is annually payable by the defendant to the plaintiff in respect of the jama. But having regard to the wording of the exception contained in S. 153 it does not appear that any such declaration is necessary in order to bring the case within the exception. It is sufficient if a question as to the amount annually payable has been decided in the decree or order. It certainly appears from the judgment that there has been a decision as regards the amount of the jama payable in respect of this tenancy. The only difference between this case and cases of the type that ordinarily come up before the Courts is that in the latter class of cases the jama alleged on behalf of the plaintiff is more than what is alleged on behalf of the defendant and in this particular case the position is reversed on account of its peculiar circumstances. The fact, however, remains that the question of the amount of rent annually payable has been decided. In this view of the matter I am of opinion that an appeal lay from the decision of the learned Munsif.

The rule is accordingly made absolute, the decision of the learned District Judge is set aside and it is directed that the appeal which the petitioner had filed in the Court of the learned District Judge from the decision of the Munsif be now heard and dealt with in accordance with law.

Costs of this rule, one gold mohur, will abide the result of the appeal.

N.K. *Rule made absolute.*

* A. I. R. 1928 Calcutta 256

MUKERJI AND ROY, JJ.

Surendra Kumar Roy Chowdhury—Appellant.

v.

Sushil Kumar Roy Chowdhury—Respondent.

Appeal No. 126 of 1927, Decided on 7th April 1927, from order of Sub-Judge, Barisal, D/- 17th and 26th February 1926, and 3rd March 1927.

* (a) *Civil P. C., O. 40, R. 1*—*Suit referred to arbitration—Court's power to appoint receiver is not ousted.*

The Court has jurisdiction to entertain the application for the appointment of a receiver even after a dispute has been referred to arbitration in accordance with the prayer of all the parties. The words in the petition for reference to arbitration "to do all works in connexion with the subject-matter of the suit and to decide the suit" do not include the passing of orders for interim protection.

[P 258 C 1 ; P 259 C 2]

* (b) *Civil P. C., O. 40, R. 1*—*Executor to act in consultation with other heirs—This condition becoming impossible is circumstance sufficient to justify appointment of receiver.*

Though a strong case must be made out to induce the Court to appoint a receiver so as to dispossess a trustee or executor who is willing to act yet, where the executor was to act in consultation with other heirs and the fulfilment of that condition had become impossible that was held to be a sufficient circumstance to justify the appointment of a receiver.

[P 259 C 2]

S. C. Basak and Surendra Nath Das Gupta—for Appellant.

B. L. Mitter, S. N. Bannerjee and Bhagirath Ch. Das—for Respondents.

Mukerji, J.—This appeal has been preferred from certain orders passed by the Subordinate Judge, First Court, Backergunge, on 17th February, 26th February and 1st March 1927, by which the learned Judge appointed a receiver in respect of properties which form the subject-matter of a suit now pending in his Court.

It is necessary, in order to deal with the contentions that have been urged on behalf of the appellant in this appeal, to set out a few facts. One Babu Raj Chandra Roy Chowdhury died leaving three sons and two daughters. For the purposes of this appeal we are concerned

with one of his sons, namely, Babu Behary Lal Roy Chowdhury, and the two daughters named Adya Sundari and Bidya Sundari. Plaintiffs 1 and 2 are two of the sons of Babu Behary Lal Roy Chowdhury and defendant 1 is another son and the plaintiffs 3 and 4 are the sons of a daughter of a predeceased son of the said Babu Behary Lal Roy Chowdhury. Defendant 2 is Bidya Sundari herself and defendant 3 is a daughter of Adya Sundari. Behari Lal died on 10th March 1917 leaving considerable properties. He left a will which was executed shortly before his death. By this will he had made provisions for paying off certain debts, had given directions as to certain bequests and monthly legacies, enjoined the erection of two temples, made arrangements for certain pujas and ultimately left the properties moveable and immovable to plaintiffs 1 and 2 and defendant 1. Defendant 1 was appointed executor under the will. In 1918 defendant 1 applied for probate. This application was resisted by plaintiffs 1 and 2, and an administrator pendente lite was appointed in the course of those proceedings. Ultimately a compromise was reached between the parties in which certain terms were agreed upon and were filed in Court. Of these terms it is necessary only to refer to those that are contained in paras 1, 7, 8 and 9 of the terms of settlement. Para 1 states :

Caveats entered by Sushil Kumar Roy and Jatindra Kumar Roy (plaintiffs 1 and 2) are to be withdrawn and probate of the will to be granted to Surendra Kumar Roy (defendant 1) on his proving the will in solemn form, and thereupon the administrator pendente lite is to be discharged.

Para. 7 states :

Until the debts have been paid off and provision made for payment of legacies and construction of mundirs as provided by Cl. 5 hereof the estate will be managed by Surendra Kumar Roy in consultation with Sushil Kumar Roy and Jatindra Kumar Roy or their respective agents authorized in their behalf by a power-of-attorney.

Para. 8 runs thus :

After the debts have been paid and provisions have been made for payment of the legacies the estate will be divided equally between the three brothers Sushil Kumar Roy, Jatindra Kumar Roy and Surendra Kumar Roy, and each will be entitled to collect his share of the rents from the zamindari properties separately and to deal with his own share.

Para. 9 runs in these words :

Babu Surendra Kumar Roy will be at liberty to go to the mofussil accompanied by an officer of the estate to be nominated by Jatindra and

ushil, and all collections made by him on account of nazar (voluntary donation) should be spent by him for feeding Brahmins and other people at Barisal for the spiritual benefit of the testator and on rendering an account in that behalf.

On these terms being filed the will was proved in solemn form : the caveat was withdrawn, a decree was passed on 30th August 1918, and in accordance therewith the defendant 1 obtained probate on 19th June 1919.

The present action which has given rise to the proceedings out of which this appeal has arisen was commenced on 28th October 1925. Essentially, it is a suit for ascertainment of the estate left by the testator Behary Lal, for the due administration thereof, for partition, for taking accounts from defendant 1 in respect of his dealings in connexion with the estate, for recovery of the moneys, papers, etc., due from him and for other reliefs. There is also a prayer, amongst the prayers in the plaint, for the appointment of a receiver. As regards this prayer the learned Subordinate Judge first of all made an order on 3rd November 1925 that necessary orders would be passed on the plaintiffs' filing an affidavit within three days. Thereafter affidavits, counter-affidavits and affidavits in reply were filed on behalf of the parties and arguments were heard on the question of the appointment of the receiver on several days till 10th December 1925. On 11th December 1925 a petition was filed on behalf of plaintiffs 1 and 2 and defendant 1, asking that the suit might be referred to an arbitrator. On 15th December 1925, defendants 2 and 3 appeared and by a separate petition made a prayer for a reference of the case to an arbitrator. On 17th December 1925 plaintiffs 3 and 4 appeared and also prayed for a reference to an arbitration. In accordance with these prayers, on 21st December 1925, the learned Subordinate Judge appointed Rai Bepin Chandra Das Gupta Bahadur, a retired Subordinate Judge, an arbitrator to decide the suit in the terms of the petitions that had been filed.

It may be stated here that the task which this gentleman has undertaken is purely a matter of love, and it is gratifying to note that as regards his conduct in connexion with the arbitration proceedings nothing has been said on behalf of any of the parties

before us. It would be tedious to set out the various proceedings that took place before the arbitrator. It is sufficient to say that there has been some delay, either intentional or unavoidable, on the part of defendant 1 to produce the papers that the arbitrator wanted, and in consequence of this delay applications had from time to time to be filed before the Court, reports had to be submitted by the arbitrator to the Court and orders had also frequently to be passed against defendant 1 for the production of the said papers. On the 25th June 1926, plaintiff 1 filed a petition in Court supported by an affidavit for the appointment of a receiver. Thereafter again heaps of affidavits, counter-affidavits and affidavits in reply were filed on behalf of different parties. Various charges were made on behalf of plaintiff 1 stating that defendant 1 was causing delay in the matter of the arbitration proceedings, had taken up an obstructive attitude with reference thereto, and that he had been guilty of negligence, misappropriation of funds, fraud, fabrication of accounts and things of that sort.

For our present purposes we do not propose to go into all these in detail. The arbitrator was asked by the Court to submit his report with regard to this application for the appointment of a receiver. On the 6th December 1926, the arbitrator submitted a report ; just the sort of report that we should have expected from him when he had not yet finished his enquiry with regard to the accounts. In this report he stated that there was undoubtedly delay on the part of defendant 1 in the matter of submission of account papers and in spite of repeated orders and verbal request the papers had not been filed in time. As regards the charge that *bejabeda* collection had been made by defendant 1, the arbitrator stated that no definite conclusion could be arrived at with regard to this matter without a local enquiry. He stated that defendant 1 and his pleaders had assured him that there would be no delay in future with regard to the submission of the account papers. As regards misappropriation he stated that it was premature to pass any opinion on that point before the accounts were examined, and as regards other charges also he was not able nor willing to pronounce any definite opinion. Thereafter

we find some further affidavits were filed on behalf of the parties and ultimately, on the 17th February 1927, the learned Judge made an order appointing a receiver in respect of the properties which formed the subject-matter of the suit. In pursuance of this order one Babu Rash Behary Chowdhury was subsequently appointed as such receiver on the 26th February 1927, and he having furnished the security bond on the 1st March 1927, a writ was issued in his favour. From these orders the present appeal has been preferred on behalf of defendant 1.

The contentions that have been urged on behalf of the appellant are five in number. To put them as nearly in the words of the learned advocate for the appellant as possible they are: first, that the Court had no jurisdiction to entertain the application for the appointment of a receiver after having referred the whole dispute to arbitration in accordance with the prayer of all the parties; second, that no case has been made out for appointment of a receiver at this stage of the proceedings when the arbitration is being proceeded with; third, that in any view of the case no sufficient grounds have been made out for appointing a receiver which will have the effect of removing defendant 1 from his office as executor acting under the will of the deceased testator; fourth, that assuming a proper case has been made out an outsider should not be appointed as receiver; and fifth, that if an outsider is to be appointed the present incumbent is not a fit and proper person who should be appointed as such.

As regards the first contention reference has been made on behalf of the appellant to Sch. 2, para. 3, Civil P. C., and to the prayer that is in the plaint for the appointment of a receiver, to the order sheet in the suit as showing that arguments on the application for the appointment of a receiver had been heard in part at the time when the reference was made, and to the terms of the petition which, it has been contended, go to show that all matters arising out of the suit had been referred to the arbitrator for decision and disposal. On behalf of the respondents this argument has been sought to be met by the technical plea that there has been no order extending the time within which the award is to be submitted by the arbitrator, and that the

arbitrator is now dealing with the matter as a commissioner and not as an arbitrator and that, therefore, the Court had ample jurisdiction to deal with the question of appointment of a receiver. This objection of the respondents in my opinion cannot be allowed to prevail in view of para. 8, Sch. 2, Civil P. C., which enables the Court to enlarge the period fixed for the completion of the award even after it has expired, and also in view of the fact that there is really nothing to indicate that the arbitrator is not still acting as such. The appellant's contention also, on the other hand, does not appear to me to be well founded. There is authority for the proposition that where on account of the arbitration clause in a partnership agreement or lease or the like, by which the parties agreed to refer all their disputes to arbitration, the Court stays proceedings pending before itself, it retains jurisdiction to deal with a prayer for injunction or for a receiver: *Law v. Garret* (1); *Compagnie du Senegal v. Woods* (2); *Hasky v. Windham* (3); and *Piri v. Roncoroni* (4). In the case of *Willesford v. Watson* (5), Lord Selborne expressed the view that, if since the passing of the Common Law Procedure Act, parties chose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a prima facie duty is cast upon the Courts to act upon such arrangement. That the plaintiff's right to a receiver and injunction is not a matter to refer can hardly be disputed. As regards injunction, there is clear authority, see *Willesford v. Watson* (5), where Lord Selborne says:

It is said that the arbitrator could not grant an injunction. No doubt he could not grant an injunction; but he might say that the thing was not to be done and there being liberty to apply to this Court, this Court would then grant the injunction.

As regards receiver the appointment of a receiver made by an arbitrator will not only be difficult of being enforced as between the parties themselves but would be utterly ineffectual as regards third parties. Of course, it is open to the arbitrator to say that some person should be put in charge or management

(1) [1878] 8 Ch. 26=20 W. R. 426=38 L.T. 9.

(2) [1883] 32 W. R. 111=53 L. J. Ch. 166=49 L. T. 527.

(3) [1889] W. N. 103.

(4) [1892] 1 Ch. D. 633.

(5) [1873] 8 Ch. 473.

of the properties, and the Court may then proceed to make the order appointing a receiver. There may be cases where the parties having agreed to refer all their disputes to arbitration the Court may wait until the questions arising in the action are decided by the arbitrator and then consider whether the prayer for receiver should be granted or not as was pointed out in *Zalinoff v. Hammond* (6). It being the duty of the Court to act upon the agreement entered into by the parties themselves it will have to be ascertained in each individual case as to what was actually referred. If the Court finds that the question of management interim was also referred it may defer the consideration of the question of appointment of a receiver in the view that the parties by agreement between themselves have disentitled themselves to the auxiliary relief which otherwise they could have from the Court. In the petition for reference the words used are :

to do all works in connexion with the subject-matter of the suit and to decide the suit.

These words, in our opinion, do not include the passing of orders for interim protection. We are accordingly of opinion that the appellant's first contention cannot be allowed to prevail.

The second and the third contentions may be taken up together. We have been addressed at great length and in detail on behalf of the parties upon the various charges that have been made or sought to be refuted. We purposely refrain from expressing any opinion on these charges. We are of opinion that the findings of the Subordinate Judge on these charges are not to be taken as being approved of by us. We do not blame the learned Judge for having recorded these findings as we can realize how unhappy his position must have been when he was invited to arrive at his conclusions on these charges, and how helpless he must have felt when much against his will he had to deal with them at a stage at which they could not be dealt with with any degree of satisfaction. It was only affidavit evidence that was before him, and the charges relate to questions of accounting on which the arbitrator has to pronounce the final opinion. Judging from the arguments that have been

advanced before us we can form some idea of the acrimonious nature of the instructions which the learned advocates had from their clients, and we feel as unhappy on hearing the arguments as the learned Judge must have felt. We consider it wholly unnecessary to go into these matters and we desire to repeat and emphasize the warning which the learned Judge has given to the arbitrator not to pay any heed to his findings on these charges. We are sure, knowing as we do who the arbitrator is, that he will proceed strictly on his own view in respect of these charges. The appellant undoubtedly is an executor who is till now acting under the probate and in so far as the question arises as to whether a receiver should be appointed which, if done, will have the effect of removing him from the management of the estate, the principles laid down by Woods, J., in the well-known case of *Haines v. Carpenter*, quoted at length in the footnote to para. 707 of *High on Receivers* will apply :

A strong case must be made out to induce the Court to dispossess a trustee or executor who is willing to act :

See also *Woodroffe on Receiver*, 2nd Ed. (pp. 144—146). The position of the appellant, however, is somewhat different from that of an ordinary executor. Under the terms of settlement to which I have referred he was to act in consultation with plaintiffs 1 and 2. That was the condition on which the contest in the probate proceedings was withdrawn. That condition has now become impossible. This, in our opinion, is sufficient in the circumstances of the present case to justify the appointment of receiver. Plaintiffs 1 and 2 are interested in two-thirds share of the properties which would be left after the legacies are paid and the other directions in the will are carried out, and their case is that the appellant is delaying the administration in order to keep the properties in his hands as long as possible. To a certain extent and in a certain sense the appellant occupies a position adverse to plaintiffs 1 and 2 and the case bears some analogy to the one cited in *High on Receivers*, 4th Edn. p. 869, para. 719. Nearly ten years have elapsed since the testator's death, and it cannot be said that the testator intended that the partition of the properties would be so long

delayed. The administration in any event has not been a successful one. This, in our opinion, is sufficient to justify the order which has been made.

As regards the fourth contention, we have done our best to induce the respondents to nominate one of them as a joint receiver with the appellant, but we are sorry to note that we have failed. In the circumstances an outsider must necessarily have to be appointed. The fifth contention has no substance. The appellant took no part in the selection of the receiver though asked by the learned Judge. There is really nothing that can be urged against the gentleman who has been appointed. The comment that has been made as regards the hurry with which the receiver entered into possession is not deserved as the real reason why he asked to be put immediately in possession was that the date for the payment of Government revenue was near at hand.

The appeal accordingly fails and must be dismissed with costs, hearing-fee being assessed at 6 (six) gold mohurs to be divided between the two sets of respondents, viz., plaintiff 1 and plaintiffs 2, 3 and 4. The receiver will get his costs from out of the estate.

It is necessary now to give some further directions to the receiver in connexion with this case. We understand that defendant 1 had paid the sum of Rs. 6,587-10-11 in accordance with our order passed on the 17th March 1927. It was understood, when this order was made by us, that the payment which the appellant would make of the Government revenue in accordance with this order would be in the nature of an advance to the estate. The receiver will now proceed to make the collections in the estate and out of the moneys that he will be able to collect he will, as early as possible, pay back to the appellant the said sum of Rs. 6,587-10-11 which the appellant has advanced. If it be not possible for the receiver to pay back the said amount to the appellant within a reasonable time, say within two months from to-day, he will be at liberty to borrow the amount on such advantageous terms as to interest as may be sanctioned by the learned Subordinate Judge. The amount aforesaid will have to be paid to the appellant within that time.

Before parting with the case we should like to make a further direction. That is in connexion with the paper-book that has been prepared in this appeal. It has been prepared in the office of Babu Surendra Nath Das Gupta. The learned vakil had very little time at his disposal for preparing the type-written paper-book. It has been done in such a way as deserves our commendation. There are very few mistakes and the papers have all been well arranged. We are told the Court office had nothing whatsoever to do with the preparation of this paper-book. If so any amount that has been deposited for work to be done by the Court office, but has not been so done, will now be returned to the learned vakil.

Roy, J—agreed in the order proposed.

D.D.

Appeal dismissed.

A I. R. 1928 Calcutta 260

C. C. GHOSE AND CAMMIADÉ, JJ.

Sadhu Shaikh—Accused—Appellant.

v.

Emperor—Opposite Party

Criminal Appeal No. 724 of 1926, Decided on 24th May 1927.

Criminal P. C., Ss. 161 and 172—Statements of a witness cannot be recorded under S. 172—Any statements recorded are under S. 161—Defence must have a right to cross-examine.

Section 172 does not provide for the recording of statements of witnesses by Police during investigation. Any statements of witnesses that are so recorded, in whatever form these statements may be recorded, are recorded under S. 161, Criminal P. C., and the defence have the right to ask for a copy of such statements and to use the statements for the purpose of contradicting the witnesses for the prosecution. [P 261, C 1]

Suresh Chandra Talukdar and Amulya Charan Sen—for Appellant.

Asraf Ali—for the Crown

Judgment.—The appellant was unanimously found guilty by the jury of offences under Ss. 147 and 325, I. P. C.; and he has been sentenced to rigorous imprisonment for two years and a fine of Rs. 100, and in default to further rigorous imprisonment for two months. The ground on which this appeal must succeed is that the learned Judge who tried the case did not give the appellant an opportunity of cross-examining a certain witness named Abbas with reference to statements made by that witness during

the investigation by the police. The learned Judge has recorded in his order that the statements of this witness were recorded by the police under S. 172, Criminal P. C. That section does not provide for the recording of statements of witnesses. Any statements of witnesses that are recorded, in whatever form those statements may be recorded, are recorded under S. 161, Criminal P. C., and the defence have the right to ask for a copy of such statements and to use the statements for the purpose of contradicting the witnesses for the prosecution. How far the statements made by this Abbas would be material it is impossible to say, but it is quite conceivable that the defence may have refrained from making use of the other portions of the diary thinking that having once been refused they would be refused again.

For these reasons we allow this appeal and set aside the conviction and sentence and order that the case be retried with a fresh jury.

The appellant who is on bail will remain on his present bail until further orders of the Sessions Judge.

N. K.

Appeal allowed.

A. I. R. 1928 Calcutta 261

SANDERSON, C. J., AND CHOTZNER, J.

Mon Mohan Chakravarti and another—Petitioners.

v.

King-Emperor—Opposite Party.

Criminal Revn. No. 462 of 1924, Decided on 14th August 1924.

(a) *Criminal P. C., S. 514*—*Proof of forfeiture and call for payment are necessary steps.*

The provisions of S. 514 indicate that two steps are to be taken. first, it must be proved to the satisfaction of the Court that the bond has been forfeited, whereupon the Court is to record the grounds of such proof; secondly, the Court, on being satisfied as aforesaid, may call upon the person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid. [P 262 C 1]

(b) *Criminal P. C., S. 499*—*Time not specified in the bond—Bond to the effect that the accused shall be produced "whenever called upon to do so"—Form was held to be not illegal.*

Where the surety bond was to the effect that "we shall produce (or cause to appear) the accused at the Sessions Court whenever called upon to do so":

Held: that the form is not illegal so as to deprive the Judge of jurisdiction on the ground

that the bond did not specify time and place in accordance with S. 499, Criminal P. C.

[P 263 C 1]

Debendra Narain Bhattacharjee—for Petitioners.

Sanderson, C. J.—This Rule was issued by two of my learned brothers, calling upon the District Magistrate to show cause why the order passed should not be set aside on the first and second grounds stated in the petition.

The order referred to was dated the 9th April 1924, and was made by the learned Sessions Judge of Dacca, by which he forfeited the bail bond of the two petitioners, and directed the Sub-Divisional Magistrate to levy the amount due from the two sureties.

It appears that, on the 26th September 1923, one Ramizuddi was ordered by the Sub-Divisional Officer of Munshiganj to execute a security bond of Rs. 300 with two sureties of Rs. 300 each, to be of good behaviour for a period of two years in a proceeding under S. 110, Civil P. C. The record was forwarded to the learned Sessions Judge; and, in the meantime the Sub-Divisional Officer ordered that Ramizuddi should be detained in prison. On 4th October 1923, an application was made to the learned Judge for the release of Ramizuddi on bail: and, on 8th October 1923, the learned Judge made an order releasing Ramizuddi on his own bail of Rs. 200 with two sureties of Rs. 200 each; the surety bond was signed by the two petitioners who are mukhtars. The form of the bond which was executed was as follows:

We the undersigned sureties do hereby execute the surety bond and promise that we shall produce the accused in the above-mentioned case at the Sessions Court at Dacca whenever called upon to do so; and in default, we bind ourselves to forfeit to His Majesty the King Emperor the sum of two hundred rupees only.

Notice was given to the two petitioners on 4th February 1924 to produce Ramizuddi in the Sessions Court on 8th February 1924. That notice was not complied with, and Ramizuddi did not appear on that date, or on subsequent dates, to which the case was adjourned. The learned Judge instituted these proceedings on 26th March 1924, relying upon a report of the Sub-Divisional Officer to the effect that Ramizuddi was absconding. The order of the learned Judge which is referred to in para. 11 of the petition, was as follows:

Perused the report of S. D. O. of Munshiganj

Issue notice on the sureties to show cause why the bail bond should not be forfeited for their failure to produce the accused before this Court. Fix 9th April 1924 for hearing.

On 9th April 1924, the muktears appeared and through their learned pleader showed cause why the bond should not be forfeited; and the ground upon which the learned pleader relied, as far as I can ascertain, was that the sureties thought that the accused would not have to be produced until the reference which had been made to the learned Judge was disposed of; that they had sent a letter to the address of Ramizuddi merely informing him as to the date of hearing and remained satisfied with that without making any serious efforts to find him. That is not the ground which was relied upon in this Court. The first ground of the petition to this Court was as follows:

That the learned Sessions Judge not having complied with the requirements of S. 514, Criminal P. C., and not having recorded or taken any evidence of forfeiture before calling upon your petitioners to show cause under that section, the proceedings of the said learned Judge and the order complained of are illegal, ultra vires and void.

Section 514 (1) provides:

Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the 1st Class, or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be so paid.

In my judgment the provisions of this section indicate that two steps are to be taken: first, it must be proved to the satisfaction of the Court that the bond has been forfeited, whereupon the Court is to record the grounds of such proof; secondly, the Court, on being satisfied as aforesaid, may call upon the person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

In my judgment the provisions as to the first step were complied with in this case. It appears that notice was given to the petitioners to show cause why the bail bond should not be forfeited. The petitioners appeared before the Sessions Judge to show cause. On that occasion it was admitted by them that they had executed the bond, and that they had received notice on 4th February to pro-

duce Ramizuddi on 8th February 1924 and the learned Judge expressed the opinion that a reasonable time had been allowed for the attendance of Ramizuddi. It does not appear whether the question as to the time allowed being sufficient and reasonable, was contested or not: If there is anything in this point it will be open to the petitioners to raise it on the further hearing which we propose to direct. The above-mentioned facts were recorded by the learned Judge in his judgment and the fact that Ramizuddi has not appeared on 8th February or on subsequent days was of course known to the learned Judge himself.

The learned Judge found that no cause had been shown why the bond should not be forfeited. This finding was not strictly in the proper form; he should have found that the bond had been forfeited. In effect, however, his judgment amounted to a finding that it had been proved that the bond had been forfeited and there is no doubt that he recorded the grounds of such proof.

In accordance with the terms of S. 514, Criminal P. C., the learned Judge should then have called upon the petitioners to pay the penalty of the bond or to show cause why it should not be paid. This step in the proceedings was not taken, although it appears that the petitioners, when showing cause against the forfeiture of the bond, presented arguments to the effect that they should not be called upon to pay the whole of the penalty specified in the bond. The learned Judge did not accept the argument and directed the Sub-Divisional Magistrate to levy the amount due from the petitioners.

I am not aware whether the petitioners will be able to produce any reasons, other than those already advanced, why the penalty should not be paid; but it is desirable that the provisions of the section should be observed, and the result, in my judgment, is that the Rule should be made absolute and the matter should be remanded in order that the learned Judge may call upon the petitioner to pay the penalty of the bond or to show cause why it should not be paid.

There should be no difficulty in the provisions of the Code in this respect being followed by the learned Judges and Magistrates in the Subordinate Courts. The provisions of S. 514 are clear, and

the form 45 in Sch. 5 is given as a guide for the notice to a surety on the breach of a bond given for the appearance of a person before the Court.

A further point was taken, viz., that the bond did not specify the time and place in accordance with the provisions of S. 499, Criminal P. C.

The bond in this case was to the effect that

we shall produce (or cause to appear) the accused at the Sessions Court at Dacca whenever called upon to do so.

In this bond the place was specified and the time mentioned was "whenever called upon to do so."

I am not prepared to hold that this form is illegal so as to deprive the learned Judge of jurisdiction.

In some cases it may be necessary to use that form. At the same time in my judgment it is desirable to follow the words of the section and to prescribe in the bond not only the place but also the time at which the accused is to attend. This will obviate the necessity of giving further notice to the sureties to procure the attendance of the accused: and even if the case cannot be tried or taken up on the day specified in the bond and has to be adjourned, the bail can be renewed so as to make it available until the day of the adjourned hearing.

The Rule, therefore, is made absolute and the matter remanded to the learned Judge so that, if he thinks it necessary to proceed further with the matter, he may take the steps which are prescribed in S. 514, Criminal P. C., and which are indicated in our judgment.

Chotzner, J.—I concur.

R D. *Rule made absolute*

A. I. R 1928 Calcutta 263 (1)

MUKERJI AND CHAKRAVARTI, JJ.

Shama Charan Das and another—Petitioners.

v.

Ashutosh Dass—Opposite Party.

Criminal Misc. No. 86 of 1924, Decided on 16th September 1924.

Penal Code S. 448—House trespass—Intention is the chief ingredient—Circumstances under which the alleged act was done must be looked into, to determine the intent.

For an offence under S. 448 intention is one of the most important ingredients and in order to determine the intent it is necessary to con-

sider the circumstances under which the act was done by the accused as also the bona fide nature or otherwise of the claim which the accused may have in respect of the property itself. [P 263 C 2]

Satindra Nath Mukherjee—for Petitioners.

Probodh Ch. Chatterjee—for Opposite Party

Order.—The complaint filed by the opposite party was in respect of offences under Ss. 448, 392, 143 and 341 I. P. C. On an examination of the opposite party on oath upon the complaint that was filed by him, the learned District Magistrate thought it proper to proceed against the accused only under S. 448. For an offence under that section intention is one of the most important ingredients, and in order to determine the intent it would be necessary to consider the circumstances under which the act was done by the accused as also the bona fide nature or otherwise of the claim which the accused may have in respect of the property itself. From that point of view the proceedings which are now pending with regard to the probate applied for by the petitioners are relevant and having regard to all the circumstances we consider it desirable that the present proceedings in the criminal Court should be stayed pending the disposal of the probate proceedings by the learned District Judge.

The Rule is made absolute.

N.K. *Rule made absolute.*

A. I. R. 1928 Calcutta 263 (2)

DUVAL, J.

Chandra Nath Sen and another—Petitioners.

v.

Nagendra Nath Ganguly—Opposite Party.

Civil Rules Nos. 825 and 826 of 1927, Decided on 10th November 1927, from order of Dist. Judge, 24 Pargannas (Alipore), dated 13th May 1927.

Provincial Insolvency Act, S. 75 (1)—Order of the District Judge under S. 68 is appealable.

An order of the District Judge under S. 68, dismissing the application of the aggrieved party on the ground that it was made beyond 21 days after the Receiver had taken possession of the property is appealable and, therefore, S. 115. Civil P. C., does not apply: 18 C. W. N. 366. Ref. [P 264 C 1]

Prafulla Kamal Das—for Petitioners.
Nripendra Chandra Das—for Opposite Party.

Judgment.—These two Rules have been obtained against an order of the District Judge of 24 Pargannas holding that an application to enquire into and rectify certain acts of the Receiver in an insolvency case was out of time and so could not be entertained. It appears that in a certain insolvency case a Receiver was appointed and he attached from the bargadars of one of the petitioners' paddy and sold it as being the property of the insolvent and in the other case he attached certain furniture. It appears that he also warned the tenants not to pay any more rent except to himself. The two petitioners feeling aggrieved at this order moved the District Judge, but he held that the matter came under S. 68, Provincial Insolvency Act, and so, as the application was made more than twenty-one days after the Receiver had taken possession of the properties, the matter was barred.

Thereupon applications were made to this Court and two Rules obtained on 24th June 1927. Subsequently, it appears that in July the two petitioners appeared before the District Judge and applied for leave to appeal to this Court against his order and the Judge granted them leave.

A preliminary point is taken and it seems to me one of substance that as the order of the District Judge in these two matters is appealable, S. 115, Civil P. C., has no application. Now, it is clear to my mind that the case must at least come under S. 75 (3) which makes it appealable to this Court by leave. Even if it did not become appealable by leave it is a matter decided by the Judge under S. 4 and is appealable. It is urged, however, for the petitioners that somehow or other they are strangers and not persons aggrieved, and in this connexion I am referred to the case of *Hanseswar Ghosh v. Rakhal Das Ghose* (1), but whether a person is aggrieved or not appears to be a question of fact and I cannot believe that a man whose paddy has been taken away and a man who has had his furniture taken away are not people who are aggrieved. I must, therefore, hold that the Rules must be discharged as an appeal lies, a fact which the learned Judge himself has admitted and the petitioners have admitted.

(1) [1914] 18 C. W. N. 366=20 I. C. 683=18 C. L. J. 359.

I, therefore, discharge both the Rules with costs to the Receiver; hearing-fee one gold mohur in each case.

Let the records be sent down as early as possible.

N.K.

Rules discharged.

* A. I. R. 1928 Calcutta 264

GREAVES AND PANTON, JJ.

Archibald George Edgcombe—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 766 of 1923, Decided on 13th December 1923.

* *Penal Code, S. 411*—*Mere suspicion on accused's part that property was dishonestly acquired is not enough.*

The word "believe" in S. 411 is a very much stronger word than "suspect" and it involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. It is not sufficient to show that the accused was careless for that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired.

[P 265 C 1]

Monmotha Nath Mukherjee and *Satindra Nath Mukherjee*—for Petitioner.

Debendra Narain Bhattacharjee—for the Crown.

Panton, J.—The present rule has been obtained by A. G. Edgcombe who, at the time of his arrest, was the 5th engineer on S. S. Aronda. He has been convicted under S. 411, I. P. C., by the Chief Presidency Magistrate. The offence is found to have been committed in respect of packets containing 1,865 one rupee notes the subject of a theft which had occurred on S. S. Maihar. The rule was issued upon the ground that the elements necessary to constitute an offence under S. 411 not being present in the case the conviction was bad in law and should be set aside. It would appear that the theft of these, among other notes, was committed some time between 14th April and 29th May last. On 29th June last at 9 p. m. the present petitioner was arrested in Rangoon by an Excise Inspector, and the packets of notes in question were then found upon his person. He is said to have informed the Inspector at the time that these notes were forged or false notes. His explanation now is that he

was conveying them from Calcutta to Rangoon at the request of a Chinese ship's carpenter with whom he was acquainted and that he was doing this as a friendly service. The findings of the learned Magistrate bearing on the points presented for consideration are:

I am satisfied that the accused was acting dishonestly and that he knew that he was engaged in some shady transaction.

Later on the Magistrate observes:

I think that he took the packets containing the notes, knowing that there was something shady about them, and that it was a transaction to be concealed from the authorities, but that he did not care to enquire what exactly was their nature. He knew generally that there was something wrong with them and may have supposed they might be forged.

Later on he observes:

I do not take his statement, that he had forged notes, to mean anything more than that he knew there was something wrong about them, but exactly what he had not troubled to ascertain.

Now the question is whether on findings such as these the petitioner could properly be convicted under S. 411, I. P. C., which requires that the person dishonestly receiving or retaining stolen property must know or have reason to believe the same to be stolen property. Now it was observed by Mr. Justice Melvill in the case of *Empress v. Rango Simayi* (1), that it was not sufficient to show that the accused was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired and that the word "believe" in S. 414, I. P. C., is a very much stronger word than "suspect" and that it involved the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing must be stolen property. Applying this test to the present case it appears to me that the findings of fact of the learned Magistrate were not sufficient to justify the conviction of the present petitioner under S. 411.

In my opinion, this Rule must be made absolute and the conviction and sentence of the petitioner are set aside. The petitioner will be discharged from his bail bond.

Greeaves, J.—I agree.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 265

NEWBOULD AND SUHRAWARDY, JJ.

Jaharlal Sadhukhan and others—Appellants.

v.

Chandra Kanta Pal and another—Respondents.

Appeal No. 274 of 1922, Decided on 24th July 1923, against appellate order of Dist. Judge, 24-Parganas, D/- 30th June 1922.

(a) *Civil P. C., O. 41, R. 27*—*Certified copy of a document not offered in evidence at the primary Court on account of the point not having been disputed—Such document should be admitted in appeal.*

Where the certified copy of proceedings in a Small Cause Court was not filed in the primary Court as the point as to the proceedings having taken place was not seriously disputed then.

Held: it should be admitted at the appellate stage as a certified copy of a public document when the question arose at that stage.

[P 266 C 1]

(b) *Civil P. C., S. 39*—*Section does not apply to a decree under the Presidency Small Cause Courts Act.*

Section 39, Civil P. C., does not apply to decrees passed under the Presidency Small Cause Courts Act as that Act has its own provisions and rules for the execution of such decrees.

[P 266 C 1]

(c) *Civil P. C., S. 39*—*Application for transfer of decree to the District Court A—Judgment-debtor resident in district B—The district Judge of A having jurisdiction over Districts both A and B—The application is in order.*

An application for the transfer of a decree was made, to the District Court of A but the judgment-debtors were resident in district B. The District Judge of A had jurisdiction over both the administrative districts A and B.

Held: The application could not be said to be not in accordance with law.

[P 266 C 2]

S. C. Maity and Apurba Charan Mukherjee—for Appellant.

Surendra Chandra Sen and Surendra Nath Bose—for Respondent.

Judgment.—This is an appeal against the order of the District Judge of the 24-Parganas affirming the order of the Subordinate Judge, fourth Court of Alipur, refusing the execution of a Small Cause Court decree on the ground that it is barred by limitation.

The appellants obtained a decree in the Presidency Small Cause Court on 4th December 1918. Their case is that on 11th August 1919 they made an application to the Small Cause Court Judge for transfer of the decree to the Hooghly District for execution and that by this application their application for execution

made on 9th January 1922 was an application within time. The lower appellate Court has held: firstly, that they have not proved that any application was made for transmission of the decree; and secondly that the application was not in accordance with law.

As regards the first point: we think the learned District Judge was wrong in refusing to admit in evidence a certified copy of the proceedings of the Small Cause Court Judge which was filed at the appellate stage. Apparently in the first Court the fact that the application for transmission had been made was not seriously disputed. When the question arose before the appellate Court we think the learned Judge should have allowed the appellants to file this certified copy of a public document in order to prove that they had applied for transmission.

As regards the second point it has been held that the application was not in accordance with law because it did not comply with the provisions of S 39, Civil P. C. Here the learned Judge was in error for, under the Presidency Small Cause Court Act and the rules framed thereunder, S 39, Civil P. C., does not apply to decrees passed under that Act. S. 31, Presidency Small Cause Courts Act, provides for the transmission of decrees to be executed outside the jurisdiction of the Presidency Small Cause Court. The particular ground on which the application has been held to be not according to law is that it sought to transmit the decree to the Hooghly Court and it is found that the judgment-debtors neither resided nor carried on business in the Hooghly District. It appears from the evidence put before us that the judgment-debtors resided and had property at Uluberia which is a subdivision of the District Howrah using the word "district" in its ordinary sense as the jurisdiction of the District Magistrate. But it also appears that the District Judge of Hooghly has jurisdiction over both the administrative districts of Hooghly and Howrah. It would, therefore appear that the fact that the application was made to a Court in the Hooghly District did not necessarily render it an application that was not in accordance with law.

But a difficulty arises as to the actual application that was made. In the copy of the proceeding which was filed before the lower appellate Court and which we

have now admitted in evidence it appears that the order passed was that the copy of the judgment was to be transmitted to the Subordinate Judge's Court of Hooghly to be executed in the Munsif's Court of Uluberia. At the hearing of the appeal before us another certified copy of apparently the same proceeding has been filed and on that copy the order is recorded that the copy of the judgment be transmitted to the District Judge's Court of Hooghly to be executed in the Munsif's Court of Uluberia. If the application was for transmission to the District Judge's Court of Hooghly the application would appear to be in accordance with law. Cl (b), S 31, Presidency Small Cause Courts Act, enables the Presidency Small Cause Court to transfer a decree direct to the Court which would execute it and does not require it to be sent through the District Judge as is provided by the provision of the Civil Procedure Code in O. 21, R 5. At the same time there is nothing in S. 31 (b) which would prevent the Presidency Small Cause Court from transmitting a decree in the first instance to the District Judge within the local limits of whose jurisdiction the judgment-debtors reside or their property might be found.

A further objection has been taken on behalf of the respondents that the application was not in order, because it further requested that the decree should be executed by the Munsif of Uluberia. It is said that at the time this application was made the Munsif of Uluberia had not jurisdiction to execute a decree the total amount of which exceeded Rs. 2,000. We do not think that this renders the application not in accordance with law. If the application was properly sent to the District Judge the reference to the Munsif of Uluberia would not prevent him from sending it to the proper Court for executing it, if as a matter of fact the Munsif of Uluberia had not jurisdiction to execute the decree.

We think, therefore, that it is necessary that an enquiry should be made and it should be ascertained what was the order for transmission that was actually passed by the Presidency Small Cause Court. It is necessary not only for the decision of this appeal, but also because it is a serious matter that from the same Court two certified copies of the same proceeding differing in material particulars should

issue. If from the result of this enquiry it appears that the application was for transmission to the Court of the District Judge of Hooghly we would hold that the application was made according to law and the present application for execution is not barred by limitation. Should it be found that the application was for transmission to the Subordinate Judge of Hooghly that would be an application for transmission to a Court which had not jurisdiction to execute the decree. It would then be necessary for the learned District Judge to consider whether the application was made in good faith or not. We are unable to accept his reasoning that because there is no evidence that the application was made in bona fide mistake it should be held that it was not made in good faith. Unless there are reasons to the contrary it seems unlikely that an application of this kind would be deliberately made for transmission to a Court not having jurisdiction, and having regard to the somewhat complicated nature of the jurisdiction of the District Judge of Hooghly an honest mistake is by no means impossible.

We accordingly set aside the order of the lower appellate Court and remand the appeal to him for rehearing and decision in accordance with these directions, and also we direct that he do make a full enquiry as to the issue of these two discrepant copies which will be sent to him. They will be marked Exs. H C 1 and H C 2.

The costs will abide the result. We assess the hearing-fee at two gold mohurs.
N K. Case remanded.

A I R 1928 Calcutta 267

MUKERJI, J.

Umesh Chandra Majumdar — Petitioner.

v

Mt. Safiyatannessa Khatun and others — Opposite Party.

Civil Rule No 629 of 1927, Decided on 21st November 1927, from order of Munsif, Jamalpur (Mymensingh), D/- 16th February 1927.

(a) *Civil P. C., O. 21, R. 92 (2)*—No notice given—Order is not without jurisdiction.

Merely because no notice is given of the application to the decree holder, the order which the Court passes is not without jurisdiction.
[P 268 C 1]

(b) *Civil P. C., O. 21, R. 93*—As long as the order setting the sale aside subsists it must attract the operation of R. 93.

Where the sale was set aside, without notice to the decree holders and the auction-purchasers applying to get back their purchase money the Court made an order in their favour.

Held: that as long as the order setting the sale aside subsists, it must attract the operation of R. 93: *A. I. R. 1922 P. C. 269* and *A. I. R. 1922 Mad. 228, Dist.* [P 268 C 2]

Prafulla Chandra Nag—for Petitioner.
Birendra Kumar De—for Opposite Parties.

Judgment.—The facts which have given rise to the order against which this Rule is directed are shortly as follows: The petitioners obtained a decree against certain judgment-debtors in 1910 in Money Suit No. 750/1164 of that year. In 1920 a jote of the judgment-debtors was sold in execution of rent decree obtained by the landlords and was purchased by some other parties and the sum of Rs. 525 was deposited by them in Court in two instalments. The petitioners had failed to realize the amount of their decree of 1910 and they, on the amount of Rs. 525 being put in by the auction-purchasers, applied for attachment of a certain portion of the said amount, Rs. 287-10-0 having gone towards the satisfaction of the decree for rent and Rs. 237-6-0 being left in Court as surplus sale proceeds. As a result of the proceedings thus instituted by the petitioners, they were allowed to withdraw Rs. 79-2-0 from Court, out of the aforesaid amount deposited by the auction-purchasers, in part satisfaction of their decree of 1910. In 1922 the amount of Rs. 79-2-0 was thus withdrawn by the petitioners. It appears that thereafter there were certain proceedings under O. 21, R. 90, Civil P. C., to which the petitioners were not parties and of which, it is said, no notice was given to them, as a result of which the sale in execution of the rent decree to which I have already referred was set aside by the Court. On the sale being set aside, as aforesaid, the auction-purchasers applied to get back their purchase money and upon that the learned Munsif made an order in their favour against which the present Rule is directed.

The substance of the contention that has been urged in support of the Rule is to the effect that the order setting the sale aside was passed in contravention of

the provisions of O. 21, R. 92, of the Code which makes it obligatory on the Court to issue notices of the application for setting aside the sale to all the parties affected by the order that has to be passed on such application. It is urged that, in the present case, the petitioners were not given such notices, that the order setting aside the sale was, therefore, one passed without jurisdiction and that inasmuch as the petitioners would suffer irreparable loss, if they are now called upon to refund the amount which they have withdrawn in part satisfaction of their own decree, the learned Munsif acted without jurisdiction and also improperly in making the order aforesaid. The whole basis of the petitioner's contention seems to me to be what is alleged by them in para. 10 of their petition and which is to the effect that the order setting the sale aside was passed without jurisdiction inasmuch as no notice was served on them and further that the proceeding held in connexion with the application for setting the sale aside was a collusive and benami affair. It may be conceded that if the order setting the sale aside may be looked upon as a nullity, the petitioners are entitled to urge that they are not bound by it and that any further or consequential orders that may have been passed on the basis of it should also be set aside.

It may also be conceded that in view of the proviso to sub-R. 2, R. 92 the Court should not have passed an order on the application for setting aside the sale without giving notice of the application to all the persons affected by such an order. But I find it very difficult to hold that merely because no notice was given of the application, the order which the Court passed was one that can be said to have been passed without jurisdiction. It was an order which the Court was wrong in passing and the parties whose interests were affected by the order may very well complain of its validity. But it is quite a different thing to say that it can be regarded as an order passed entirely without jurisdiction. The petitioners do not appear to have challenged the validity of the order itself either by an application for review or by moving against it or by taking such other measures as the law allows. So long as the order is not set aside all consequences that it may legiti-

mately lead to will follow. The present application on which this rule has been granted is not directed against that order but against a subsequent order which has been passed directing the petitioners and the judgment-debtor to refund the amount which had been withdrawn by them. I am unable to see what relief the petitioners can expect in this Rule so long as this Court is not competent to go behind the order that was passed setting aside the sale. The provisions of O. 21, R. 93 of the Code are imperative. The rule runs in these words:

Where a sale of immovable property is set aside under R. 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid.

In the present case the sale has been set aside under R. 92. The order by which the sale has been set aside is at the present moment a subsisting order and so long as it subsists it must attract the operation of R. 93. In support of the argument that the equities are in favour of the petitioners and that they should not be made to suffer in consequence of an order passed in the proceedings to which they were not parties, reference has been made to the decision of the Judicial Committee in the case of *Jai Berham v Kedar Nath Marwari* (1), and also to a decision of the Madras High Court in the case of *Raja Rao v. Anantha Narayanan Chetty* (2). These two decisions have very little bearing upon the present case as the statutory obligations arising under R. 93, O. 21, Civil P. C. did not come in for consideration in either of them. Whatever other remedies the petitioners may have in connexion with this matter, I am clearly of opinion that on the facts, as they are, the present Rule cannot be made absolute. The Rule is accordingly discharged; but in view of the circumstances of the case, I make no order as to the costs.

N K.

Rule discharged.

(1) A. I. R. 1922 P. C. 269=2 Pat. 10=49 I. A. 351. (P. C.).

(2) A. I. R. 1922 Mad. 228.

A. I. R. 1928 Calcutta 269

NEWBOULD AND MUKERJI, JJ.

Abdul Rezaak and others—Appellants
v.*Emperor*—Opposite PartyAppeal No. 171 of 1924, Decided on
17th July 1924.*(a) Criminal P. C., S. 297—Evidence summarized by both sides at great length—Jury taking notes of the same—Judge is not relieved from summing up.*

The fact that the evidence had been summarized at great length by both sides and the jury had taken notes from the arguments and had themselves made a complete summary of the evidence for their own convenience would not relieve the Judge from the duty of conforming to the provisions of S. 297, which distinctly lays down that he should sum up the evidence.

27 Bom, 644, Ref. [P 270 C 1]

(b) Criminal P. C., S. 297—Direction as to law of private defence—That private defence can be exercised even with respect to person and property of another not exposed to jury—Direction is bad—Penal Code, S. 97.

Where the Judge told the jury that the essence of the law of private defence was that the person exercising it must be possessed of reasonable fear either for his own safety or the safety of his property:

Held: that exposition of the law on the right of private defence was not exhaustive, for, under S. 97, I. P. C. the right of private defence extends under the restrictions specified in that section not only to the defence of one's own body or property, but to the body or property of any other person as well. [P 270 C 2]

(c) Criminal P. C., S. 297—Law of private defence not well explained—Accused prejudiced—Conviction was set aside.

Where there had been no proper summing up and the direction as to the right of private defence was also not free from objection, and the accused had been prejudiced by these defects:

Held: that the conviction of and the sentences passed on the accused should be set aside.

[P 270 C 2]

(d) Criminal P. C., S. 298 (2)—Judge's telling the jury his view of facts is not only permissible but desirable.

In many cases it is not merely permissible but also desirable that the Judge should tell the jury what view he has taken of the facts, in order to enable them to consider the facts properly and arrive at their own decision on them: 13 W. R. Cr. 34, *Foll.* [P 270 C 2]

Camell and Upendra Kumar Roy—for Appellants.*Khondkar*—for the Crown.*Nripendra Chandra Das*—for Complainant.

Judgment.—The appellants who are fifteen in number were tried by the Additional Sessions Judge of Tippera with the aid of a jury. The jury unanimously

found all the appellants guilty under S. 147, I. P. C., and one of them, viz., appellant 6, guilty also under S. 323, I. P. C. The learned Judge accepting the verdict of the jury convicted these appellants under S. 147, I. P. C. and sentenced each of them to undergo rigorous imprisonment for nine months. He also convicted appellant 6 under S. 323, I. P. C. and sentenced him to undergo rigorous imprisonment for six months, this sentence to run concurrently with that passed under S. 147, I. P. C.

The learned Judge in charging the jury at the close of the case did not sum up the evidence that was adduced in this case. He observed that the evidence had been summarized against each accused at great length by both sides and he, therefore, left it to the jury to consider upon the lines which he had indicated what conclusion they should draw from that evidence. The reason why the learned Judge did not sum up the evidence is to be found in a note which he has embodied in his heads of charge. That note runs as follows:

The charge I had originally prepared for delivery has been destroyed by me purposely. In it I had myself summarized by narrative and charts the evidence against each of the seventeen accused. Such a summary in fact it is in most cases incumbent on the Judge to put before the jury. In the present case, however, my own opinion on the question of the truth or falsehood of the prosecution case is so very strong that I found it impossible to place this evidence before the jury without indicating at every time my opinion in such a way as I know might fail to leave their decision as unfettered, as the law contemplates it must be in a jury trial. I have, therefore, deliberately, in fairness to the side whose story I find unacceptable, omitted to comment on the actual evidence in detail. The jury have taken down from the arguments a complete summary of the evidence against each accused, and the fact that there is no necessity to do so again supports my conviction that under the circumstances it would be more discreet not to do so.

Now, the law with regard to this matter is quite clear and is to be found in S. 297, Criminal P. C. That section says:

In cases tried by jury, when the case for the defence and the prosecution's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Upon the plain words of this section it is abundantly clear that the learned Judge should sum up the evidence for the prosecution and the defence in the course of his charge to the jury. The object of summing up the evidence is to

enable the jury to arrive at a right decision on the facts and a proper summing up is one in which the learned Judge makes a clear and distinct statement of the evidence on both sides with such advice as to the legal bearing of that evidence and the weight which should properly be attached to the several parts of it as sound judicial discretion would suggest.

The fact that the evidence had been summarized at great length by both sides and the jury had taken notes from the arguments and had themselves made a complete summary of the evidence for their own convenience would not, in our opinion, relieve the learned Judge from the duty of conforming to the provisions of S. 297, Criminal P. C., which distinctly lays down that he should sum up the evidence. If any authority is needed for this proposition we may refer to the case of *Emperor v. Malgowda Basgowda* (1). The reason why the learned Judge refrained from summing up the evidence is that he himself had formed a rather strong opinion on questions of fact and he apprehended that it would be impossible for him to place the evidence before the jury without indicating the opinion which he had formed, and if he indicated that opinion it would probably fetter the decision of the jury. We do not quite understand why that should be so, so long as the learned Judge does not endeavour to persuade the jury to agree with him and clearly tells them that they are the sole judges of facts and that they are not bound to accept any opinion on questions of fact which he may express. If a proper caution to this effect is duly administered there can be no objection to the learned Judge's expressing his own opinion to the jury. Of course it is desirable that he should not express his opinion too strongly. But if he happens to do so and sufficiently warns the jury we do not think that there can be any objection. In fact the law allows such a course. S. 298, sub-S. 2, lays down that the

Judge may, if he thinks proper, in the course of his summing up express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding.

And it is obvious that in many cases it is not merely permissible but also desirable that the learned Judge should

tell the jury what view he has taken of the facts in order to enable them to consider the facts properly and arrive at their own decision on them. Even under the Code of 1861, in which there was no provision corresponding to that contained in sub-S. 2, S. 298, it was held by this Court in the case of *Dwarka Nath Sen* (2) that

there can be no doubt that a Sessions Judge is bound to sum up properly, that he ought to advise the jury on questions of fact, and that there is no objection, to use the words of the learned Chief Justice Tindal, to the Judge's letting the jury know the impression which the evidence has made upon his own mind.

The omission to place the evidence before the jury and to give them proper direction with regard to that evidence is a material defect in the charge and must necessarily cause prejudice.

There is another point to which our attention has been drawn by the learned counsel for the appellants and that is with reference to the learned Judge's direction on the question of the law as to the right of private defence. The learned Judge told the jury that the essence of the law of private defence is that the person exercising it must be possessed of reasonable fear either for his own safety or the safety of his property. This exposition of the law on the right of private defence is not exhaustive. For under S. 97, I. P. C., the right of private defence extends under the restrictions specified in that section not only to the defence of one's own body or property, but to the body or property of any other person as well.

For the above reasons we think that there has been 'no proper summing up, and the direction to which we have just referred is also not free from objection. That the accused have been prejudiced by defects in the learned Judges charge is clear from the fact that the learned Judge was not prepared to agree with the verdict of the jury. We, therefore, think that the conviction of and the sentences passed on the appellants should be set aside, and we accordingly do set them aside.

Having regard to the view taken by the learned Judge of the evidence in the case we do not order a retrial, but we leave it open to the authorities to take further proceedings against the accused if they consider it proper to do so.

R.D.

Conviction set aside.

(1) [1900] 27 Bom. 644=4 Bom. L. R. 683.

(2) 13 W. R. Cr. 34.

A. I. R. 1928 Calcutta 271 (1)

NEWBOULD AND B. B. GHOSE, JJ.

Choyenuddin Pramanik and another—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1086 of 1924, Decided on 12th March 1925.

Criminal P. C., S. 360—Provision not complied with—Deposition is inadmissible in subsequent trial.

An omission to comply with the provisions of S. 360, Criminal P. C., in recording depositions in a former case is a bar to the use of such deposition as evidence in any subsequent proceedings (e. g. trial under S. 211, Penal Code.)

[P 271 C 1]

S. K. Sen, Satindra Nath Mukherjee and Manindra Lal Bose—for Petitioners.

Order.—The petitioners who obtained this Rule have been convicted one of an offence punishable under S. 211, I. P. C. and the other of abetment of that offence. The first ground on which the Rule was granted was that in the original trial arising out of the complaint now found to be false the depositions were not read over in accordance with the provisions of S. 360, Criminal P. C. In the explanation submitted by the District Magistrate it is admitted that this was not done. But it is urged that this could not have vitiated the trial in the present case as the proceedings in the former case had not been used in evidence. It appears, however, from the trying Magistrate's judgment that at least one deposition was used in evidence in that case. The deposition of Basir Ex. 29 is mentioned more than once. That an omission to comply with the provisions of S. 360 Criminal P. C., is a bar to the use of the deposition as evidence was decided long ago.

The Rule was also granted on the ground that the elements necessary to constitute offences under Ss. 211 and 211/109 I. P. C., not being present in the case the convictions are bad in law. Though there are findings sufficient to support the convictions, on a consideration of the judgments both of the trying Magistrate and of the appellate Court we hold that the case is not one in which we should order a retrial after reversing the present convictions on the ground of the wrong admission of evidence. The complaint which is found to

have been false was against one Emajuddi. We may take it that Emajuddi was wrongly accused and did not abduct the wife of the petitioner Basir. But there seems very little material on the record to justify the conclusion that Basir accused him knowing that there was no just or lawful ground for such a charge. The principal fact against him appears to be that when on 20th June he laid information at the thana he accused another person. But the prosecution have not shown that he did not receive other information before he complained before the Magistrate on 25th June.

The case against the other petitioner Choyenuddin who has been convicted of abetment rests on the fact that he assisted Basir in taking legal proceedings and that he had a reason for wishing to harm Emajuddi. But it does not seem to have occurred to the lower Court that this enmity with Emajuddi may well have led him to support Basir's complaint believing it to be true to an extent which he would not have done but for this enmity.

On the whole we do not think that it will serve any useful purpose to order a retrial. The Rule is made absolute. We set aside the convictions and sentences passed on the petitioners and direct that they be discharged from their bail bonds.

N.K.

*Rule made absolute.**** A. I. R. 1928 Calcutta 271 (2)**

SUHRAWARDY AND DUVAL, JJ.

Tara Chand—Defendant—Appellant.

v.

Gobinda Chandra Mandal and others—Plaintiffs—Respondents.

Appeal No. 1026 of 1922, Decided on 23rd July 1924, from appellate decree of Sub-Judge, Khulna, D/- 12th August 1921.

* Civil P. C., S. 11—*Subject-matter the same—Previous judgment upon merits after hearing some evidence on both sides though in plaintiff's absence is res judicata.*

Where the subject-matters of the two suits were the same and where the Court decided the previous case after both sides had given certain amount of evidence and wrote a judgment upon the merits dismissing the suit in plaintiff's absence and no appeal was preferred against that judgment,

Held: that it cannot be alleged that previous judgment has no worth because the decree in the suit was nothing more than a dismissal for default and that the matter was *res judicata*.

[P 272 C 2]

Satindra Nath Mukherjee—for Appellant.

Jadu Nath Kanjilal—for Respondent.

Judgment—In this case the plaintiff sued to recover rent for the years 1322 to 1325 at the rate of Rs. 66-5-6 a year. The defendant contested the suit denying the relationship of landlord and tenant and contending that the suit was barred by the principle of *res judicata*. The learned Munsif found that the relationship of landlord and tenant did not exist between the parties and that the suit was barred by the principle of *res judicata*. In appeal the learned Subordinate Judge found on both points against the finding of the Munsif and decreed the appeal. On the case coming up before us, the main point argued is that of *res judicata*. The plaintiff's case is that he holds a *ganti* settlement from the Talukdar Purna Chandra Bose and the *jama* in question was originally held by the defendant directly under Purna Chandra Bose. Purna Chandra Bose brought a Suit (No. 259 of 1915) against the defendant in respect of a *jama* and that suit was dismissed. The defendant's case is that that suit acts as *res judicata*. The *jama* of the land in respect of which rent was then claimed is the same as in the present case and the case was decided on the merits. The plaintiff's case, however, is that the *jama* is not necessarily the same. In the plaint in the former suit the rent claimed was Rs. 66-5-0 and now it is Rs. 66-5-6; and in the second place, as the first suit was not decided on the merits, it should be treated as one which has merely been dismissed for default. It appears that in the Suit No. 259 of 1915 a certain amount of evidence had been recorded on behalf of the plaintiff and defendant and the case adjourned on their application for further evidence on each side. On the next hearing day the plaintiff did not appear and the suit was determined in his absence. It is argued that such determination would only amount to dismissal and has the same value as the dismissal under O. 9, R. 8. Now, as regards the first point, there is no doubt that the suit of 1915 referred to the same *jama* and to the same land as the present suit. No

doubt, there was a mistake of two pice in the rental which was sought to be corrected, but such correction was refused. But we have compared the subject-matters of the two suits and it is obvious that they are the same. As to the second point, the Munsif decided the case and wrote a judgment upon the merits. No appeal was preferred against that judgment and in our opinion, it cannot now be alleged that it has no worth because the decree in the suit was nothing more than a dismissal for default. The learned Munsif came to the finding that there was no relationship of landlord and tenant after recording the evidence of both sides on the subject. We must hold for the reason that the matter is *res judicata*.

The result is that this appeal is allowed and the suit dismissed with costs in this and the lower appellate Courts.

R.D.

Appeal allowed.

A. I. R. 1923 Calcutta 272

C. C. GHOSE AND GREGORY, JJ.

Keshab Lal Dutta and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 557 of 1927, Decided on 6th July 1927.

Police Act, S. 30—Notification under, is inoperative after occasion for it has passed away.

A notification under S. 30 cannot be held to be operative after the occasion which called for the notification has passed away. [P 272 C 2]

S. K. Sen, Bhudhar Halidar, Nirmal Kumar Sen and Nagendra Kumar Dutt—for Petitioners.

Order.—No cause is shown. We have examined the record for ourselves and we are satisfied that the conviction of the petitioners is illegal in the circumstances stated. There was undoubtedly a notification under S. 30 of the Police Act in 1926, but that could not be held to be operative after the occasion which called for the notification had passed away. In this view of the matter, the Rule is made absolute, the conviction and sentence of the petitioners are set aside and the fines, if paid, be refunded.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 273 (1)

DUVAL, J.

Jotirmoy Goswamy and others—Plaintiffs—Petitioners.

v.

Guru Gobinda Goswami and others—Opposite Parties.

Civil Rule No. 917 of 1927, Decided on 16th. November 1927, from order of 3rd Munsif, Bankura, D/- 15th June 1927.

Civil P. C., O. 23, R. 1—Court considering that application for withdrawal should not be granted—Proper course is to dismiss application and proceed with suit.

If the Court does not consider that the application for withdrawal with liberty to bring a fresh suit should be granted, the proper course is to dismiss the application and then go on with the case: 32 Bom. 345; A. I. R. 1926 Cal. 233 and 20 C. W. N. 1011, *Foll.* [P 273 C 1]

Bankim Chandra Mukherjee and Ban-sorilal Sarcar—for Petitioners.

Judgment.—This rule is heard *ex parte*. In this matter the plaintiff sued to recover a certain share of a tank on declaration of his title thereto. The defendant appeared, the case was adjourned until it was over a year old and on 15th June last came on for hearing. The plaintiff was examined and the defendant was examined in part. A verbal application followed by a written application was then made on behalf of the plaintiff as there were certain formal defects—leave was prayed for to withdraw from the suit with liberty to bring a fresh suit. This application was strenuously opposed and the learned Munsif rejected it. But instead of then finishing the case and deciding it on the evidence on the record and on such further evidence in the case as might be adduced he made declaration that the plaintiff is permitted to withdraw from the suit without liberty to bring a fresh suit with costs to be paid to the contesting defendant and subsequently made a memo. of such costs. Now as was pointed out in the case of *Mahant Biharidasji v. Parshotamdas Ramdas* (1), the proper course is if the Munsif did not consider that the application for withdrawal with liberty to bring a fresh suit should be granted, to dismiss the application and then go on with the case. This ruling has been followed also in the case of *Kamini Kumar Roy v. Rajendra Nath Roy* (2),

and is also in accordance with the decision of a Division Bench of this Court in the case of *Suradhani Debya v. Chandra Nath Pramanik* (3). I must hold, therefore, that the order of the Munsif does not amount to a dismissal of the suit or to the suit being withdrawn unconditionally. I, therefore, set aside what appears to be an order disposing of the suit in this way and order that the case do go back to the learned Munsif to proceed to dispose of the suit on the assumption that the application to withdraw with liberty to bring a fresh suit has been refused. It follows too that the present order for costs in favour of the defendants must also be set aside as it will be for the Munsif now to dispose of the suit as a contested suit in the ordinary way.

To this extent the Rule is made absolute. No one appearing on the opposite side, I make no order as to costs in the Court.

N.K.

Rule made absolute.

(3) [1916] 20 C. W. N. 1011=37 I. C. 131.

A. I. R. 1928 Calcutta 273 (2)

SANDERSON, C. J., AND RICHARDSON, J.

Baikanta Nath Ghose—Plaintiff—Appellant.

v.

Bhuban Chandra Mahapatra and others—Defendants—Respondents.

Appeal No. 2069 of 1921, Decided on 18th July 1923 from appellate decree of 2nd Additional Dist. Judge, Midnapur, D/- 11th August 1921.

Landlord and Tenant—Non-transferable occupancy holding—Sale of—Acceptance of rent by landlord from transferee described as marfatdar in receipt—Question of landlord being estopped from suing for khas possession depends on facts of each case.

The question of the landlord being estopped from suing for the khas possession of a non-transferable occupancy holding, which has been transferred to a third party from which third party the landlord has accepted rent and granted a receipt therefor, but describing therein the third party as marfatdar, depends on the facts of each case: 17 C. W. N. 1088, *Foll.*

[P 274 C 1]

Where in such a case the landlord had previously declared that on transfer the occupancy holding had become abandoned and subsequently accepted rent from the transferee describing him in the receipt as marfatdar of the original tenant.

Held: that the landlord was precluded from maintaining that the transferee was but an

(1) [1908] 32 Bom. 345=10 Bom. L. R. 293.

(2) A. I. R. 1926 Cal. 233.

agent of the original tenant inasmuch as he (the landlord) had declared the land abandoned on its being transferred. [P 275 C 1]

Pyari Mohan Chatterjee—for Appellant.

S. Maiti and B. Apurba K. Mukerjee—for Respondents.

Sanderson, C. J.—This is an appeal by the plaintiff against the judgment of the learned Additional District Judge of Midnapur.

The point which arises on this appeal may be stated in the words of the learned District Judge at the beginning of his judgment, whether the landlord's claim for khas possession of the lands of a non-transferable occupancy holding is debarred by his having recognized a private purchase and he is estopped from suing for khas possession.

The learned vakil for the appellant has drawn our attention to several cases in which the Court had to deal with a dakhila granted to a transferee of a non-transferable occupancy holding as *marfatdar* of the original tenant: and, the learned vakil contended that the principle of those cases should be applied to this case and the appeal should be allowed.

In my judgment the principle which should be applied to such a case as this was laid down by Sir Lawrence Jenkins when he was the Chief Justice of this Court, in the case of *Prabhavati Dassi v. Taibatunnessa Choudhurani* (1) and, the passage to which I refer is at p. 1091 as follows:

But it is said, on the other side, that those receipts do not amount to a recognition because they are *marfatdari* receipts and, therefore, have no such legal effect as defendant 1 claims. I am inclined to think that Courts have yielded too freely to the temptation of being blinded to realities by the words "*marfatdar*" and "*gujratdar*" and so the true facts have suffered. At the same time I am bound to admit that there are expressions in the cases which would suggest that where these words appear no recognition can be inferred. I think, however, each case must be determined on its own circumstances, and the Court should determine in each case whether, on a consideration of all the facts—not merely by giving undue weight to words used—a legal inference is or is not to be drawn that there has been a recognition establishing a relationship of landlord and tenant between one who has paid and another who has received rent for a number of years.

That statement, it is quite true, as the learned vakil pointed out, was not neces-

sary for the decision of that case, but the principle was adopted by my learned brother Mr. Justice Chatterjee in the case of *Monmoth Nath Mitter v. Anath Bundhu Pal* (2), the passage being at p. 214. In my judgment that is now accepted, at all events so far as this Court is concerned, as the proper principle which ought to be applied to such a case as this. I, therefore, have to consider whether there were in this case such facts as would justify the learned Additional District Judge in arriving at the conclusion that the plaintiff had recognized the father of the first four defendants, whose name was Sadananda, Mahapatra, as the tenant.

The suit was brought on the 18th September 1918, and it appeared that the original tenant of the non-transferable occupancy holding was Guru Prosad, and he had purported to sell his holding to his father in December 1910. One of the allegations in the plaint was that Guru Prosad had abandoned the land without making any arrangement for the payment of the rent of the same; and both the learned vakils agreed that the allegation as to the abandonment was based upon the sale which was alleged to have been made in December 1910. Therefore, we must approach this case upon the allegation of the plaintiff that the original tenant Guru Prosad had abandoned the land so long ago as 1910. A suit was brought for rent, and a decree was obtained and a sale was about to take place when the amount necessary to meet the decree was deposited by the purchaser, that is to say, Sadananda Mahapatra, the predecessor of defendants 1 to 4.

The learned Munsif, when he allowed the purchaser to deposit the decretal dues, added a note that the order would not affect the rights of any party. In February 1915, the plaintiff, alleging that the money which was lying in the Court belonged to him, made an application that it should be paid to him: he took the money out of Court without making any protest against the order of the Munsif allowing the deposit to be made by the alleged purchaser. In July 1917 a rent receipt was granted by the plaintiff and that is described in the learned Judge's judgment as follows:

He accepted rents from the private purchaser and granted a dakhila in the name of the late

(1) [1913] 17 C. W. N. 1083=20 I. C. 664=19 C. L. J. 62.

(2) [1918] 23 C. W. N. 201=56 I. C. 222.

tenant but describing the purchaser as mar-fatdar.

As I have said, this suit was brought in 1918. In this case, it is true that the dakhila described the person, who paid the rent, as an agent of the original tenant, but as I read the learned Judge's judgment it amounts to this, that that description of the purchaser was not a correct description. I find it difficult to understand how the purchaser could be properly described as agent of the original tenant in 1917, when it is remembered that the original tenant, as alleged by the landlord, had abandoned the land so long ago as 1910.

It is not necessary for me to say more than that, in my judgment, applying the principle which was laid down by Sir Lawrence Jenkins in the case to which I have referred, there was sufficient material before the learned Additional District Judge to justify him in concluding that the plaintiff had recognized the purchaser.

Consequently, in my judgment, this appeal should be dismissed with costs.

Richardson, J.—I agree.

D D. *Appeal dismissed.*

A. I. R. 1928 Calcutta 275

M. N. MUKERJI AND MALLIK, JJ.

Jnanendra Nath Mukherjee and another—Plaintiffs—Appellants.

v.

Jitendra Nath Mukherjee and others—Defendants—Respondents.

Appeal No. 347 of 1925, Decided on 16th August 1927, from original order of Sub-Judge, 2nd Court, Hooghly, D/- 28th April 1924.

(a) *Civil P. C., Sch. 2, para. 21*—Award though interfering with strangers' rights is binding on parties.

When the award purports to interfere with the rights of strangers, the strangers will not in any event, be affected by it; but as between the parties to the award its provisions must be held to be operative. [P 276 C 2]

(b) *Civil P. C., Sch. 2, S. 1 (1)*—*Executor cannot make reference to arbitration in contravention of the will.*

An executor cannot legally make any reference to arbitration which will go against the terms of the will. [P 276 C 2]

(c) *Probate and Administration Act, S. 4*—*Executor having once elected to act as such*

cannot refuse or renounce—Test of determining such election by acts laid down.

The office of executor being a private office of trust named by the testator and not by the law, one named executor may refuse the office or renounce. It is, however, too late to refuse or renounce when one has once elected to act as executor; and he may determine such election by acts which amount to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse are: (1) anything done by the executor with relation to the effects of the testator which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the will, liable as executor *de son tort*. [P 276 C 2, P 277 C 1]

Bibhuti Bhusan Lahiri and Surendra Nath Basu—for Appellants.

Bijan Kumar Mukerji—for Respondents.

Judgment.—One Kailas Chandra Mukherji died in November 1910 leaving a will dated 28th August 1908. He left two sons, Jnanendra and Debendra, by his first wife and four sons, Jogendra, Jatindra, Jitendra and Jonendra by his second wife. He also left a daughter Ashalata by his second wife, who was unmarried at the time of his death. Jnanendra, Debendra and Jogendra had attained majority at the date of the will, and Kailas Chandra Mukherji appointed all the said three sons as executors. Jogendra, however, died during the lifetime of his father, a few months before the death of the latter. No probate was taken of the will, but on 17th January 1921, there was an agreement between the first party consisting of Jnanendra and Debendra and the second party consisting of Jatindra, Jitendra and Jonendra by which the disputes between them were referred to the arbitration of three gentlemen, Babu Nanda Lal Pal, Babu Hari Charan Chatterji and Babu Kanti Chandra Ghose. The arbitrators made their award on 25th November 1921. On 1st February 1922, Jnanendra and Debendra applied to the Court against Jatindra, Jitendra and Jonendra that the award might be filed. This gave rise to the suit which was tried by the Subordinate Judge, 2nd Court, Hooghly. The Subordinate Judge made an order refusing to file the award and dismissed the suit. Hence this appeal.

It was stated in the argument that a dispute had arisen between the two parties for the partition of the movable and immovable properties left by their

father and in respect of the construction of the will and also with regard to the accounts connected with the estate left by him. It was stipulated that:

Both the parties shall be bound by the award that may be given by the said arbitrators on making a partition or any other settlement in respect of the self-acquired moveable and immovable properties of our father, by relying on the evidence and documents that may be put forward. None of the parties shall be competent to raise any objection or plea thereto. The parties shall all be bound by the decisions arrived at by the arbitrators, with respect to the respective assets or liabilities of the parties after examining and looking through the accounts of the income and expenditure of the estate left by our father since his death.

The will was put forward as one of the documents in the case, but the arbitrators thought, to quote their own words, that it was "unworthy of evidence." The arbitrators nevertheless referred to the will, but only for the purpose of ascertaining the testator's intention and not with the object of giving effect to the same, and, on the other hand, the arrangement contemplated by the testator was freely departed from in the award. As regards partition the allotments were made in contravention of the terms of the will in order to suit the desire of the parties or their mutual convenience. The unmarried daughter Ashalata, who was not a party to the agreement or the suit, had been given certain ornaments by the will, but the arbitrators held that Kailas had no authority to dispose of them and they awarded the same to the plaintiffs. There were other variations made though they were of minor importance. The award also gave credit in favour of the plaintiffs in respect of a sum of Rs. 4,500 on the ground of maintenance charges incurred by them on account of the defendants.

The Subordinate Judge has dismissed the suit upon three main grounds, and these grounds have been challenged before us.

The first ground on which the Subordinate Judge has proceeded is that in his opinion the arbitrators exceeded their authority. In his opinion the arbitrators had no power to partition the properties or award the ornaments in violation of the terms of the will as the parties did not challenge its propriety, and any intention on their part to do away with it was not apparent. So far as this ground is concerned I am unable to agree in the

view of the learned Subordinate Judge, for the terms of the agreement left it open to the arbitrators to make any award they thought fit either in accordance with or in contravention of the will. In my opinion the arbitrators did not exceed their authority. It is true that the award purported to interfere with the rights of strangers—notably the daughter Ashalata—and the strangers would not in any event be affected by it; but as between the parties to the award its provisions must be held to be operative if there is no other question about its validity.

The next ground on which the learned Subordinate Judge rested his decision is that one of the arbitrators, Babu Nanda Lal Pal did not assent to one of the terms of the award, namely, that about the credit of Rs. 4,500 in favour of the plaintiffs on account of the maintenance of the defendants. The finding has been assailed before us and reliance in this respect has been placed upon certain passages in the deposition of the said arbitrator Babu Nanda Lal Pal as indicating a failure of memory on his part and also upon the deposition of another arbitrator Babu Kanti Chandra Ghose as establishing that there was such assent. A careful study of the evidence of these two gentlemen has convinced me that there must have been a misunderstanding in the matter, that is to say, Babu Nanda Lal Pal never assented to this particular provision, while Babu Kanti Chandra Ghose on his part honestly thought that Babu Nanda Lal Pal had given his assent. It is impossible to believe that such a positive statement as the one which Babu Nanda Lal Pal made in answer to the Court towards the end of his deposition was due to a failure of memory. Both the witnesses are quite respectable and their integrity is beyond reproach. On this ground alone the dismissal of the suit is amply justified.

Another ground on which the judgment of the Subordinate Judge rests is that the plaintiffs being executors could not legally make any reference to arbitration which would go against the terms of the will. This proposition has been challenged, it being urged that it will not hold good in this case as the plaintiffs have not taken probate of the will and have not accepted their office as executors. Now the office of executor being a private office of trust named by the testator and not by the law

one named executor may refuse the office or renounce. It is, however, too late to refuse or renounce when one has once elected to act as executor; and he may determine such election by acts which amount to an administration. The acts which amount to an administration, so that the party cannot afterwards refuse are: (1) anything done by the executor with relation to the effects of the testator which shows an intention in him to take upon him the executorship, and (2) whatever acts will make a man not named executor in the will, liable as executor *de son tort* (William on Executors, 11th edn., Vol. 1, p. 194). In the present case the plaintiffs, and for the matter of that the defendants as well, put the will forward and relied on its contents, and were unable to agree as to its construction, but never showed any intention to act in defiance of its terms beyond leaving it to the arbitrators to settle the dispute in the best way they could and agreeing to abide by the award that they would make. The plaintiffs who are two of the executors named in the will, have been handling the estate and effects of the testator ever since his death which took place so far back as 1910. Far from refusal or renunciation the reference to the arbitration, one of the matters referred thereby being the construction of the will itself, affords ample indicia of the plaintiffs having accepted the office.

They cannot be permitted to enter into an agreement the result of which may be, and in this particular case has been, to bring about an award nullifying the intention of the testator. The object sought to be attained by such an agreement is something that the law does not permit, namely, to allow the parties to acquire title to property in contravention of the terms of a will in a case where the title is claimed under the will itself, to allow the executors to have the will construed by a tribunal of their own choice without proving the will and evading of the duty fixed by law, and to allow the executors and some of the legatees to join together and make an arrangement for the distribution of the properties contrary to the testator's intention and to the prejudice and detriment of the remaining legatee or legatees under the will. The Court which is asked to pass a judgment and issue a decree in accordance with such an award may very well

refuse to do so treating the award as an invalid one. Under the English law when it is too late for an executor to renounce, he having once elected to act as such, he may be cited to take probate and his disobedience will amount to a contempt of Court.

In my opinion, therefore, the decision of the Court below is right and this appeal should be dismissed with costs, hearing-fee being assessed at three gold mohurs.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 277

MOOKERJEE AND SUHRAWARDY, JJ.

Sm. Chandra Tara Debi and another—Appellants.

v.

Srish Chandra Bhattacharjee—Respondent.

Appeal No. 206 of 1921, Decided on 19th December 1923, against original decree of Dist. Judge, Dacca, D/- 25th August 1921.

(a) *Probate and Administration Act, S. 70—Executor, purchasers of interest of testator's son can object to grant of letters.*

Grant of letters of administration may be opposed by person claiming interest in estate by purchase at sale in execution of decree against sons of deceased who would have taken estate in event of intestacy: 6 Cal. 460 and 10 Cal. 413, *Foll.* [P 278 C 1]

(b) *Succession Act (1865), S. 187—Letters of administration with will annexed—Unless the estate is completely administered and no action is necessary on the part of the Court probate should be granted.*

Where a will has been propounded and proved, the probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the terms of the will for a long time, as it is absolutely necessary for the legatees to establish their title by proof of the will. The probate Court cannot go into the question whether the legatees have or have not acquired independent title by adverse possession. But if it is proved that the estate has been completely administered and that no further action was needed on the part of the Court, letters need not be granted: 10 C. W. N. 432 and 9 C. L. J. 116, *Foll.* [P 278 C 2]

Kali Kinkar Chakrabarti—for Appellants.

Surendra Chandra Sen and Prokash Chandra Pakrashi—for Respondent.

Judgment.—We are invited in this appeal to examine the propriety of an order of dismissal, made on an application for letters of administration with

copy of will annexed in respect of the estate of one Sibsundari Debi. The lady made a testamentary disposition on 15th June 1896. She died in the following month leaving four sons, two of whom had been married. The will recites that as the sons were of extravagant habits, it was necessary to take steps for the preservation of the estate. The property was consequently left to the two daughters-in-law and various directions were given for its management and distribution. On 2nd January 1920, the daughters-in-law made the present application for letters of administration to the estate of their mother-in-law with copy of her will annexed. The application was opposed by one Srish Chandra Bhattacharyya, who claimed an interest in the estate by purchase at a sale held in execution of a decree against the sons of the deceased, who would have taken the estate in the event of intestacy. In view of the decisions of this Court in *In the matter of Bhobosoonduri Dabee* (1) and *Surbo Mongala v. Sasi Bhusan* (2), the objector was clearly entitled to take exception to the grant of letters of administration. But the District Judge has not investigated the case on the merits at all; he has rejected the application on the preliminary ground that as the estate has been sold in execution of a decree on a mortgage granted by the heirs-at-law, it had been "administered," and there was no occasion for the grant of letters of administration. In support of this extraordinary view, he has invoked the authority of the decision in *Lalit Chandra v. Baikuntha Nath* (3). We are of opinion that the order made by the District Judge cannot be maintained either on authority or on principle.

It may be conceded that where the object of the litigation appears to be not to administer the estate left upon the death of the deceased but merely to obtain a declaration of heirship so as to fortify the position of the successful party in a regular suit that may be instituted no grant should be made. This position is borne out by the decisions in *In the goods of Nursingh Chandra* (4), *Lakshmi Narain v. Nanda Rani* (5) *Chandi*

Charan v. Banke Behary (6), *Lalit Chandra v. Baikunta Nath* (3), *Parsania v. Hari Charan* (7) and *Prasanna Kumari v. Ram Chandra* (8). But there is no room for the operation of this principle where an application is made for probate of a will or for letters of administration with copy of the will annexed. There is, as explained in *Charu Chandra v. Nohush Chandra* (9) a fundamental distinction between letters of administration to the estate of an intestate and letters of administration, not upon intestacy, but with copy of the will annexed. In the latter case, we have to take account of the fact that S. 187, Succession Act, which is not reproduced in the Probate and Administration Act, but is made applicable to the wills of Hindus by S. 2, Hindu Wills Act, as amended by S. 174, Probate and Administration Act, ordains that no right as executor or legatee can be established in any Court of justice unless a Court of competent jurisdiction in British India shall have granted probate of the will under which the right is claimed or shall have granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

Reference may in this connexion be made to the case of *Adwaita Charan v. Krishna* (10). In that case, it was ruled that where a will has been propounded and proved, the probate Court should grant probate even though it should appear that there were no debts due to or by the testator and the legatees have been in possession in accordance with the terms of the will for a long time, as it is absolutely necessary for the legatees to establish their title by proof of the will. The probate Court cannot go into the question whether the legatees have or have not acquired independent title by adverse possession. Chatterjee, J., pointed out that there was no conflict of authorities on the point. In the cases of *In the goods of Nursing Chandra Bysack* (4), *Lalit Chandra v. Baikunta Nath* (3), *Parsania v. Hari Charan* (5) and *Prasanna Kumari v. Ram Chandra* (8) there was no will, and the application was for

(1) [1881] 6 Cal. 460.

(2) [1884] 10 Cal. 413.

(3) [1910] 14 C. W. N. 463=5 I. C. 395.

(4) [1899] 3 C. W. N. 635.

(5) [1909] 9 C. L. J. 116=3 I. C. 287.

(6) [1906] 10 C. W. N. 432.

(7) [1913] 17 C. L. J. 65=16 I. C. 588.

(8) [1913] 17 C. L. J. 66=17 I. C. 155.

(9) A. I. R. 1923 Cal. 1=50 Cal. 49.

(10) [1917] 21 C. W. N. 1129=42 I. C. 933.

grant of letters of administration upon intestacy. In *Lakshmi Narain v. Nanda Rani* (5) and *Chandi Charan v. Banker Behary* (6), there was a will which had been probated; but in the one case permission was sought to sell the estate in the course of administration and in the other case letters of administration were sought after the death of the executor. In both cases, it was ruled that no order should be made, inasmuch as there was evidence to show that the estate had been completely administered and no further action was needed on the part of the Court. We may point out that the decision, in *Adwaita Chandra Mandal v. Krishna Dhan Sircar* (10), is in conformity with that in *Charu Chandra v. Nohush Chandra* (9). There the will had been executed on 9th March 1889, the testator died on 29th April 1894, and the application for letters of administration was made on 26th June 1916, that is, more than 22 years after the death of the testator; yet the District Judge granted letters of administration on 13th July 1917 and the grant was confirmed by this Court on 14th November 1917. We observe that in *Sarojini v. Haridas Ghose* (11), probate was granted, though the estate had been sold in execution of a decree against the heir-at-law, who had been excluded from the succession by the testamentary disposition. In that case, as here, the grant was opposed by the purchaser who claimed title from the apparent heir-at-law. Finally the decision in *Charu Chandra v. Nohush Chandra* (9) shows that when a grant has been made the grantee may have to face considerable difficulty when he seeks to recover the estate from the persons in possession; that, however, is no ground for refusal of the application. The order made by the District Judge cannot be supported and must be discharged.

The result is that this appeal is allowed, the decree of the Court below set aside and the case remitted to that Court in order that the question of genuineness of the will may be investigated on such evidence as may be adduced by each side. The appellants are entitled to their costs in this Court. We assess the hearing-fee at two gold mohurs. The costs in the lower Court will abide the result.

D.D. Case remanded.

(11) A. I. R. 1322 Cal. 12=49 Cal. 235.

A. I. R. 1928 Calcutta 279

SUHRAWARDY AND DUVAL, JJ.

Bishnu Chandra Sen and others—
Plaintiffs—Appellants.

v.
*Behari Lal Pradhan—*Defendant—
Respondent.

Appeal No. 993 of 1922. Decided on 17th July 1924.

Landlord and Tenant—Tenancy-at-will—
Notice to quit given according to T. P. Act,
S. 103—Tenant is liable to be ejected.

When the tenant is a tenant-at-will and his tenancy has been determined by a notice to quit under S. 106, T. P. Act, he is liable to be ejected, irrespective of the terms of the contract determining the tenancy. [P 280 C 1]

Brojo Lal Chakravarty and Kali Kin-
*kar Chakrabarty—*for Appellants.

*Santimony Majumdar—*for Respdt.

Judgment.—This appeal arises out of an ejectment suit which was brought by six plaintiffs against the defendant after service of notice to quit. The defendant was holding the land under a kabulyat dated Aswin 1312, which was one for a lease from year to year. He took lease of the tank for the purpose of rearing fish therein undertaking not to cut trees standing on the banks or to do any act prejudicial to the tank. The plaintiff's case was that the defendant had cut down and appropriated some trees on the bank, and had allowed weeds and mars to grow on the water rendering it unfit for human consumption. The plaintiffs thereupon served a notice to quit upon the defendant, putting an end to the tenancy which the defendant had by his conduct forfeited. The trial Court dismissed the suit on the ground that the plaintiffs had failed to prove that as a matter of fact the defendant was guilty of any act injurious to the tank. The plaintiffs appealed against the decree of the Munsif, and the appeal was heard by Mr A. H. Carter on 20th April 1921. The appeal was allowed and the plaintiff's suit decreed. On 29th April 1921, an application was filed before the Judge by two persons Aputam Sen and Mohan Krishna Sen to be substituted in place of plaintiff 5 (Bodhi Satta Sen) who, it was alleged, had died on 31st January 1921. Notice was ordered to be served of this application and it came on for hearing before Mr. J. A. Ross who had succeeded Mr. Carter as District Judge of Murshidabad. It was heard on

20th August 1921, when the following order was passed:

It is ordered that the legal representative of the deceased appellant will be brought on the record and the appeal will be reheard. Fix 28th September 1921 for hearing.

The effect of this order was to vacate the judgment of Mr. Carter delivered on 20th April 1921. The appeal was reheard by Mr. Ross, on 1st February 1922 and dismissed with costs.

The plaintiffs appeal to this Court and two grounds have been urged on their behalf: first, that the order passed by Mr. Ross on 20th August 1921, vacating the entire judgment of Mr. Carter and ordering a rehearing of the whole appeal was passed without jurisdiction and was erroneous in law. On this point reference has been made to O. 41, R. 4, and we are asked to hold that on the date on which Mr. Carter delivered his judgment the appeal was not incompetent nor was the order passed by the Judge liable to be set aside, the grounds of appeal being common to all the appellants. The appellants are joint landlords. They served the tenant with notice to quit and on the expiration of the time provided in the notice brought the suit for ejectment. The fact that one of the landlords died since the institution of the appeal would not affect the right of the others to get a decree in ejectment and in support of this reference has been made to the case of *Dwarka Nath Roy v. Kali Sankar Roy* (1). We think that there is great force in this argument. But it is not necessary for the purposes of this case to consider this matter more minutely for on the second ground that the appellants have taken, we are of opinion that they are entitled to succeed. That ground is that on the findings of the Courts below the defendant was a tenant-at-will and his tenancy has been determined by a notice to quit presumably under S. 106, T. P. Act irrespective of the fact that he did or did not do any act in contravention of the terms of the contract determining the tenancy and so he was liable to be ejected. The second issue framed by the learned Munsif was as follows :

Is the defendant a tenant-at-will under the plaintiff ?

In disposing of that issue the learned Munsif observed that this issue was raised owing to the defendant claiming

a right of occupancy in respect of the tank and he held that the parties were bound by the Transfer of Property Act, and that the provisions of the Bengal Tenancy Act did not apply. Mr. Ross in appeal has considered this finding of the Munsif as a finding that the defendant was a tenant-at-will. He observed :

The respondent raised the issue whether he was a tenant-at-will, whether a notice to quit was served on him and whether he injured the tank by any act contrary to the terms of the kabuliyat. The Munsif found for the plaintiffs on the two first issues and I think rightly.

We have, therefore, the finding of the learned Judge of the Court of first appeal that the defendant was a tenant-at-will. It has been found by the learned Munsif and that finding has not been displaced by the Judge, that the notice to quit was duly served upon the defendant. The only objection, therefore, that may be urged in defence is that there is a contract between the parties to take the case out of the operation of S. 106, T. P. Act. The learned vakil for the respondent contends that as the defendant reared fish in the tank and did not commit any act likely to injure the tank or pollute the water of the tank, it should be presumed that the contract between the parties was that so long as the respondent carried out the terms of the contract he would not be liable to be ejected. If this contention prevails, the defendant must be taken to have acquired a permanent tenancy in the tank so long as he does not commit any act contrary to the contract. We do not think that that was the intention of the parties. There is no other term in the kabuliyat which will stand in the way of the plaintiff landlords determining the tenancy by a proper notice. We think that on this finding the plaintiffs are entitled to succeed.

The result is that the decree of the Court below is set aside and the plaintiff's suit, in so far as it claims recovery of possession from the defendant by ejecting him from the tank, is decreed. Since we have held that the plaintiffs are entitled to succeed in ejectment by virtue of the determination of the tenancy of the defendant under S. 106, T. P. Act., they are not entitled to any compensation in the suit. That part of the claim is dismissed. The plaintiffs will be entitled to get proportionate costs in all the Courts.

R.D.

Décreet set aside.

* A. I. R. 1928 Calcutta 281

RANKIN, C. J., AND CHOTZNER, J.

Ahamadar Rahman—Appellant.

v.

Dwip Chand Choudhury and another—Respondents.

Criminal Appeal No 333 of 1927 and Criminal Revn. No. 7 of 1927, Decided on 9th November 1927, from order of Dist. Judge, Chittagong, D/- 5th March 1927.

* *Criminal P. C., S. 476-B*—*There is only one appeal from the decision on an application for making complaint.*

The policy of the law, as laid down in 'S. 476-B' is this that, whenever there is a decision by a Court upon an application that a complaint shall be made, whether that decision be one way or another, there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court, his remedy after that is to take his defence before a jury or Magistrate, according to the nature of the case. Two Courts, and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not: *A. I. R. 1924 Bom. 347* and *A. I. R. 1925 Lah. 322, Foll : A. I. R. 1926 Pat. 81, Dist.* [P 284 C 1,2]

A. K. Fazlul Haq, Debendra Narain Bhattacharji and Tarapado Banerji—for Appellant.

Khundkar and Narendra Kumar Das—for Respondents.

Rankin, C. J.—This is an appeal from an order, dated 5th March 1927, and made by the District Judge of Chhittagong under S. 476-B, Criminal P. C. It appears that the appellant was a tenant to and tahsildar of a certain party. He, in the course of his duty, appears to have collected rents due to his masters and there was certain litigation between the parties. In 1924 the masters brought certain rent suits for arrears in respect of the years 1920 to 1923 against the present appellant and his cosharers. He pleaded full payment as regards the rent of 1920 and part payment as regards the later years, and on this latter point he supported his case by producing two dakhilas, Ex. A and Ex. A-1. It is said that Ex. A is a dakhila emanating from the sudder cutchery and Ex. A-1 was given by one Mahendra under orders of the sudder cutchery. Be that as it may, the Munsif, in whose Court the suit was brought, decreed the rent suit in full and appears to have made an observation that the dakhilas were suspi-

cious. Thereupon the plaintiffs in the case made an application to the Munsif under S. 476, Criminal P. C., asking him to take steps by making a complaint to institute prosecution of the present appellant for producing in evidence these documents known by him to be false; in other words, for perjury and forgery. The case itself—the rent suit—went on appeal to the District Judge, but the Munsif's finding was affirmed on 10th July 1926. Thereupon the petition asking the Munsiff to make a complaint to the Magistrate was revived and a miscellaneous case was started and the parties commenced to contest the question whether the Munsif's Court ought not to make a complaint against the present appellant. How far they contested it on the merits is doubtful, because it would appear that in the end, on 4th December 1926, the application of the plaintiffs-landlords was dismissed for default. Taking that order of dismissal for default as being, in the words of S. 476-B, a refusal to make a complaint, the plaintiffs-landlords appealed against it to the District Judge who, on 5th March 1927, made the order against which the present appeal is brought. By his order the learned District Judge gives certain reasons which appear to him to amount to good prima facie proof that the dakhilas were forgeries. He goes into the questions of the counterfoils, the numbers of the counterfoils and so on. He comes to the conclusion that there is a good prima facie case, not only that they were forgeries, but that the present appellant used them knowing them to be forgeries.

In the present appeal the first question that arises is whether, in a case like this, an appeal lies to the High Court or not. That question depends upon the words of S. 476-B, Criminal P. C. What is said is that, in a case where the first Court, in dealing with an application to lodge a complaint, refuses to lodge a complaint, and an appeal is taken to a superior Court which decides to make a complaint there is a further right of appeal from that; because S. 476-B, having operated to give an appeal from the order of the first Court dealing with the matter, operates all over again when the second Court decides that a complaint should be made. Mr. Fazlul Haq, the learned Advocate who appears for the appellant, does not contend that, if in such a case

as this the superior Court had dismissed the appeal, thereby refusing to make a complaint and agreeing with the Court below from such an order, a right of appeal to the High Court would lie. He contends that it makes all the difference that the order of the superior Court was an order which for the first time amounted to the making of a complaint. He agrees, too, that if in the first Court a complaint had been made and on appeal the appeal had been dismissed, no further appeal would lie to this Court. He contends that in the particular case, where the first Court having refused to make a complaint a superior Court differs and does for the first time make a complaint then S. 476-B operates to give what is in effect a second appeal. There is some authority upon this question and it is very important that the matter should be rightly decided. The question is whether the intention of the legislature was to give one appeal from every decision upon an application for an order that a complaint shall be made, or whether the intention of the Code is not merely to give that right, but in addition to give a right to one appeal from every order directing a complaint.

In my judgment it is desirable to refer to three cases in which this matter has been dealt with. The first case to which I would refer is the case of *Somabhai Valabh Bhai v. Aditbhai Parshottam* (1). That case was one in which a Subordinate Judge decided to make a complaint. The language used by the Subordinate Court was language applicable to the old Code, but in fact the first Court decided to make a complaint. On appeal the superior Court, namely, the Sessions Judge, reversed that order and recalled the complaint. Thereupon an appeal was brought to the High Court and the decision of Macleod, C. J., and Shah, J., was to the following effect :

From that order in effect directing withdrawal of the complaint the petitioner has filed an appeal. The first question is whether the appeal lies. We are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate.

It is quite true that in that particular case the superior Court had refused to make a complaint and had set aside the order directing a complaint to be made. The learned Judges do not seem to me to

proceed upon that all. They proceed, I think, upon the principle that, on the true construction of S. 476-B, there is no provision for a second appeal; there is no provision for an appeal to be taken from the order made by the superior Court.

The next case to which I would refer is the case of *Muhammad Idris v. Emperor* (2). In that case there had been a Subordinate Judge's order refusing to make a complaint and there had been an appellate order under S. 476-B directing a complaint to be made, so that it was a case exactly on all fours with the present case; and when an appeal was taken to the High Court of Lahore the matter was referred to a Bench for decision. The appellate Bench decided in this way :

The question referred to us in this appeal and in Appeals Nos. 233 and 236 of 1924 is whether an appeal lies to this Court from an appellate order of the District Judge making a complaint which the Subordinate Judge might himself have made under S. 476, Criminal P. C. S. 476-B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under S. 476 or S. 476-A, and neither of those sections relates to a complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint.

It appears to me, therefore, that the High Court of Lahore has proceeded upon the same principle as the High Court of Bombay, namely, that under S. 476-B there is evidently an intention to give one appeal from the decision of the first Court which deals with an application that a complaint should be made. Whether the appeal results in granting the application or refusing the application, there is one appeal, and only one appeal, provided for by S. 476-B.

The case, however, in which the matter has been most fully discussed is a case which is in favour of the present appellant. That is the case of *Ranjit Narain Singh v. Rambahadur Singh* (3). The learned Judges there take the view that if the superior Court acting under S. 476-B decides in a particular way or for the first time decides to make a complaint which the lower Court has refused to make then the section having once operated proceeds to operate all over again because the order made by the superior Court in such a case is itself an order making a complaint; and,

(2) A. I. R. 1925 Lah. 322=6 Lah. 56.

(3) A. I. R. 1926 Pat. 81=5 Pat. 262.

(1) A. I. R. 1924 Bom. 347=48 Bom. 401.

therefore, an order making a complaint having been made, and made for the first time, S. 476-B has a second lease of life and operates upon that to give in effect a second appeal. In so deciding the learned Judges appear to have been in agreement with a previous case decided by Mr. Justice Mullick, in the same High Court but which is not, so far as I know, reported. They do, however, cite in full for the present purpose the dicta of Mr. Justice Mullick and it appears that an application was made to a Sub-Deputy Collector to make a complaint against one Faijdar Rai directing his prosecution for the offences of using a forged document and giving false evidence. The Sub-Deputy Collector refused to take any action. The complainant appealed to the Collector under S. 476-B. The Collector disagreed with the Sub-Deputy Collector's view and himself made a complaint. Thereupon Faijdar Rai appealed to the Divisional Commissioner by way of second appeal and the Divisional Commissioner held that no such appeal was competent. The matter came to the High Court before Mr. Justice Mullick and he took the view that the second appeal to the Commissioner was competent. The reasons which he gives are as follows :

Section 476-B, Criminal P. C., appears to contemplate that, if an appellate Court sets aside the order of the original Court, the party prejudicially affected has a right of appeal to the Court to which appeals from that appellate Court ordinarily lie.

The view taken by Mr Justice Mullick was, so far as I can see, not that it depended upon whether the superior Court decided to make a complaint or decided for the first time to make a complaint, but merely upon whether the appellate Court set aside the order of the original Court. In *Ranjit Narain Singh v. Rambahadur Singh* (3), that was not the view which the appellate Bench appears to have adopted. The view that it adopted is this : that if an order for a complaint to be made is made by the first Court and upheld by the second Court no further appeal lies, but if such an order is refused by the first Court and a complaint is made by the second Court, then an appeal lies, not by reason of any express provision to that effect at the end of S. 476-B, but by reason that the section operates upon the same subject-matter over again, this being a complaint

within the meaning of the opening words of the section.

In my judgment it is unsound to hold on the language of S. 476-B that any such distinction was intended. S. 476-B gives a right of appeal first to a person aggrieved because any civil, revenue or criminal Court has refused to make a complaint. It also gives it to any person against whom such a complaint has been made ; and if this section is to operate upon the same subject-matter twice, so as in effect to produce more than one appeal from the first decision upon an application to direct a prosecution I think it applies indifferently whether the effect of the second Court's order is to make a complaint or to refuse to make a complaint. In the present case now before us the Munsif refused to make a complaint. The only meaning of the appeal to the District Judge was to ask him to make a complaint. It was in his discretion to make a complaint or not to make a complaint. If he had refused to make a complaint and upheld the order of the Munsif I fail to see why he would not have been as much within the opening words of the section as he was when he decided to differ from the Munsif, and to make a complaint. It seems to me to be erroneous to say that if he makes a complaint he does so not under S. 476-B but under S. 476, but while if he refuses to make a complaint under S. 476 he does so under S. 476-B. S. 476 applies, in the case of a "superior Court," i. e. a Court superior to the Court in which the offence took place only after a complaint is made under an authority not given by the section. S. 476-B applies to a complaint made or refused by a Court acting under the authority conferred upon it by S. 476 or S. 476-A. Hence the words used are "has refused to make a complaint under S. 476 or S. 476-A etc." The reference to S. 476 is in almost identical terms at the conclusion of Ss. 476-A and 476-B and had the legislature intended to produce the result now contended for on behalf of the appellant it would have provided specifically for an appeal when a complaint is made by a Court acting under the powers conferred by S. 476-B.

Prima facie S. 476-B deals first of all with a Court and then with the Court to which the former Court is subordinate which is called the superior Court. In

my judgment it is a misconstruction of the section to suppose that when the superior Court has acted under the section and the section has taken its effect the same matter is to be subjected for the second time to a process exactly of the same character with the result that one provision in general terms for an appeal operates twice.

It has been pointed out to us that under S. 476-A, if this matter had not been canvassed in the Munsif's Court at all, the District Judge might have made an order that a complaint should issue. In that case he would have been dealing with the matter for the first time and it is clear on the terms S. 476-B that an appeal would have lain from his decision. It is important to point out that an appeal would lie from his decision equally whether he refused to make a complaint under S. 476-A or whether he made a complaint under S. 476. There would be no difference at all according to the result or the nature of his order. There would be one appeal from the Court which dealt with the matter for the first time. I fail altogether to see how this shows it to be correct to construe S. 476-B as though it were intended to take operation upon the same case twice over.

It has been suggested that the language at the end of the section assists the appellant's case, namely, the wording where it is said that if the superior Court makes such complaint the provisions of S. 476 shall apply to the complaint. That is quite clear and necessary. The accused can be sent in custody to a Magistrate. The superior Court in such a case can bind over any person to give evidence before a Magistrate. The Magistrate must proceed according to law and so forth. There can be no doubt that S. 476 must apply. But, as I ventured to point out in the course of the argument, that is a very different thing from saying that S. 476-B must apply all over again.

I am of opinion, therefore, that the policy of the law as laid down in S. 476-B, is this : that whenever there is a decision by a Court upon an application that a complaint shall be made—whether that decision be one way or another—there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first

time ordered to be prosecuted by the superior Court his remedy after that is to take his defence before a jury or a Magistrate according to the nature of the case. Two Courts and only two are to deal with this preliminary question as to whether a person shall be prosecuted or not. If the second Court is against the present accused he must look to the jury for his safety.

This being a proceeding in a civil case a Rule has been obtained under S. 115, Civil P. C., asking us to interfere with the order made and the learned advocate for the appellant asks us upon this rule to take action because he says that the learned Judge's order is not a proper complaint and that he has not recorded a finding that it is expedient in the interest of justice that the appellant should be prosecuted. When we come to look at what is absolutely required by the Criminal Procedure Code it does not seem to be illegal to deal with the matter as the learned District Judge has done. Having given his reasons holding that there is a good *prima facie* case he says :

I, therefore, direct the prosecution of Ahamadar Rahaman. Let a copy of this order be sent along with the records to the proper Magistrate as a complaint.

That seems to me to be sufficient under the Criminal Procedure Code. In some cases a more formal and fuller document may be required, but in this case I am not prepared to hold that it is not a good complaint. The learned Judge says : "I direct the prosecution of Ahamadar Rahaman." It is true that he has not used the exact words of S. 476 as indeed he should have been done ; but in my judgment there can be no doubt that he has come to the conclusion that it is expedient in the interest of justice. After all the question is whether or not this man used forged documents knowing them to be forged documents and gave evidence which was perjured evidence before a Court of law. If it appeared to the learned Judge that there was a *prima facie* case against him of that character, then in the absence of very special circumstances it would be in the public interest that that matter should be investigated before a competent Magistrate.

In my judgment, therefore, the appeal fails and must be dismissed and the Rule must be discharged.

Chotzner, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 285

SUHRAWARDY AND MALLIK, JJ.

Gohali Saha and others—Defendants—Appellants.

v.

Debendra Nath Mukherjee and another—Plaintiffs—Respondents.

Appeal No. 2015 of 1925, Decided on 22nd July 1927, from appellate decree of Dist. J. Murshidabad, D/- 2nd April 1925.

Hindu Law—Joint family—Absolute bequest to widow—Widow bequeathing the property to her son—Son gets it as personal property.

Where a Hindu bequeathed absolutely his self-acquired property to his widow by executing a will in her favour and she in her turn bequeathed the same property to her son by executing another will:

Held: that the property was not ancestral but the personal property of the son: 23 Cal. 262 and 6 W. R. 71, Dist. [P 286 C 2]

Hemendra Nath Sen and Gopendra Nath—for Appellants.*Tarakeswar Pal Chowdhury and Jitendra Mohan Banerjee*—for Respondents.

Mallik, J.—This appeal arises out of a suit for recovery of the plaintiffs' dues amounting to Rs. 1,110-8-0 on a mortgage bond executed by the father of the defendants, one Luski Shaha, in favour of the plaintiffs. The defence was that the defendants and their father were members of a joint Hindu family governed by the Mitakshara law, that the mortgaged property was the paternal property of the defendants' father and the defendants had a vested right therein, and that Luski Shaha, therefore, had no right to create a mortgage alone on the property in excess of his own share. The trial Judge held that the mortgaged property was the paternal property of Luski and that the defendants had a vested right therein. He held also that there was an antecedent debt of Rs. 335 which has paid off with the consideration money received by Luski for the bond in suit and that the mortgaged property was liable for satisfaction of that amount only; and on these findings the trial Judge decreed the plaintiff's suit in part. On appeal by the plaintiffs the learned District Judge came to the conclusion that the mortgaged property was not ancestral, but the personal property of Luski and so his sons; the defendants had no vested right therein; and on this finding the lower appellate Court gave a full decree to the plaintiffs. The defendants have appealed to this Court.

There were two points taken before us: firstly it was said that the lower appellate Court was wrong in giving a full decree to the plaintiffs as by doing that it allowed to the plaintiff more than what the plaintiffs had asked for in their appeal; and secondly, it was contended that the learned District Judge was in error when he came to the conclusion that the mortgaged property was not ancestral but only the personal property of Luski.

The first point, which is a short one, can be disposed of quickly. The contention of the learned advocate on this point was that when the lower appellate Court gave a full decree to the plaintiffs it allowed them by that decree Rs. 775-8-0 (Rs. 1110-8-0, the total amount claimed, minus Rs. 335, the amount of the antecedent debt), whereas the plaintiffs had valued their appeal at Rs. 559-2-0 only. This contention of the learned advocate was obviously based on misconception and a misreading of the order passed by the trial Judge. The trial Judge, it is true, found that the amount of the antecedent debt was Rs. 335 only. But in the decree that he made in favour of the plaintiffs he allowed the plaintiffs not only Rs. 335, but the interest as well on that amount calculated at the rate in the bond. If the total of Rs. 335 and the interest thus calculated would be deducted from the total amount claimed, Rs. 1,110-8-0, there would (sic) a balance of Rs. 559-2-0, the amount at which the plaintiffs had valued their appeal.

The second contention is much more important and practically the whole controversy before us has been over it and over the question whether the property was ancestral or Luski's personal property. There is no dispute that the property was originally the self-acquired property of Luski's father Bangali. It appears that Bangali Saha bequeathed this property to his widow Methrani Dasi by executing a will in her favour and Methrani in her turn made a bequest of it to Luski Shaha by executing another will in favour of Luski. The learned advocate for the appellants contended that the property when it came to Luski became his ancestral property inasmuch as it had been at one time the property of his father Bangali: and in support of this contention he cited the case of *Muddun Gopal v. Ram Buksh* (1). This case however,

(1) 6 W. R. 71.

does not appear to me to go very much in support of the learned Advocate's contention. All that was held in that 6 W. R. case was that landed property acquired by a Mitakshara father and distributed by him amongst his sons does not by such gift become the self-acquired property of the sons. It does not lay down that a property which goes to a Mitakshara son becomes his ancestral property simply for the reason that it had at one time belonged to his father, no matter how the property goes to the son, whether direct from the father or after having passed through several hands in the interval. The learned advocate contended that the deviation from a direct descent of the property from Bangali to Luski in the present case was of no consequence and for that purpose he placed reliance upon the case of *Beni Pershad v. Puran Chand* (2). But that case is clearly distinguishable from the case before us. In that case a Hindu governed by the Mitakshara law assigned an ancestral mauza to his widow in lieu of her maintenance. After the death of the widow the property devolved on the grandsons and in a subsequent litigation over the property it was held that the mauza retained the character of ancestral property during the lifetime of the widow. But in that case the interest of the widow that was created by the assignment in her favour, was of a temporary nature and only a limited one, whereas in the present case there was no limitation of any kind imposed on the interest which Methrani acquired under the will and the will which Bangali executed in Methrani's favour made Methrani Dasi the absolute owner of the property. The authorities which the learned advocate cited before us do not, therefore, in my opinion go in support of the contention urged by him. The question whether a property is ancestral or self-acquired has been very well stated in West and Buhler, Book 2, Introduction, p 19 :

Ancestral property, as amongst descendants, comprises property transmitted in the direct male heir from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate. Thus in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand property inherited by him from females, brothers or collaterals, or directly from a great-grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact,

may be said to be co-extensive with the objects of *apratibandha daya* or unobstructed inheritance.

This view agrees with the view arrived at by Jagannath and it is the view of Jagannath that represents the Bengal opinion. In the present case the property before it came to Luski, had, it is true, at one time belonged to his father Bangali. But it was not transmitted to Luski in a direct line. It came to him not even by inheritance from a female, his mother, but by a bequest made by her and it was by no means *apratibandha daya* or unobstructed inheritance inasmuch as it could not have come to Luski at all had there been no will executed by Methrani Dasi in Luski's favour. I am, therefore, of opinion that the learned District Judge was right when he held that the property was not ancestral, but the personal property of Laski Saha.

In view of the aforesaid observation the appeal must fail. It is accordingly dismissed with costs.

Suhrawardy, J.—I agree.

N.K.

Appeal dismissed.

* * A. I. R. 1928 Calcutta 286

RANKIN, C. J., AND MITTER, J.

Maharajah Bir Bikram Kishore Manikya Bahadur, son of Maharajah Birendra Kishore Manikya—Plaintiff—Appellant.

v.

Ali Ahamad, son of Sahajad Kayem and others—Defendant—Respondent

Privy Council Appeals Nos. 118 to 164 of 1923, Decided on 24th August 1923, from appellate decrees in Appeals Nos. 417, 418, 420 to 423, 426, 427, 429 to 432, 435 to 438, 440 to 442, 446, 448 to 451, 455 to 462, 464 to 467, 471, 473, 476 to 478, 480 to 482, 483 and 485 of 1920.

(a) Civil P. C., O. 32, R. 3—Subsequent to the admission of appeal to Privy Council Deputy Registrar of High Court should not act for the minor respondent. (Obiter)

(Obiter) While it is in accordance with the practice that in default of any more suitable next friend or guardian, the Deputy Registrar should be appointed for the purpose of the proceedings in the High Court for obtaining leave to appeal to Privy Council and so forth, upon the final admission of the appeal the Deputy Registrar ceases to act any further as guardian for the minors. It is not the practice of the Calcutta High Court that the Deputy Registrar of the Court should act any further on behalf of the minors in cases which go to the Privy Council. [P 287 C 2]

*** * (b) Privy Council—Practice—Appeal admitted—High Court has no power to order appellant to Privy Council to put the guardian ad litem in funds for arguing the case before the Privy Council, on behalf of the minors.**

Where an appeal to the Privy Council was admitted and an application, by the guardian ad litem for certain minor respondents, was made to the High Court asking to order the appellant to England to put the guardian in funds to have the case argued on behalf of the minors before the Judicial Committee :

Held! that the High Court had no power to make such order. [P 288 C 2]

Ramesh Chandra Sen, Birendra Chandra Das and Santimoy Majumdar—for Appellant.

Jatindra Nath Sanyal — for minor Respondents.

Rankin, C. J.—This is an application in connexion with a batch of 47 appeals now pending before His Majesty in Council. The Privy Council numbers are 118 to 164 of 1923. The appeals arise out of certain settlement proceedings under the Bengal Tenancy Act and they raise a question between the appellant to England and various tenants of his as to the right of the appellant to an enhancement of rent. The High Court decided against the appellant and his application for leave to appeal to His Majesty in Council was filed on 10th December 1923.

It appears that when the cases were before this Court the Deputy Registrar was representing the interest of certain minors among the tenants, and for the purpose of the application for leave to appeal to the Privy Council there was an order made on 8th February 1924 that the Deputy Registrar should continue to represent the minors when he represented in the High Court appeals, and certain provision was made for his costs. A certificate that the cases were fit to be taken on appeal was granted by this Court on 8th June 1925 and the appeals were finally admitted on 27th July 1925; since that time the record has been printed in India and has lately been forwarded to England.

Now, the practice of this Court with reference to minors in cases of appeals to the Privy Council is as follows: By Rr. 41 and 42 of Ch. 6 of the High Court Rules on the appellate side it is provided that

all applications by, or on behalf of, an infant shall be made in the name of the infant by the person whose name is on the record as his next friend or guardian; and whenever any application is consented to, or opposed by, an infant,

the infant shall in like manner be represented by the person who appears on the record as his next friend or guardian.

Rule 42 says :

In cases where there is no next friend or guardian upon the record, a separate application for appointment of a next friend or guardian must be made.

Now, while it is in accordance with the practice that in default of any more suitable next friend or guardian, the Deputy Registrar should be appointed for the purpose of the proceedings in this Court for obtaining leave to appeal and so forth, upon the final admission of the appeal, the Deputy Registrar ceases to act any further as guardian for the minors. It is not our practice that the Deputy Registrar of the Court should act any further on behalf of the minors in cases which go to the Privy Council. Accordingly, on 26th August 1925, an application for appointment of a guardian having been made, the gentleman, whose application is now before us, Babu Jatindra Nath Sanyal, was appointed guardian ad litem for the minor respondents to England. It appears that out of these 47 appeals there are ten in which this gentleman has been appointed guardian for minor respondents. The numbers of the ten appeals are as follows : 127, 131, 132, 141, 148, 152, 155, 156, 158 and 163.

We are now concerned with an application made by Mr. Sanyal as guardian asking us to order the appellant to put him in funds to have these cases argued on behalf of the minors by a solicitor and junior counsel before the Judicial Committee. Some estimate has been obtained from the agent in England as to the amount of money which would be required for this purpose and it appears that £ 300 or £ 400 would apparently be necessary, considering that the paper-book is very large and that there would be a good deal of work connected with the case. In these circumstances I find that no such order in connexion with Privy Council appeals has ever been made by this Court hitherto. I am not sure whether any such order has ever been asked for hitherto, and it is necessary very carefully to consider by what right and on what principle such an order could be made by this Court. No doubt, in ordinary cases before the Courts in India under the Civil Procedure Code, it

would be quite an ordinary practice to direct that the plaintiff in a suit should put the guardian ad litem in funds to a certain extent for the defence of the minor defendants; but we are here exercising a jurisdiction of a very special character. Certain rules have been made under statutory powers by the Judicial Committee of the Privy Council. Under those rules certain duties are cast upon the Courts in India in connexion with appeals to His Majesty in Council. The Indian Legislature by the Civil Procedure Code, particularly by O. 14, has commissioned the Courts in India to carry out the duties that are imposed by the rules made by the Judicial Committee, but unless we can find that there is express authority given to this Court to make order as is now asked in connexion with an appeal to His Majesty in Council which has been finally admitted and is before His Majesty in Council at the present moment it is not plain to me that we can have any right to do so.

It may or may not be that such an order could be obtained from the Judicial Committee, but our right to make such an order must be granted by an express provision. I have been through the relevant sections of the Civil Procedure Code, O. 45. I have been through the rules made by the Judicial Committee called the Judicial Committee Rules of 1908 and also through the order in Council which came into operation in January 1921 and was made on 9th February 1920. I have failed to find in any of these rules a provision that would entitle us to take upon ourselves to make such an order as is asked for. The question is no longer one of the proceedings before this Court. Proceedings before this Court have terminated and the whole matter is before the Judicial Committee. In this connexion it is noticeable that under R. 13 of the provisions made by the Privy Council for Indian appeals, where at any time between the admission of an appeal and the dispatch of the record to England, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court, on an application, may grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status; so that in

such a case all that this Court can do is to grant a certificate. In that case the name of such person shall be deemed to be so substituted or entered on the record without express order of His Majesty in Council. On the other hand, by R. 14, where an appeal becomes defective subsequently to the dispatch of the record to England the Court may cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted; and there the matter stops so far as this Court is concerned. In my opinion, any order such as is herein asked for would be assuming a jurisdiction of a character which is materially different from anything that can be justified by the rules which govern Courts in India. It is, however, right to say that in the present case it does not appear to me that the order asked for would be an order which it would be either reasonable or in the interest of the minors to make.

As I understand the matter, the minors in the ten appeals in question are concerned in resisting the claim of the landlord to a certain enhancement of rent. It appears in the present case that out of all the respondents who are *sui juris* no one appears to be entering appearance or defending the case upon appeal to His Majesty in Council. No doubt that attitude is adopted with a quite intelligent appreciation of the interest of the parties. It is quite clear that if we were to make an order upon the appellant directing him to put the applicant in funds of £400, apart from any question of hardship upon the appellant who has given Rs. 6,000 security for costs for all these appeals already, the result upon the interest of the minors might well be disastrous. If by any chance the appeals also were to succeed with the result that the minor respondents became chargeable for such a large sum as their own costs in the appeals the result would probably be that the whole of their interest in the tenancies would be sold and they would be deprived probably of their means of life. On the other hand, if the appeals should succeed *ex-parte* the result would presumably be that there would be a certain enhancement of rent and it by no means follows that the Privy Council would direct them to pay any costs which in all the circum-

stances it would be inequitable or unjust that they should pay. I am not in the least satisfied that even if this Court had the power to make such an order as is asked for it would be in the interest of the minor respondents that the order should be made. On the contrary, it appears to me that on the question of interest the common-sense of the matter is that the attitude adopted by those respondents who are *sui juris* is an indication of the fact that it is better that the appeals should be heard *ex parte* on points of law and that the order asked for should not be made. This is a matter of first impression and I have thought it necessary to explain in detail the position.

The application, therefore, must be refused. There will be no order as to costs.

Mitter, J.—I agree.

R.D. *Application refused.*

A. I. R. 1928 Calcutta 289

B. B. GHOSE AND CAMMIADÉ, JJ.

Jatindra Nath Ray—Plaintiff—Appellant.

v.

Nagendra Nath Ray and others—Defendants—Respondents.

Appeal No. 54 of 1925, Decided on 4th January 1928, from original decree of Sub-Judge, Krishnagar, D/- 28th January 1925.

(a) *Hindu Law — Succession — Bandhus — One offering greatest spiritual benefit is preferred.*

Where the parties are related in the same degree, the preferential right should be in him who confers the greatest spiritual benefit on the deceased : 19 *Mad.* 405 (P.C.), *Foll.* [P 292 C 1]

(b) *Hindu Law — Succession — Test about "nearness of blood" laid down.*

According to the Mitakshara and the Viramirodaya, in doubtful cases the rule as to how it should be determined that a person has more blood particles in common with the propositus is that it should be decided in accordance with the efficacy of oblations offered to the ancestors. [P 293 C 1]

(c) *Hindu Law — Succession — Distinction between full and half blood should be restricted to cases mentioned in texts.*

Where the text writers meant that there should be a difference between the relations of full blood and half blood, that was specially enumerated. Where there is no such distinction made in the text, the words should be construed as including both full blood and half blood : 32 *Cal.* 261 and 40 *Cal.* 82, *Ref.*

[P 293 C 2]

(d) *Hindu Law — Succession — Bandhus — Father's half sister's son has precedence over mother's sister's son.*

According to the Mitakshara School, mother's sister's son of the propositus should be postponed to the father's half-sister's sons : *Case-law, considered.* [P 293 C 2]

Bijan Kumar Mukerjee, Rames Chandra Pal, Mritunjoy Chattopadhyaya, Lalit Mohan Ray and Biraj Mohan Roy—for Appellant.

Jyoti Prasad Sarvadhikari, Radha Binode Pal, Bhupendra Krishna Bose, Sadhan Chandra Ray Chowdhury and Surja Kumar Aich—for Respondents.

B. B. Ghose, J.—This appeal is by the plaintiff for recovery of possession of certain properties on the allegation that he is the preferential heir of the last male owner and is, therefore, entitled to succeed to the properties as the next reversioner. The properties originally belonged to one Rameswar Ray who died on the 6th June 1882 leaving a widow Mankumari Barmanya pregnant with child. She gave birth to a posthumous son on the 31st December 1882. That son died on the 7th March 1883, leaving his mother Mankumari as his sole heir. This lady was in possession of a Hindu widow's estate till her death on the 5th June 1916. A controversy then arose as to whether the plaintiff and his two brothers, pro-forma defendants 3 and 4, were the preferential heirs or the defendants. The two parties are related in this way : the plaintiff and his brothers are the mother's sister's sons of the infant who was the last male owner, the propositus. The defendants are the sons of the father's half-sister of the propositus. The properties are partly debuttar and partly secular and the title to possession is the same both with regard to the debuttar and secular properties. Nothing turns upon the nature of the properties in the decision of the case. The point in controversy is a rather vexed one as to the preferential right of *atma bandhus* in the same degree to succeed to the properties of a deceased person under the Mitakshara which governs the parties in the case as found by the Subordinate Judge. There is no question before us that the parties are governed by the Mitakshara. The only question that was argued is whether the mother's sister's sons are to be preferred to the father's half-sister's sons. The Subordinate Judge has decided the question in favour of the

defendants and has held that the mother's sister's sons should be postponed to the father's half-sister's sons. The plaintiff alleges that his two brothers have taken their shares and have, therefore, refused to join him as plaintiffs, and his claim is only to a one-third share in the properties. The question in controversy was raised in the second issue as framed by the Subordinate Judge, namely, as to whether or not the plaintiff is the preferential heir of the deceased infant, son of Rameswar Ray. The Subordinate Judge, after considering the various cases cited before him on the point, came to his conclusion. It is unnecessary for me to repeat the grounds on which the Subordinate Judge held in favour of the defendants, as the questions argued before us will be stated by me in detail.

It is argued on behalf of the appellant that the fact that the defendants are related through the father does not give them a preferential right; nor is the fact that the text in the Mitakshara mentions atma bandhus related through the father first as in the line of heirs, decisive on the question, because the order in which the names are given is not the guiding factor in deciding which of the heirs should be preferred. The list of bandhus is enumerated in the Mitakshara, Ch. 2, S. 6, verses 1 and 2, which are as follows:

(1) On failure of gentiles, the cognates are heirs. The cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text: "the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle must be considered as his own cognate kindred".....(2) Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them, his father's cognate kindred; or, there being none, his mothers' cognate kindred. This must be understood to be the order of succession here intended.

The question as to the precedence of atma bandhus standing in the same degree of relationship to a deceased person has been the subject of discussion in many decisions of the different High Courts where the Mitakshara law prevails; and it must be admitted that there is a good deal of divergence of opinion among the various High Courts as to the principle which should guide the Courts in coming to a conclusion with regard to the question, and the Madras High Court is divided against itself with regard to the question. It has been held in several

cases that bandhus related through the father should be preferred to those related through the mother, and those whose relationship to the deceased is intervened by two females are to be postponed to those whose relationship is intervened by one female. In some cases it has been held that precedence must be in accordance with the order in which the atma bandhus are enumerated in the text, that is to say, the son of the deceased's own father's sister must come before the son of his own mother's sister; and this principle is sought to be supported by the rule of interpretation enunciated in Jaimini's Nyayamala. The principle first stated is laid down in some of the Madras cases of which I may cite *Sundrammal v. Rangasami Mudaliar* (1) and *Balusami Pandithar v. Narayana Rau* (2). The second principle which I have stated above is laid down in the case of *Appandai Vathiyar v. Bagubali Mudaliyar* (3). But in the last case the principle enunciated in the previous cases was dissented from; and this last case was again dissented from in a later case of *P. Rami Reddi v. Gangi Reddi* (4).

Turning to the Allahabad High Court: we find that the rule that the order of precedence should be followed in accordance with the order in which the atma bandhus are named in the text was not accepted. But it was laid down in the case of *Ram Charan Lal v. Rahim Baksh* (5) that bandhus connected through the father are to be preferred to those connected through the mother. In Bombay it was laid down in the case of *Saguna v. Sadas Shiv* (6) that, according to Mitakshara, those connected through the male line among the bandhus are to be preferred to those connected through the females. The rule that a bandhu connected with the propositus through one more female than another should be postponed to that other was not followed in the case of *Rajappa v. Gangappa* (7). Then again the question was debated at considerable

(1) [1894] 18 Mad. 193=4 M. L. J. 275.

(2) [1897] 20 Mad. 342=7 M. L. J. 207.

(3) [1909] 33 Mad. 439=20 M. L. J. 275=5 I. C. 280=(1910) M. W. N. 44.

(4) A. I. R. 1925 Mad. 807=48 Mad. 722.

(5) [1916] 38 All. 416=34 I. C. 103=14 A. L. J. 538.

(6) [1902] 26 Bom. 710=4 Bom. L. R. 527.

(7) A. I. R. 1922 Bom. 420=47 Bom. 48.

length by a Full Bench of the Patna High Court in the case of *Umashankar Prasad v. Mt. Nageswari Koer* (8). But the learned Judges composing the Bench give different reasons for their conclusion and there is no unanimity as to the principle to be followed in giving preference to one set of *atma bandhus* to another set.

In this state of judicial decisions in the Courts in India one would try to find if any certain direction can be obtained from any decision of the Judicial Committee of the Privy Council. The case of *Vedachela Mudaliar v. Subramania Mudaliar* (9) was relied upon on behalf of the appellant in support of the proposition that an *atma bandhu* related through the father has no preferential right to claim succession to the property of a deceased as against one connected through the mother. On behalf of the respondents it has been contended that, although there are certain expressions in the judgment which might support the contention urged on behalf of the appellant by Dr. Bijon Kumar Mukerjee, those observations are really obiter, and should not be taken as authorities as compelling us to accept the proposition that is sought to be drawn from the observations in the judgment. It is, therefore, necessary to examine the case in some detail. The controversy in that case was between the maternal uncle and the son of a paternal aunt's son and their Lordships held that the maternal uncle succeeded in preference to a son of the paternal aunt's son. At p. 359 of the Report their Lordships made the following observations :

For instance, among *atma bandhus* enumerated, the name of the father's sister's son is first given ; then comes the mother's sister's son ; and after him, the son of the mother's brother. Similarly among specifically named (*pitri*) *pitri bandhus*, first comes the son of the father's paternal aunt and among (*matri*) *matri-bandhus* the son of the mother's paternal aunt. From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be

the guiding factor. Assuming, however, the inference to be well founded the question arises: What is the place of the mother's brother among *atma bandhus* ?

From this passage it would appear that their Lordships did not desire to lay down any definite rule as to whether those related through the father's side should be given preference or not. But later on, while discussing the case *Vedachela v. Subramania* (9) already cited, their Lordships observe at p. 363:

And then comes the passage on which the Judges in *Balusami v. Narayana* (2) relied in their division of *atma bandhus* into two sub-classes—namely, *ex-parte paterna* and *ex-parte materna*. That passage runs thus :

"Nor could it be urged here that the mother being nearer than the father, the *matri-bandhus* take the wealth before the *pitri bandhus*. From the text, 'of these the mother is more important than the father ; (2) mother's precedence alone is stated and not that of the mother's *bandhus* ; therefore, we think it sound that the *matri-bandhus* should take the wealth only after the *pitri-bandhus*'

A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*. It only explains why *pitri-bandhus* are to be preferred to *matri-bandhus*. The mother's position being special to herself under an express rule.

This passage has been taken as having disapproved the rule laid down in the two Madras cases : *Sundrammal v. Rangasami* (1) and *Balusami v. Narayana* (2), so far as they lay down that among *bandhus* of the same class those *ex parte paterna* are to be preferred to those *ex-parte materna*. I have already pointed out that in the previous part of the judgment their Lordships said that it was unnecessary to express any opinion on that point. The difficulty as to what has been decided by their Lordships of the Privy Council in this case with reference to the general principle in debate is further enhanced by the fact that their Lordships themselves referred in a later case, *Kenchava v. Girimallappa* (10), as to what has been decided in the case of *Vedachela v. Subramania* (9). Their Lordships observe [at p. 376 of 51 I. A.] :

The question of priority as between *atma bandhus ex-parte paterna* and those *ex-parte materna* has been the subject of much discussion, the latest, word on the subject being found in *Vedachela Mudaliar v. Subramania Mudaliar* (9), which decided in 1921, that as between *pitri-bandhus* and *matri bandhus*, the preference given to the former is settled.

(8) [1918] 3 Pat. L. J. 663=7 Pat. L. W. 1=48 I. C. 625=(1919) P. H. C. C. 162 (F.B.).

(9) A. I. R. 1924 P. C. 33=44 Mad. 753=48 I. A. 349 (P. C.).

(10) A. R. 1924 P. C. 209=48 Bom. 569=51 I. A. 368 (P. C.).

It may be pointed out that in *Vedachela's* case (9) the question as to priority as between pitri-bandhus and matri-bandhus was not disputed. It was admitted in that case that the parties in controversy were both related to the deceased as atma bandhus. But there can be no question that as between pitri-bandhus and matri-bandhus pitri-bandhus are entitled to priority. The question, therefore, as to the priority of atma bandhus, who are related through the father, and those who are related through the mother, seems to have been left in as much obscurity with reference to the general principle enunciated in the cases I have cited, as before. I do not think, having regard to the divergence of judicial opinion, that I should hazard an attempt to lay down any general principle with regard to the point in controversy raised in the various decisions. It seems to me it would be a fruitless endeavour. I shall, therefore, confine myself to the decision of the present question on principles with regard to which there is no controversy; and that principle is that where the parties are related in the same degree, the preferential right should be in him who confers the greatest spiritual benefit on the deceased. This is one of the principles laid down in the case of *Muthusami v. Muttukumarasami* (11) which was affirmed by the Privy Council on appeal in the case of *Muthusami Mudaliar v. Muthukumarasami Mudaliyar* (12), and I should follow the principle laid down in that case all the more, as their Lordships of the Privy Council observe in *Vedachela v. Subramania* (9) that

in the absence of any express authority varying the rule, the propositions enunciated in *Muthusami v. Muttukumarasami* (12) furnish a safe guide. Those propositions are enunciated in the following terms: (i). Those who are bhinnagotra sapindas or are related through females born in or belonging to the family of the propositus are bandhus; (ii) that as stated in the text of Vridha Satatapa or Baudhayana, they are of three classes, viz., atma bandhus, pitri-bandhus and matri-bandhus, and matri-bandhus succeed in the order in which they are named; (iii) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (iv) that as between bandhus of the same class the spiritual benefit they confer upon the pro-

positus is, as stated in the *Viramitrodaya*, a ground of preference.

This proposition that the ground of preference should be according to the spiritual benefit conferred upon the propositus is not controverted by the appellant's counsel. But he contends that in the present case the plaintiff confers greater benefit on the propositus than the defendants do. His argument is that the plaintiff offers three oblations to the maternal ancestors that is to say, his maternal grandfather; maternal great-grandfather and maternal great-great-grandfather. The propositus also offered oblations to all these three ancestors. On the other hand, the defendants offer the same class of divided oblations to their maternal grandfather, maternal great-grandfather and maternal great-great-grandfather. These relations are paternal grandfather, paternal great-grandfather and paternal great-great-grandfather of the propositus. The propositus offered oblations to three ascendants:—father, grandfather and great-grandfather. Therefore, the defendants offer oblations to two only of the ancestors of the propositus to whom he would have offered oblations. Therefore, there is greater merit conferred by the plaintiff than by the defendants. Against that Mr. Sarbadhikari for the respondents argues that the oblations offered to the paternal ancestors are of greater merit than those offered to the maternal ancestors, and the reason is that the propositus himself partakes of the oblations which are offered to his paternal ancestors. This proposition is supported by the authority of the *Viromitrodaya* which was referred to in the judgment in the case *Muthusami v. Muttukumarasami* (11) which I have already cited. At p. 155 of Golap Chandra Sarkar's Translation of the *Viramitrodaya* the following passage occurs:

Since a person (when deceased) partakes of the oblations presented to the three paternal ancestors beginning with the father by reason of the union of oblations (effected through the ceremony called sapinda karan); and since the three descendants in the male line beginning with the son presented oblations to that person himself; and since he who while living offered oblations to an ancestor in the male line partakes, when dead, of the oblations presented to that ancestor by reason of union of oblation: thus the middlemost person who, while living offered oblations to his ancestors and when dead partakes of the oblations presented to them becomes the object to whom oblations are presented by others that are

(11) [1892] 16 Mad. 23 (30)=2 M. L. J. 296.

(12) [1896] 19 Mad. 405=23 I. A. 83=6 M. L. J. 113=7 Sar. 45 (P. C.).

living and partakes, with these latter while they are dead, of the oblations presented (to him) by the daughter's son and the like.

and so on. The conclusion must, therefore, follow that in the present case the defendants being so related as to confer greater spiritual benefit on the propositus they are the nearer heirs.

It is contended again on behalf of the appellant that the plaintiff is nearer in blood, because he has more blood particles in common with the propositus than the defendants; and learned counsel refers to the fact that the defendants are only sons of the father's half-sister of the propositus. It may possibly be that, according to medical theories the plaintiff may have more blood particles in common with the propositus than the defendants have. But the Mitakshara and the Viramitrodaya state that in doubtful cases the rule as to how it should be determined that a person has more blood particles in common with the propositus is that it should be decided in accordance with the efficacy of oblations offered to the ancestors.

The last argument that has been urged on behalf of the appellant is that if it had been a question between the father's full sister's son and the mother's sister's son, then the father's sister's son might possibly be entitled to preference. But a half-sister is not the same as a full sister: and therefore the father's half-sister's son cannot claim the same right as a full sister's son. It is further argued that what the old text meant by the term "father's sister's son" was father's full sister's son. But there is no difference between a half-sister and a full sister in this respect. If there had been a competition between a father's full sister's son and a father's half-sister's son, that would have been a matter for consideration. But when we have to consider the position of the parties as related in the present case, we have to deal with the matter on the basis of spiritual benefit. As the father's half-sister's son offers the same number of oblations to the paternal ancestors of the propositus and of the same efficacy as the father's full sister's son would have done I do not think that the fact of the defendants being the father's half-sister's son of the propositus makes any difference in this case. With regard to another argument that pitri-swasa in the enum-

eration of atma bandhus refers only to a full sister of the father, and half-sister's son of the father is not one of the enumerated atma bandhus, but would come merely as a bandhu not enumerated in the text it may be stated that the proper construction of the text does not lead to any such inference. Where the text writers meant that there should be a difference between the relations of full blood and half blood, that was specially enumerated. Where there is no such distinction made in the text, the words should be construed as including both full blood and half blood. As authority for this proposition the following cases may be referred to: *Dasharathi Kundu v. Bipin Behari Kundu* (13) and *Shashi Bhushan Lahiri v. Rajendra Nath* (14).

On all these grounds this appeal must fail and be dismissed with costs to the principal defendants-respondents.

A cross-objection has been urged on behalf of the defendants-respondents on the question as to the cost of the lower Court. The Subordinate Judge, although he has dismissed the suit of the plaintiff, has not allowed any costs. But he has not given any reason for doing so. We do not see any reason for depriving the contesting defendants of their costs in the Court below. The cross-objection must, therefore, be allowed to this extent that the contesting defendants would have their costs from the plaintiff in the Court below. There will be no costs of this cross-objection.

Cammiade, J.—I agree.

R.K.

Appeal dismissed

(13) [1904] 32 Cal. 461=9 C. W. N. 119.

(14) [1912] 40 Cal. 82 (85)=15 I. C. 225=16 C. W. N. 1094.

A. I. R. 1928 Calcutta 293

SUHRAWARDY AND CUMING, JJ.

Macneil & Co.—Defendant 2—Petitioner.

v.

Debendra Nath and others—Opposite parties.

Civil Rule No. 1159 of 1924, Decided on 28th November 1924, from decision of Offg. Dist. Judge, Hooghly.

(a) *Civil P. C.*, O. 39, R. 1, Cl. (a)—*Law of granting injunction as against trespasser and*

as against cosharer distinguished — Order granting injunction in the latter case must be made with caution—Specific Relief Act, S. 53.

The law with regard to granting of injunction which obtains in a case brought against a trespasser is not the same as that in a case where one of the cosharers sues another in partition. Every owner of the land, whatever the extent of his share, has the right to use the land in any way which he thinks proper. If that be not so, it will not be possible for any cosharer to use any part of the land in coparcenary for any profitable purpose and, therefore, an order passed against a cosharer restraining him from building upon a portion of the joint property must be passed with great caution.

[P 291 C 2]

(b) *Special Relief Act, S. 53—Convenience.*

While passing an order of injunction the Court should look into the balance of convenience caused to the parties.

[P 295 C 1]

Provas Chandra Mitter and Satindra Nath Mukherjee—for Petitioner.

Amarendra Nath Bose and Nanda Gopal Banerji—for Opposite parties.

Order.—This rule is directed against an order granting a temporary injunction against the petitioner passed by the Subordinate Judge of Hooghly. The plaintiffs brought a suit for recovery of a share of the properties in suit. Defendant 2 is the petitioner before us and is a trading company in Calcutta who are building a mill on the land in suit and the injunction asked for by the plaintiffs and which has been granted by the Court is to the effect that the petitioners should be restrained from continuing to build on the land. The injunction was prayed for presumably under O. 39, R. (1), Cl. (a), which provides that the Court may by order grant a temporary injunction if the property in dispute in a suit is in danger of being wasted or damaged or alienated by any party to the suit. It is, therefore, necessary to see whether the present case is really a case in which any property is being wasted or damaged. We have been relieved of the necessity of dealing with this matter with regard to the merits by the admission made by the opposite party through their learned advocate that the defendants are not in possession of the land in suit or at any rate of the land on which they are attempting to erect this building. If that is so, this injunction is infructuous, for it is impossible for anyone to raise structures upon land in possession of another. But the learned advocate for the opposite party contends that the defendant com-

pany may forcibly dispossess the plaintiffs and continue their building operations on the land in suit. If that contingency arises the plaintiffs have a remedy in the criminal Court. We, therefore, need not consider this case on the footing of there being a possibility of the petitioners building upon the land in suit. The learned Subordinate Judge has only considered the question whether there is a bona fide dispute or not and having come to the conclusion that there is a bona fide dispute he has without further considering the matter granted the injunction prayed for: and in support of his order he has observed that great complications will arise if defendant 2 be allowed to build structures on the disputed property and if the suit be eventually decreed. We have heard the learned advocate for the opposite party at great length, but we are not convinced that really great complications will arise even if the plaintiffs succeed in their suit. The learned advocate for the petitioners has frankly admitted that his clients are prepared to take the risk of building upon the land in suit and to abide by the result of the suit, if it is decreed against them; and his clients will not raise any objection on the ground that they have raised buildings upon the land. In the present case we are not satisfied that the structures if raised by the petitioners upon the land in suit will cause any damage or waste to the opposite party as they are not using the land for any other purpose.

The question becomes very different when we take into consideration the fact that the present suit is one for partition and that defendant 2 admittedly is a sharer in the land in suit. The law with regard to granting of injunction which obtains in a case brought against a trespasser is not the same as that in a case where one of the cosharers sues another in partition. Every owner of the land, whatever the extent of his share, has the right to use the land in any way which he thinks proper and this has been laid down by their Lordships of the Judicial Committee. If that be not so, it will not be possible for any cosharer to use any part of the land in coparcenary for any profitable purpose and, therefore, an order passed against a cosharer restraining him from building upon a portion of the joint property must be passed with great caution. There may be circumstances under which a

co-sharer may be restrained from doing any such act : for instance where the object of the co-sharer building upon a portion of the land is to induce the Court, when time for partition of the joint property comes, to let him have this land in preference to any other portion of it. We do not see how in this case the property in suit is liable to be damaged or wasted by defendant erecting some structures upon it.

The next point which has been urged by the opposite party is that we should look into the balance of convenience. It is no doubt a safe guide ; and looking at it from this point of view we are of opinion that by this order of injunction greater inconvenience will be caused to the petitioner than to the opposite party. The petitioner intends to start a Mill on the adjacent land and this land is required for necessary structures ; and it is possible that if he is not allowed to build on this land his loss cannot be compensated by the opposite party.

The Rule is made absolute, and the order of the Court below granting injunction is set aside. The petitioners are entitled to their costs of this hearing. We assess the hearing fee at three gold mohurs.

Let the record be sent down as soon as possible.

Cuming, J.—I agree.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 295

C. C. GHOSE AND BUCKLAND, JJ.

Madan Gopal Daga—Appellant.

v.

Sachindra Nath Sen—Respondent.

Appeal No. 135 of 1926, Decided on 27th April 1927, from decree in original civil suit.

Companies Act, S. 202—Order of Court under S. 195, Companies Act, is not a judgment within the meaning of Cl. 15, Letters Patent (Calcutta), and hence not appealable under S. 202—Companies Act, S. 195—Letters Patent (Calcutta).

An order under S. 195, Companies Act, made by a Court directing the directors of a company to appear before the Court for examination as to their dealings in respect of the affairs of a company is not a judgment within the meaning of Cl. 15, Letters Patent (Calcutta) and therefore is not appealable. [P 296 C 1]

N. N. Sircar and *S. C. Bose*—for Appellant.

A. K. Roy—for Official Liquidator.

C. C. Ghose, J.—In this matter my learned brother, Mr. Justice Pearson, made an order on 17th November 1926 by which he directed that two persons, namely, Madan Gopal Daga and H. F. Pilcher, the directors of the abovenamed company* should appear before this Court for examination as to their dealings in respect of the affairs of the above company. This order which was made under the provisions of S. 195, Companies Act (7 of 1913) is the subject-matter of the present appeal. It is unnecessary for me to set out the facts involved in the present appeal because the same are to be found in my judgment, dated 22nd June 1925, printed on pp 37 and 38 of the paper-book and in the judgment of Mr. Justice Pearson, dated 17th November 1926, printed on pp 23 and 24 of the paper-book. A preliminary question has been raised as to whether the order made by Mr. Justice Pearson on 17th November 1926 is an appealable order.

Now the section of the Indian Companies Act relating to appeals from orders is S. 202 and it runs as follows:

Re-hearings of and appeals from any order or decision made or given in the matter of the winding up of a company by the Court may be had in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

From the terms of this section it would appear that an order made in the matter of the winding up of a company to be appealable must come within the meaning of the word "judgment" as used in Cl. 15, Letters Patent, and, therefore, the question resolves itself into this, namely, whether the order made by Mr. Justice Pearson is a "judgment." I am not unmindful of the contention which has been advanced on behalf of the appellant, namely, that the words "same manner" and "same conditions" used in S. 202, Companies Act, mean that the procedure as regards appeals from orders made in the winding up of a company by the Court must be the same as in the case of orders made in cases within the ordinary jurisdiction of the Court and that nothing further was intended or is indicated. That may or may not be so; but in my view an order made in winding up in order to be appealable under S. 202, Companies Act, must satisfy

[* Pilcher & Co. Ltd. (in liquidation)—Ed.]

the requirements of Cl. 15, Letters Patent as understood and explained in various decided cases in this Court from time to time. If that is so, then can it be said that the order made by Mr. Justice Pearson amounts to a "judgment"? It is urged that it amounts to a "judgment" inasmuch as it amounts to adjudication on the question as to whether the persons mentioned in the order were liable to be examined under the provisions of S. 195, Companies Act, and, that therefore, there has been a determination of a "right" or a "liability." I do not think that is the correct way of looking at the matter. All that was held by Mr. Justice Pearson amounted to this, namely, that a *prima facie* case has been made out by the liquidator for eliciting information about the affairs of the company from these two persons. Their "liability" has not been determined upon. After the best consideration that I have been able to give to this matter, I am unable to persuade myself that there has been any determination of any "right" or "liability" in this matter by Mr. Justice Pearson. In my opinion, therefore, the order made by Mr. Justice Pearson does not amount to a "judgment" as referred to in Cl. 15, Letters Patent. In the view I have taken it is unnecessary for me to go into the merits of the case.

The appeal, therefore, is incompetent and as such should be dismissed with costs.

Buckland, J.—The section does not give an unqualified right of appeal. It gives such a right, but in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or decision of the same Court in cases within its ordinary jurisdiction.

Conditions have to be fulfilled and one of the conditions to be fulfilled in the case of an appeal from an order or decision of a Judge exercising original civil jurisdiction is that the order or decision must be a judgment. That is by virtue of Cl. 15, Letters Patent, besides which, in addition to this section, nothing is relied upon as giving a right of appeal. Unless, therefore, the order of Pearson, J. is a judgment it does not fulfil the condition and there is nothing more to be said.

The word "manner" in my opinion is intended, primarily at least, to refer to procedure. Whether it connotes any-

thing more is a question which may have to be more fully considered in other circumstances hereafter. Whatever its full and precise significance may be, it cannot assist the appellant on this point.

As to the order appealed against being a judgment I agree with the view which my learned brother has expressed and that this appeal should be dismissed with costs.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 296

DUVAL, J.

Shiba Kumari Debi — Defendant 1—
Petitioner.

v.

Mt. Daksha Bala Dassi Chowdhurani and others—Opposite Parties.

Civil Revn. No. 1095 of 1927, Decided on 5th January 1928, from decree of 1st Munsif, Krishnagar, D/- 30th May 1927.

Bengal Patni Regulation (8 of 1819), S. 14—Sale of patni in a rent decree—Surplus withdrawn by a creditor of one patnidar—Sale subsequently set aside—Zamindar made to pay whole purchase-money—Suit lies by zamindar against the creditor—Suit is governed by Art. 120, and not Art. 62, Limitation Act.

Certain patni was sold for arrears of rent under patni regulation on 17th December 1919 and was purchased by a third party. The zamindars took out their dues from the purchase-money and the balance remained in deposit. A decree-holder against one of the patnidars attached the surplus sale proceeds on 4th June 1920 and realized his dues in full under that attachment on 25th September 1920. Some of the darpatnidars, however, on 17th September 1920, brought a suit to have the patni sale set aside. The suit was decreed and the zamindars had to refund to the auction-purchaser the amount which the auction-purchaser had paid for the patni at the putni auction. Thereafter, a suit was brought by the zamindars against the decree-holder to recover with interest Rs. 161 which he had withdrawn by attachment under the money decree.

Held: that the decree-holder took the risk of withdrawing the money when the period of limitation for bringing a suit to set aside the sale had not yet expired. He acted at his own risk and was therefore liable to refund the amount: 38 C. L. J. 137, *Rel. on.* [P 297 C 2]

Held: further, that the decree-holder, when he took the money or the Court when it handed over to him the money, did not intend the money to be for the use of the zamindars and therefore Art. 62 did not apply but the residuary Art. 120 would apply. [P 297 C 2]

Urukramdas Chakravarti — for Petitioner.

Sarat Chandra Roy Chowdhury, Rupendra Kumar Mitter, Mritunjay Chattapadhyay and Shanti Kumar Roy Chowdhury—for Opposite Parties.

Judgment.—This rule has been obtained in a Small Cause Court suit. It appears that the zamindars, now opposite parties 1 and 2, had under them opposite parties 3 to 9 as their patnidars. The patni was sold for arrears of rent under the patni regulation on 17th December 1919, and was purchased by a third party. The zamindars took out their dues from the purchase-money and the balance remained in deposit. Thereafter, the present petitioner who held a money decree against opposite party 3 attached the surplus sale proceeds on 4th June 1920, and realized his dues in full under that attachment on 25th September 1920. Some of the darpatnidars, however, on 17th November 1920, that is to say, eleven months after the patni sale brought a suit to have the patni sale set aside. The suit was decreed by the Subordinate Judge of Nadia in January 1922 and that decree was confirmed by this Court. Under that decree, the zamindars, opposite parties 1 and 2 had to refund to the auction-purchaser the amount which the auction-purchaser had paid for the patni at the patni auction. Thereafter, the present Small Cause Court suit was brought by opposite parties 1 and 2, the zamindars, against the patnidars and the present petitioner to recover with interest Rs. 161 which the present petitioner had withdrawn by attachment under his money decree against opposite party 3. The Small Cause Court Judge has given the zamindars, opposite parties 1 and 2, a decree against the present petitioner only for Rs. 161 with interest and discharged the case as against the other opposite parties, the patnidars. A rule has been obtained as to why this decree should not be set aside or varied.

Two points are taken by the present petitioner, the judgment-creditor of opposite party 3, one of the patnidars. The first is that his money decree is now barred and has been already satisfied. If he has now got to refund the money, he will never recover his decree for Rs. 161 from defendant 2 and he states that the plaintiffs may get a decree against opposite party 3 but that they should not get a decree against him. The second point raised is that the Small Cause Court suit was barred by limitation. I have heard the learned vakil for the petitioner. As to the first point: the matter, as was pointed out by the learned Small Cause

Court Judge, is very similar to the case of *Behari Lal Seal v. Bijoy Chand* (1), though in that case the surplus sale-proceeds were withdrawn by the patnidars during the pendency of a suit to set aside the patni sale. Here, the petitioner took the risk of withdrawing the money when the period of limitation for bringing a suit to set aside the sale had not yet expired. He, therefore, acted at his own risk and I am not prepared, therefore, to say that the decision of the Small Cause Court Judge is in this respect contrary to law. As to the second point, the learned Small Cause Court Judge held that Art. 120, Lim. Act, would apply. It is urged on behalf of the petitioner that Art. 62 would apply and so the suit is barred by limitation. In this connexion, I am referred to the case of *Harihar Misser v. Syed Mohamed* (2), and it is urged that that case is an authority to show that Art. 62 applies. To my mind, it is an authority to show that Art. 62 does not apply, for the learned Judges there pointed out that the point to be decided when the question is whether Art. 62 applies or not is for whose use did the party making the payment intend the money. Now, it cannot be said that the petitioner when he took the money or the Court when it handed over to him the money intended the money to be for the use of opposite parties 1 and 2. In this view, I cannot hold that Art. 62 applies; the other articles mentioned in the lower Court have not been invoked before me. I must hold, therefore, that the learned Small Cause Court Judge has rightly fallen back on the residuary Art. 120. The opposite parties 4 to 9 appear, but opposite party 3 does not. They maintain that they are entitled to their costs as they have been unnecessarily impleaded in this Court. They never had anything to do with the taking out of the money which was taken out as if it was the sole property of opposite party 3 who does not appear.

In the result, the rule is discharged with costs. I allow two sets of costs, one to opposite parties 1 and 2 and the other set to opposite parties 4 to 9, two gold mohurs in each case.

R.K.

Rule discharged.

(1) [1906] 38 C.L.J. 137.

(2) [1916] 20 C.W.N. 983=37 I.C. 30=1 Pat. L.J. 374=2 Pat. L.W. 401.

A. I. R. 1928 Calcutta 298

DUVAL AND MUKERJI, JJ.

Nisi Kanta Das and others—Defendants—Appellants.

v.

Brojendra Nath Pal and others — Plaintiffs—Respondents.

Appeal No. 978 of 1925, Decided on 12th December 1927, from appellate decree of Addl. Dist. Judge, Midnapore, D/- 16th February 1925.

Bengal Tenancy Act, S. 103A and S. 103B—Record-of-rights finally published—Presumption under S. 103B arises—But order under S. 103A directing the name of a particular person to be entered is a valuable evidence as to possession by such person.

The presumption under S. 103, Cl. (b), no doubt attaches to the record-of-rights when it is finally published, but an order passed by a revenue officer on a dispute in proceeding under S. 103A directing the name of a particular person to be entered in respect of a certain property is a very valuable piece of evidence on the question of possession so far as that party is concerned. [P 299 C 2]

Brojo Lal Chakravarti and Santimoy Majumdar—for Appellants.

Apurba Charan Mukerjee—for Respondents.

Mukerji, J.—This appeal arises out of a suit which was instituted by the plaintiffs for declaration of title to and for confirmation of possession in or, in the alternative, for recovery of possession in respect of, an eight annas share in a tank and its bank. The suit was dismissed by the trial Court, that Court holding that the plaintiffs had failed to make out their title and that they had not been in possession, at any time, of the property in suit before the suit was instituted. The lower appellate Court, on an appeal being preferred by the plaintiffs from the aforesaid decision, reversed the said decision and decreed the suit in plaintiffs' favour holding that the plaintiffs had succeeded in proving their title and also that the suit was not barred by limitation. The plaintiffs' case, shortly stated, was that the tank in question belonged originally to two brothers Nilmani Ray and Madhusudhan Ray in equal shares. The plaintiffs claimed to have acquired the eight annas share of Madhusudhan Ray and Nilmani Ray's share, according to the plaintiffs, devolved upon the contesting defendants. The arguments that have been advanced

in support of this appeal which has been preferred by the defendants may be classed under two heads. The main arguments have been directed towards the finding of the learned Additional District Judge on the question of the plaintiff's title. It would be tedious to set out in detail all that has been urged so far as this branch of the appellants' contention is concerned. It has been urged, for instance, that the attention of the lower appellate Court was directed more to the question of the superior right in the tank and that the findings that have been arrived at by that Court in plaintiffs' favour really related to the said superior right, while, in point of fact, the subject matter of the suit was the jote right in the said property. It has been also urged that certain important documents or rather the bearing of them, so far as the present case is concerned, have not been properly considered by the learned Additional District Judge and in this respect reference has been made to such documents as Exs. N 1, and D 1. It has been also contended that there is an inconsistency in the findings of the learned District Judge so far as Exs. 7 A and D 2 are concerned; because while the learned Judge has said that D 2 does not relate to the property in suit, he has relied upon Ex. 7 A which gives the same pottah number of the property as D 2 contains.

These and various other matters have been brought to our notice but having given to all these matters the consideration that they deserve, we are of opinion that the learned Additional District Judge has very elaborately discussed the bearing of all the relevant documents and arrived at a conclusion with which it is not possible for us to interfere in second appeal. As regards the jote right, it is clear that there are some documents which deal with the said right and the findings of the learned Additional District Judge, so far as this right is concerned, cannot be said to have been based on no evidence. As regards D 1 and N 1 they have been specifically referred to in the learned Additional District Judge's judgment and as regards 7 A and D 2, the argument proceeds merely upon the fact that the same pottah number is given in the two documents: while, on a careful consideration of these documents, it will

be clear that there are other matters mentioned which go to show that the properties to which they relate are not identical. This contention, directed against the question of the plaintiffs' title, must, therefore, be overruled. The finding that the plaintiffs' title to the eight annas share of the tank and its banks will accordingly stand.

The other arguments that have been advanced relate to the question of limitation and generally to the finding of the learned District Judge as regards the question of the plaintiffs' possession. The learned Additional District Judge has observed in his judgment that the record-of-rights was finally published on the 27th October 1910, and, inasmuch as the suit was instituted on 27th October 1922, it was not time barred. He has made the following further observation in his judgment :

I believe plaintiffs' evidence of possession up to the final publication of the record-of-rights. It is true that the defendants are in possession since the final publication of the record of-rights as told by some of the plaintiffs' witnesses.

He seems, therefore, to have been of opinion that inasmuch as the suit was instituted within 12 years from the date on which the record-of-rights was finally published and as upon the evidence he was able to come to the conclusion that the plaintiff was in possession up to that date and the defendants came to be in possession only after the record-of-rights was finally published ; therefore, the suit was within time. The whole of the reasoning taken together if it can at all be accepted may perhaps be considered sufficient to dispose of the question of limitation and also the question of the plaintiffs' possession. But there is an initial difficulty in accepting this reasoning which has been given by the learned Judge. It appears that although the record-of-rights was finally published on the 27th October 1910, on 8th January 1909, an order was passed by the revenue authorities on a dispute in proceedings taken under S. 103(A), B. T. Act, that the name of the second party alone, that is to say, of the defendants in the present suit was to be recorded in the whole of the Nisf No. 4870 to which the subject-matter of the suit relates. The presumption under S. 103, Cl. (B) B. T. Act, no doubt attaches to the record-of-rights when it is finally pub-

lished ; but it cannot be disputed that the order passed by a revenue officer directing the name of a particular person to be entered in respect of a certain property is a very valuable piece of evidence on the question of possession so far as that party is concerned. This entry which is Ex 24 in the case does not appear to have been considered by the learned District Judge ; because wherever he has referred to the entries in the settlement records, he has referred only to the records finally published. I am of opinion that in arriving at his finding on the question of possession, the learned Additional District Judge, in having ignored this very important piece of evidence which is on the side of the defendants and in relying entirely upon the oral evidence of possession that is on the record and which must necessarily be of a far less evidentiary value, has not dealt properly with the case.

I am, accordingly, of opinion that while the findings of the learned Additional District Judge on the question of the plaintiffs' title must be taken to be final and will not be allowed to be reopened here, his decision on the question of plaintiffs' possession and on the question of limitation will have to be set aside and the case sent back so that the latter question only may now be dealt with afresh on hearing the parties again with reference to the materials on the record.

The appeal is thus allowed and the case remanded to the lower appellate Court to be dealt with in the light of observations made above.

Costs of this appeal will abide the result of the remand.

Duval, J.—I agree.

R.K.

Case remanded.

A. I. R. 1928 Calcutta 299

SUHRAWARDY AND GRAHAM, JJ.

Hara Chandra Mandal and others—
Plaintiffs—Appellants.

v.

*Mohananda Mondal and others—*Defendants—Respondents.

Appeal No. 483 of 1925, Decided on 19th December 1927, from appellate decree of 1st Sub-Judge, Dacca, D/- 18th November 1924.

(a) *Vendor and Purchaser—Sale by person out of possession is valid if not void on other grounds.*

Where the plaintiff suing in ejectment claimed under a transfer from the true owner, the deed of sale containing an untrue statement as to the payment of the purchase-money, but being otherwise reasonable in its terms, and affirmed and acted upon by both vendor and purchaser and neither champertous nor contrary to public policy.

Held : the deed operated as a present transfer to the plaintiff giving him a good title on which it was competent for him to sue, unless the defendants succeeded in proving that the transfer was not merely voidable but absolutely void: 27 All. 271 (P.C.), *Foll.* : A. I. R. 1923 Cal. 521, *Dist.* [P 301 C 1]

(b) *Transfer of Property Act, S. 55—A trespasser cannot challenge the validity of a sale as between vendor and vendee—Trespasser—Plea—Practice.*

Any question that may arise between a vendor and vendee with reference to the transaction in respect of its voidability is outside the competence of a trespasser to challenge the validity of the sale on any such ground. [P 301 C 2]

Bimal Chandra Das Gupta—for Appellants.

Kanai Lal Saha and Biraj Mohan Majumdar—for Respondents.

Suhrawardy, J.—This appeal arises out of a suit by the plaintiff for recovery of possession of certain piece of land said to have been purchased by him from defendants 3, 4 and 5. The plaintiff's case was that the land belonged to three brothers Raj Mohan, Nanda Mohan and Deba Mandal. After the death of Raj Mohan and Deba Mandal their shares were inherited by defendants 3 and 4—defendant 5 being one of the brothers. The defence of the principal defendants was that the property belonged to Rajmohan alone and that he had transferred it to the defendants before his death. During the progress of the suit in the trial Court the plaintiff added an alternative prayer to his plaint, namely, that if it was found that his vendors had no interest in the property the price paid by him to them might be decreed against them. The defence of the vendor-defendants was that the land belonged to the three brothers and that Rajmohan did not sell the land to defendants 1 and 2 as alleged by them, but that they had sold the land to the plaintiff; and consequently a decree for refund of purchase money should not be made against them. Judhisthir, defendant 3, further said that the entire purchase money, as mentioned in the kobala, was

not paid to him and a portion of it was still unpaid. The Munsif in the trial Court held upon an examination of the evidence that the case for defendants 1 and 2 was true and that the property belonged to Rajmohan alone who had sold it to the defendants as alleged by them. On appeal the learned Subordinate Judge found that the property did not belong to Rajmohan alone, that it belonged to all the three brothers jointly and that the kobala propounded by the defendants was not executed by Rajmohan and was not a genuine document. After entering this finding against the defendants the learned Subordinate Judge went on to discuss the merits of the plaintiff's case and remarked that the consideration of the three kobalas from defendants 3, 4 and 5, though they had equal shares, was not the same. He, however, does not question the genuineness of the plaintiff's kobalas but records an opinion about them in these words :

In my opinion, all these kobalas were mere paper transactions and they were created to enable the plaintiff to bring this suit. If the plaintiff really intended to purchase this land, he would have paid Rs. 200 to Judhisthir. I, therefore, find no reason to decide the question of title in plaintiff's favour.

In the result he confirmed the decree of the Munsif which was to the effect that the plaintiff's suit should be dismissed and that amount admitted by defendants 3, 4 and 5 to have been received from the plaintiff should be returned to the plaintiff by the defendants. I regret I am unable to follow the reasoning of the learned Subordinate Judge in this matter. He finds that the defendants' kobalas were not genuine. The defendants are, therefore, trespassers and he holds that the plaintiff's kobalas are genuine, but says that they are paper transactions created in order to enable the plaintiff to bring this suit. It is difficult to understand what the learned Subordinate Judge exactly means by using the words "paper transaction." This is one of the instances where expressions are loosely used without attaching proper legal significance to them. The reason that the Subordinate Judge gives for holding that the plaintiff's kobalas are paper transactions is that they were created to enable the plaintiff to recover possession of land from the defendants. If that is the idea with which the documents were created I do

not see why they should be called paper transactions. The vendors admit that they sold the property and the purchaser claims that he has purchased this property. That being so, it is difficult to imagine any circumstances which would enable the Court to say that the documents were paper transactions.

In the case of *Lal Achal Ram v. Raja Kazim Husain* (1), their Lordships of the Judicial Committee held that where the plaintiff suing in ejectment claimed under a transfer from the true owner, the deed of sale containing an untrue statement as to the payment of the purchase money, but being otherwise reasonable in its terms, and affirmed and acted upon by both vendor and purchaser, and neither champertous nor contrary to public policy, it operated as a present transfer to the plaintiff, giving him a good title on which it was competent for him to sue, unless the defendants succeed in proving that the transfer was not merely voidable but absolutely void. The present case seems to me to fall exactly within the principle enunciated by their Lordships. It is a suit against a trespasser who has no right to retain possession of the property as against the true owners of it. The true owners are defendants 3, 4 and 5. They say that they had sold the property to the plaintiff and the plaintiff in virtue of that transfer—it does not matter whether the entire consideration money was paid for the transfer—brought the present suit against the defendants who had no right to retain possession of it in the presence of his vendor. In support of the view of the Court below reference has been made to the decision in the case of *Kamini Kumar Deb v. Durga Charan Nag* (2), where it has been held that if a document is fictitious the principle in the decision in *Achal Ram's* case (1) does not apply. Though I consider that the law as broadly enunciated in that judgment is an inroad upon the principle underlying the decision of the Judicial Committee in *Achal Ram's* case (1), I do not think that the considerations which influenced their Lordships in *Kamini Kumar's* case (2), to hold against the document are present in the present case. In *Kamini Kumar's* case (2), there is no finding that the

defendants were trespassers. In fact on the statement of the facts of that case it is evident that they had some ostensible right to the possession of the lands in suit there. It has not been further found that the person who had title to the land support the plaintiff's title either in the plaintiff in his own right or in the plaintiff as the representative of the true owner. The contention of the defendants in that case was that the conveyance upon which the plaintiff relied was without any consideration and passed no right. It may be said that a transaction without any consideration is void and, therefore, falls outside the decision in *Achal Ram's* case (1). In the present case there was consideration, though inadequate according to the Subordinate Judge, upon which plaintiff's title was well founded. If the consideration is inadequate the vendors may have the right to void the transaction, or in other words it renders the transaction voidable. If the whole of the purchase money is not paid to one of the vendors he has the right of an unpaid vendor under the law. But any question that may arise between a vendor and a vendee with reference to the transaction is outside the competence of a trespasser to challenge the validity of the sale on any such ground.

Now, the reason which the Subordinate Judge has given to hold that the kobalas are paper transactions is that they are created to enable the plaintiff to bring the suit. Admitting the object to be as stated by the Subordinate Judge I do not find any reason why the plaintiff cannot maintain the suit. The vendors, defendants 3, 4 and 5 had the right to maintain the suit. The plaintiff under those transactions is either their agent or benamdar in either capacity he is entitled to maintain the suit. Then again under the decree passed by the Subordinate Judge the amount of consideration received by defendants 3, 4 and 5 has been decreed against them. The vendors admit that they have sold the property and received the price therefor, and the purchaser says that he has purchased it and paid the consideration for it. I fail to see on what principle of law the vendors can be compelled in these circumstances to return the purchase money. In my opinion on the finding arrived at by the Subordinate Judge the plaintiff is entitled to succeed.

(1) [1905] 27 All. 271=8 O. C. 155=32 I. A. 113=8 Sar. 772 (P.C.).

(2) A. I. R. 1923 Cal. 521.

The result is that this appeal is allowed, the decree of the lower appellate Court set aside and the plaintiff's suit decreed with costs throughout.

Graham, J.—I agree.

N.K.

Appeal allowed.

* A. I. R. 1928 Calcutta 302

C. C. GHOSE AND BUCKLAND, JJ.

Mohan Lal Golchha and others—
Decree-holders—Appellants.

v.

Kasimuddin Shaikh and others—Res-
pondents.

Appeal No. 435 of 1926, Decided on 5th December 1927, from appellate order of Sub-Judge, Pabna, D/- 31st July 1926.

* *Limitation Act, Art. 182, Cl. (5)—Step-in-aid—Order for issue of warrant—Inference that Court acted on some application of a decree-holder can be drawn—Such application is a step-in-aid.*

The filing of an affidavit of service which is the same thing as proving service of notice on the judgment-debtors is a step-in-aid of execution. The fact that an order for issue of warrant was made shows conclusively that the Court must have acted on some application or other of the decree-holders and such an application is a step-in-aid of execution within the meaning of Art. 182, Cl. (5). [P 302 C2]

Gopendra Nath Das—for Appellants.

Surajit Chunder Lahiri—for Respondents.

C. C. Ghose, J.—In this case, the only question involved is a question of limitation. The appellants are the decree-holders and they applied for execution of the decree which they had obtained, the application for execution being filed on 31st October 1924. It appears that the Durga Puja holidays of that year did not terminate till that date and, therefore, if it be held that the decree-holders were within time, that is to say, that the application was filed within a period of three years from 28th September 1921, the date when the decree-holders filed process fee in the previous execution case, then it must follow as a necessary corollary that their present application for execution was within time. The dispute between the parties is with reference to what has happened on 28th September 1921. The appellants contend that what happened on 28th

September should be regarded by the Court as a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Sch. 1, Lim. Act. Whereas the respondents contend that the decree-holders did not take any step whatsoever in aid of execution within a period of three years from the date when they last made their application for execution and that, therefore, the lower appellate Court, was right in holding that the application was barred by limitation. Now, the order-sheet shows what happened on 28th September 1921. The order runs as follows :

Service of notice proved. Decree-holders to file the remaining process-fees within a short time. Issue warrant of arrest returnable by 30th November 1921.

As far as one can make out from the order-sheet and from the order under date 28th September 1921 two things happened on that date. First, the decree-holders proved that service of notice upon the judgment-debtors had been effected and, in the second place, it is reasonably clear that the decree-holders must have made an application orally to the Court for an order for warrant of arrest of the judgment-debtors. It has been held in the case of *Pran Krishna Das v. Pratap Chandra Daloï* (1), that the filing of an affidavit of service which is the same thing as proving service of notice on the judgment-debtors is a step-in-aid of execution. Speaking for myself, I see no reason to take a view different to that taken by Woodroffe and Walmsley, JJ., in the case referred to above. In the present case, the decree-holders, in my opinion, are on stronger ground when they point to the order-sheet and ask us to infer that they must have made an oral application to the Court for issue of warrant of arrest and that their application was granted. The fact that an order for issue of warrant was made shows conclusively that the Court must have acted on some application or other of the decree-holders. If the decree-holders had made an application which resulted in the order for issue of warrant of arrest of the judgment-debtors, it must be held that the decree-holders did take on that date a step-in-aid of execution within the meaning of Art. 182, Cl. (5), Sch. 1, Lim. Act. That being so, no question of limitation can possibly arise in this case and it must be held, in my

(1) [1917] 21 C. W. N. 423=38 I. C. 586.

opinion, that the decree-holders' application was within time. In my judgment, the appeal should be allowed and the judgment-debtors' objection to execution must be dismissed with costs. The hearing-fee in this Court is assessed at two gold mohurs.

Buckland, J.—I see no possible ground upon which this case can be distinguished from the case of *Pran Krishna Das v. Patap Chandra Daloi* (1). I, therefore, agree that the appeal should be allowed with costs.

N.K.

Appeal allowed.

*** A. I. R. 1928 Calcutta 303**

CUMING AND MUKERJI, JJ.

Mt. Fatima Khatun — Plaintiff—Appellant.

v.

Fazlal Karim Mea—Defendant—Respondent.

Appeal No. 1869 of 1925, Decided on 26th February 1928, from appellate decree of Addl. Sub-Judge, Noakhali, D/- 21st April 1925.

(a) *Mahomedan Law — Agreement for talak may be entered into after marriage.*

An agreement for talak may be entered into after the marriage. Such post-nuptial delegation is valid: 46 Cal. 141, *Rel. on.* [P 304 C 1]

* (b) *Majority Act, S. 2 (1)*—"Capacity to act"—Scope explained—A minor can delegate to his wife the power of divorce.

The Majority Act does not use the expression "capacity to contract" but "capacity to act" which is of much wider import. The expression includes also capacity to contract. Adopting this view of the meaning of the expression "capacity to act in the matter of divorce" a minor can delegate to his wife the power of divorce: 21 Bom. 430, *Rel. on.*

[P 304 C 1]

Jitendra Kumar Sen Gupta—for Appellant.

Cuming, J.—This appeal arises out of a suit by a Mahomedan lady for a declaration that the marriage tie between herself and her husband has been dissolved. Her case was that she was married to one Fazlul Karim Mea on the 17th August 1905, that a kabilnama was executed by the defendant in her favour in which he agreed not to remarry during the lifetime of the plaintiff and not to illtreat her. He further contracted not to cause her pain of body or mind, not to desert her, to maintain her wherever

she lived of her own choice, not to misconduct himself and always to behave properly; there was a further agreement that if he violated any of these terms embodied in the kabilnama the plaintiff would have the power to divorce herself from her husband. It was the case of the plaintiff that the defendant had violated all these terms and that in the exercise of that power she divorced herself from her husband on the 10th April 1921 by uttering the word 'Talak' three times. She further executed a deed of divorce which was registered. The defendant contended that the kabilnama was not binding upon him, that it was executed after the marriage and that he was minor at the time. He further alleged that it had been executed under his wife's undue influence and coercion. He further denied the allegations as to ill-treatment, cruelty, misconduct and desertion. He apparently did not deny that he had violated one of the conditions, namely, that he had remarried twice. The first Court found in favour of the plaintiff and granted her the declaration sought for. In appeal the learned Judge set aside the decree of the first Court and dismissed the plaintiff's suit. He found that the kabilnama was executed not immediately after the marriage, but about a month after the marriage. He found that at the time of the marriage the defendant was under the age of 18. He further found that the contract had been entered into as the result of undue influence exerted by the wife's relation through the wife. He found that one of the terms of the contract had been violated, namely, the plaintiff's husband had remarried. He further held that this talak by agreement can only be entered into before the marriage. He further found that the contract itself was entered into by the defendant when he was a minor and, therefore, he could repudiate it on obtaining majority specially when the contract was vitiated by undue influence and coercion. He, therefore, allowed the appeal.

The plaintiff has appealed to this Court. This appeal raises a number of difficult questions of Mahomedan law and we are in the somewhat unfortunate position that the respondent in the case is not represented before the Court. The first point urged by the learned vakil for the appellant is that the learned Judge

was wrong in holding that a talak by agreement must be entered into before the marriage; in support of this contention he cited the case of *Sainuddin v. Latifannessa Bibi* (1). In that case Shamsul Huda, J., had to decide this particular point, namely as to whether a post-nuptial delegation of the power of divorce or *tutweer-i-talaq*, as it is called by Musalman lawyers, is not valid. The learned Judge remarks:

No authority has been cited for such a proposition. A reference to books on Mahomedan law makes it abundantly clear that such post-nuptial delegation is valid.

This disposes of the first objection of the learned Judge. The next point that has been raised before us is whether a Mahomedan minor can enter into a contract by which he delegates the power of divorce to his wife in the event of certain circumstances happening. Admittedly the general rule is that a minor cannot contract. The learned vakil for the plaintiff-appellant relies upon S. 2 of Majority Act. S. 2 provides that:

Nothing herein contained shall affect the capacity of any person to act in the following matters, namely, marriage, dower, divorce and adoption.

The learned vakil for the appellant contends that the delegation of power to divorce to wife is an act in the matter of divorce and therefore, falls within S. 2, Cl. 1, of the Majority Act. This view which the learned vakil would have us adopt of S. 2 of the Majority Act is supported by the decision of the Bombay High Court in the case of *Bai Shirinbai v. Kharshedji* (2) with special reference to p. 436. There the learned Judges remark:

The Majority Act does not use the expression "capacity to contract" but "capacity to act" which is of much wider import.

The expression includes also capacity to contract. Adopting this view of the meaning of the expression "capacity to act in the matter of divorce" we hold that a minor can delegate to his wife the power of divorce.

There only remains the finding of the learned Judge that the contract was vitiated by undue influence and coercion. In dealing with this point the learned Judge remarks as follows:

The contract under consideration is an ordinary contract and not one of marriage, dower or divorce. As regards the plea of undue influ-

ence and coercion, the very terms of the contract show that there must have been some such thing there to induce defendant to bind himself hand and foot in that way. As regards the statement that it was the wife's act, the meaning must have been that it was exercised by the wife through other persons of mature age.

Therefore, as far as can be seen, the learned Judge in coming to the conclusion that the defendant had established the plea of undue influence and coercion, has relied on the terms of the contract itself. Looking at the contract itself it cannot for one moment be held 'that the stipulation to allow the wife in certain circumstances to divorce herself from the husband would of itself show that the contract was brought about by undue influence and coercion. There was nothing whatever unreasonable in the husband to delegate to the wife the very same power to divorce in the event of certain circumstances happening. There is a further finding of the learned Judge that the undue influence was exercised not really by the wife, but by her relations. In other words the defendant has not made out the plea that the contract was brought about by the undue influence of the wife; and when we look at the age of the parties and the circumstances in which the contract was entered into this plea of undue influence and coercion is absurd.

The picture of a child of some 12 or 13 by undue influence and coercion inducing another child of sixteen or so to enter into a particular contract or to consent to some particular term in a contract borders on the ridiculous. It is to my mind difficult to see how such a plea could be seriously put forward. It is more difficult to see how it could actually be accepted.

The result is that we set aside the decree of the lower appellate Court and restore the decree of the trial Court. The appellant is entitled to her costs both here and in the lower appellate Court.

Mukerji, J.—I agree.

N.K.

Appeal allowed.

(1) [1918] 46 Cal. 141=48 I. C. 600=22 C. W. N. 924.

(2) [1896] 22 Bom. 430.

A. I. R. 1928 Calcutta 305 (1)

MUKERJI, J.

Rama Nath Naskar and others—Defendants—Appellants.

v.

Tarak Nath Banerjee and others—Plaintiffs—Respondents.

Appeal No. 1837 of 1925, Decided on 21st December 1927, from appellate decree of Third Addl. Dist. Judge, 24-Per-gannas, D/- 7th April 1925.

Civil P. C., O. 41, R. 23—No. appeal lies from remand order passed under inherent jurisdiction.

An order of remand passed by the first appellate Court in the exercise of its inherent jurisdiction and for the ends of justice is not appealable. [P 305 C 1]

Syed Nasim Ali—for Appellants.

*Apurba Charan Mukherjee and Pan-
chanon Ghosal*—for Respondents.

Judgment.—The decree of the lower appellate Court which has given rise to this appeal is divisible into two parts. The first of these parts is the decree for arrears of rent that has been awarded to the plaintiff. The second part of it relates to the question of enhancibility of the existing rent. The appeal to this Court is directed against the second part aforesaid and is confined to the relief which the plaintiffs claimed for enhancement of rent. The trial Court decreed the suit at the existing rate of rent with damages at 12½ per cent. The prayer for enhancement of rent was dismissed by that Court. The lower appellate Court has confirmed the decree for arrears of rent with the modification that instead of 12½ per cent as damages, damages have been awarded at 25 per cent. As regards the prayer for enhancement of rent the order that has been made by the lower appellate Court is that the decree of the trial Court is to be set aside and the case remanded for a fresh decision of the question in the light of such further evidence as the parties may think fit to adduce. The order in question appears to me to be one which is not one of those orders of remand from which an appeal would lie under the Civil Procedure Code. It is an order which the learned Judge evidently thought fit to pass in the exercise of its inherent jurisdiction and for the ends of justice. I am, therefore, of opinion that no appeal would lie from this decision and that the present appeal must, therefore, on that ground be dismissed.

I have been asked by the learned vakil for the appellants to treat the memorandum of appeal as an application under S. 115, Civil P. C. I have given the matter the consideration that it deserves but I am unable to say that the reason which the learned Additional District Judge has given for making an order would not justify the same. Speaking for myself, I would perhaps not entirely agree with the view which the learned Additional District Judge has taken at least as regards the form in which he has made the order. That, however, is a different matter. On the whole I am unable to hold that the order, such as it is, calls for the interference of this Court under the provisions of S. 115, Civil P. C.

The learned vakil for the appellants has brought to my notice the fact that settlement operations are in progress in the district to which the case relates and that in view of the provisions of S. 111, Ben. Ten. Act, the further trial of the suit that has been ordered by the learned Additional District Judge should be stayed. This, no doubt, is a matter that has got to be considered, but I would leave it to the trial Court to determine whether the section to which I have just now referred is applicable under the circumstances and to pass such orders as regards this matter as it may consider proper to pass.

The appeal is dismissed, but in the circumstances there will be no order as to costs.

N.K.

*Appeal dismissed.***A. I. R. 1928 Calcutta 305 (2)**

MUKERJI, J.

Makbul Ali Chowdhury—Defendant 1—Appellant.

v.

Sasi Kumar Malla and another—Plaintiff 1 and Defendant—Respondents.

Appeal No. 867 of 1925, Decided on 30th November 1927, from appellate decree of Addl. Sub-Judge, Chittagong, D/- 16th January 1925.

Landlord and Tenant—Deed of kabuliyat—Construction.

A tenancy consisted of a tank with its banks and a plot of land adjoining thereto. It was created by a kabuliyat by which the tenant got a right to graze cattle on the bank after fencing

them all round, rear fish and catch them, and enjoy the fruits of fruit bearing trees then existing on the bank. The kabuliyat was headed as a "kabuliyat for nine years." Below the heading when naming the tenant as executant it spoke of him as Makbulali cultivator for nine years.

Held: that the object of kabuliyat was to create an agricultural tenancy in favour of the tenant. [P 303 C 2]

Narendra Kumar Das—for Appellant.

Chandra Sekhar Sen—for Respondents.

Judgment.—The contention that has been urged in this appeal is that the Subordinate Judge was wrong in holding that the tenancy in suit is governed by the Transfer of Property Act and that the Munsif who tried the suit had rightly held that the Bengal Tenancy Act applied to it.

The subject-matter of the tenancy is a tank with its banks and a plot of land adjoining thereto. It had its origin in a kabuliyat the material portion of which runs in these words:

I shall graze cattle on the banks after fencing them all round. I shall rear now fish and catch them and shall not make any objection to your catching the old fish. I shall enjoy the fruits of the fruit-bearing trees now existing on the banks. I shall be entitled to catch fish throughout the year and shall not be competent to raise objection to your catching fish on any festive occasion. If I fill up the tank without your permission I shall not be entitled to raise any objection to your getting khas possession of it. I shall always clear the weeds of the tank and if the tank is not cleared I shall be liable for damage.

Were these terms the only materials from which the purpose of the tenancy had to be determined, I would have agreed with the respondents' contention that it was not made out that the tenancy was for agricultural or horticultural purposes. The defendant's (appellant's) case in the written statement was that he had cultivated paddy, etc., on the lands and had grown fruit trees on the banks of the tank, and that he had not used the lands for the purpose of grazing. The Munsif held that he did not cultivate the lands, but used the same for the purposes of grazing. This finding has not been reversed by the Subordinate Judge. On this finding the defendant seeks to argue that the grazing was for a purpose ancillary or incidental to his cultivation of other lands in the village, in respect of which he is a settled ryot as is shown by the khatian. Whether having put forward a definite case which failed, the defendant can be, or at any rate should be, permitted to construct another case upon the findings that have been arrived at against him, may be

debatable question. But, in my opinion, there is much surer indication than all this in the kabuliyat itself as regards the status of the defendant which it purported to create.

The kabuliyat is headed as a "kabuliyat for nine years." Below this heading, when naming the defendant as the executant, it speaks of him as "Naysena Meadi Chasa Sree Makbul Ali" (i. e., Makbulali cultivator for nine years). I am of opinion that it was so said because the object was to create in favour of the defendant an agricultural tenancy for nine years or to make him a cultivating tenant for that period. I think there is no ambiguity in the meaning of the document and that the view taken by the Munsif of the defendant's status is the correct one.

I accordingly allow the appeal, set aside the decree of the Subordinate Judge and restore that of the Munsif with costs in this as well as the lower appellate Court.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 306

MUKERJI, J.

Mujaffar Ahmed — Plaintiff — Petitioner

v.

Karim Baksh and others — Defendants—Opposite Parties.

Civil Rule No 959 of 1927, Decided on 5th December 1927, against judgment of first Court Munsif, Sudharam, D/- 29th Apr. 1927 in S.C.C. Suit No. 1436 of 1926.

Limitation Act, Art. 36—Suit to recover price of goods lost by the carrier—Delivery so as to give carrier lawful possession must be proved.

To give rise to these special privileges or liabilities which attach to transactions by or with carriers, the relationship as between a carrier and his customer has first to be established and, for the presumption of an implied contract to carry, delivery of the goods so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage is the indispensable essential.

Plaintiff put the goods on the defendant's ferry boat for conveyance and himself got on to it. He found that the boat was being overloaded and feeling it unsafe to travel on it, he got down and wanted to take down his goods but the defendant refused to allow him to do so. The boat started on its journey with his goods and capsized on the way and the goods were lost. He sued to recover price of the goods.

Held: that as there was no delivery in this case the article applicable to the case was not Art. 30 or 31 but the general article namely Art. 36. [P 307 C 1]

Jitendra Kumar Sen Gupta—for Petitioner.

Akhil Chandra Dutt—for Opposite Parties.

Judgment.—The only question which arises in this rule is whether the plaintiff's claim is barred by limitation.

The learned Munsif has held that the suit is barred under Art. 30 or 31, Sch. 1, Lim. Act, having been instituted more than one year after the date when the loss or injury took place or when the goods ought to have been delivered.

Shortly stated the facts which have not been controverted are that the plaintiff put the goods on the defendant's ferry boat for conveyance and himself got on to it. Other passengers with their goods also did so. The plaintiff found that the boat was being overloaded and feeling it unsafe to travel on it, he got down and wanted to take down his goods but the defendants refused to allow him to do so. Notwithstanding the plaintiff's protest the boat started on its journey with his goods and capsized on the way and the goods were lost. The claim is for recovery of price of the goods.

To give rise to those special privileges or liabilities which attach to transactions by or with carriers, the relationship as between a carrier and his customer has to be first established. There was admittedly no express contract for carriage: and for the presumption of an implied contract to arise, delivery of the goods so as to enable the carrier to acquire lawful possession of the goods for the purpose of carriage is the indispensable essential. It is difficult to see upon the facts set forth above that there was any delivery in this case. The Article applicable to the case is, therefore, not Art. 30 or 31 but Art. 36, and the claim was not barred.

The other facts having been found in plaintiff's favour, the plaintiff is entitled to a decree.

The rule is made absolute. The decree of the learned Munsif is set aside and plaintiff's suit is decreed with costs in the trial Court as well as in this Court. Hearing fee in this rule is fixed at one gold mohur.

N K.

Rule made absolute.

A. I. R. 1928 Calcutta 307

B. B. GHOSE AND ROY, JJ.

Efari Dasya—Appellant.

v.

Podai Dasya—Respondent.

Appeal No. 239 of 1925, Decided on 29th June 1927, from original decree of Dist. Judge, Assam Valley Dt., D/- 24th October 1925.

(a) *Succession Act* (39 of 1925), S. 237—*Application for probate of a draft of a will — Applicant not able to prove that the will has been lost or mislaid since the testator's death — Applicant is not entitled to the probate.*

Where the applicant for grant of probate or letters of administration of the draft of a will alleged to have been executed by a testator, is not able to prove that the will has been lost or mislaid since the testator's death, he has failed to satisfy the terms of S. 237 and is, therefore, not entitled to the probate. [P 303 C 2]

(b) *Will — Revocation*—No rule can be laid down as to circumstances under which presumption of revocation of will can arise.

The question as to the presumption of the will being revoked by the testator with reference to the fact of its being in his possession till the time of his death is to be decided more or less upon the circumstances of each case. It cannot be laid down as a rule of law that under certain circumstances a presumption should be made that the will was revoked by the testator or not. *Allan v. Morrison*, (1900) A. C. 604, *Ref.*; 18 C. W. N. 527 and 31 Cal. 885, *not foll.* [P 309 C 1]

Bijon Kumar Mukerjee — for Appellant.

Atul Chandra Gupta and *Bankim Chandra Banerji*—for Respondent.

B. B. Ghose, J.—This is an appeal against the judgment and decree of the District Judge of Assam Valley Districts refusing to grant probate or letters of administration of the draft of a will alleged to have been executed by the testator, Jipati Thakuria, in January 1904. The applicant was the daughter of the testator. The testator died on 25th June 1910. At the time of his death, he had his daughter, the petitioner, his widow Podai, the objectrix, an infant son, Kali Charan, and another stepson named Nanmal. At the date of the will his son, Kali Charan, was not born. By the will, a 3rd share each was given to Efari, the petitioner, Podai, the wife, and to Nanmal. It is alleged by the petitioner that after the death of the testator each of the three persons was in possession by taking pattas from the revenue authorities of the lands left by the testator and they were in joint possession till the year 1908. In 1924 disputes commenced

among those parties and the petitioner was sought to be deprived of her share of the properties and that is the reason why she has applied for probate of the draft of the will in May 1925. The will is alleged to have been lost. Efari, the petitioner, says that she gave the will to Osharam Gaonbura, a relation of the testator, for the purpose of mutation of names in the revenue register after the death of the testator. Osharam never returned the will to her and she never asked for it, but when the disputes arose, she sent a registered notice to him to make over the original will to her. The registered letter containing the notice was not accepted by Osharam and was returned to the petitioner. Osharam also did not give the original will to her and it is on that account that she has asked for probate of the draft from which the will was written out and executed by the testator. The objectrix, Podei, denied the execution of the will and she supported her allegation by her own evidence as well as the evidence of her witnesses. The learned Judge was of opinion that Jipati did execute a will in terms of the draft but he held that after the birth of his son, Kali Charan, he would probably have wished to revoke the will or to modify its terms and he could have revoked the will by simply tearing it up. He apparently came to the conclusion that that was what the testator himself did.

The learned Judge then discussed the evidence as to the existence of the will after the death of Jipati, which fact he noticed is only supported by the evidence of Efari herself and by the evidence of a witness named Adhiram. The learned Judge holds that Adhiram is not a reliable witness and he does not believe the story that Efari made ever the will to Osharam as she alleges, the learned Judge being of opinion that it is unlikely that Efari would have left the will with Osharam for some 15 years. He also refers to the fact that there is no mention of the will in the patta and, in his view, the record of the three names is probably due merely to the fact that they were in joint possession of all the property of Jipati. He came to the conclusion that the evidence as regards the existence of the will at the time of the testator's death was unreliable and, therefore, refused to grant probate.

The first objection taken on behalf of the petitioner in her appeal is that the question of revocation of the will was improperly decided by the District Judge, as that was not the issue raised by the objectrix nor was any evidence led in support of that story. The whole question on which the parties went to trial was : Was there a will executed or not ? The learned Judge having found that the will was executed, he ought to have placed the burden of proof upon the objectrix to show that the will had been revoked by the testator. The mere fact that a son had been born to the testator after the date of the execution of the will is not sufficient to raise the presumption that the will was revoked. The contention on behalf of the appellant is therefore that at any rate the case should be remanded to the lower Court for the purpose of a fuller enquiry as to the question of revocation. In answer to the contention of the appellant, the respondent submits that the question of revocation although not distinctly raised in the issues was sufficiently raised in the pleadings of the parties. It is pointed out to us that in the petition of the appellant herself it is stated that Kali Charan, the son of the testator, was born in 1316 B. S., in the month of Pous. The will was, however, not revoked. In answer to that, the objectrix states that according to the draft filed it is clear that the late Jipati had no son of his then, but on the birth of his son he would never keep any such will outstanding.

However inartistic these statements may be it cannot be said that upon these allegations the Judge was not justified in going into the question of revocation of the will by the testator on the birth of his son. The point next urged on behalf of the appellant is that if it is shown that the will was in the possession of the testator till the time of his death, then only the loss may be referred to the presumption of revocation by the testator himself. If it is shown that the will was not in the possession of the testator up to the time of his death, no such presumption of revocation by the testator arises. In support of this contention he relies upon the cases of *Sarat Chandra Basack v. Golap Sundari Dasya* (1) and *Anwar Hossein v. Secretary of State* (2).

(1) [1918] 18 C. W. N. 527=21 I. C. 121.

(2) [1904] 31 Cal. 885=8 C. W. N. 821.

The contention is that the burden of proof is upon the objectrix to show that the will was actually in the possession of the testator till his death. It seems to me that the question as to the presumption of the will being revoked by the testator with reference to the fact of its being in his possession till the time of his death is to be decided more or less upon the circumstances of each case. In my opinion, it cannot be laid down as a rule of law, that under certain circumstances a presumption should be made that the will was revoked by the testator or not. I may refer to the case of *Allan v. Morrison* (3), which was cited by the learned advocate on behalf of the respondent in support of this proposition. It seems to me, however, that the present controversy should be decided on the terms of S. 237, Indian Succession Act of 1925—which corresponds to the repealed S. 24, Probate and Administration Act 5, 1881. The section runs thus :

When a will has been lost or mislaid since the testator's death . . . and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

In this case the petitioner asks for probate of the draft of the will. She must, therefore, prove that the will has been lost or mislaid since the testator's death. The petitioner gave her evidence in support of the allegation that the will was in existence after the testator's death and it has since been lost. Her story is that the will was in the possession of the testator for two years after its execution. Then it was made over to her and she made it over to Osharam for the purpose of mutation of names. This story has not been accepted by the District Judge. If this story is believed, then there is no question, as is admitted on behalf of the respondent, that the appellant would be entitled to the grant asked for. But is this story probable? The first difficulty which arises in believing this story is, why should the testator make over the will to the daughter instead of to his wife, and even if he did so, is it natural that he should not ask it back after the birth of his son who would be left destitute under the terms of the will? The story also of the petitioner having made over the will to Osharam is incredible, and Osharam swears that it was

never made over to him. If that story falls to the ground, then the petitioner has not been able to prove that the will has been lost or mislaid since the testator's death. That being so she has failed to satisfy the terms of S. 237, Indian Succession Act, and is, therefore, not entitled to probate. The appeal must, therefore, be dismissed with costs.

Roy, J. —I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 309

RANKIN, C. J. AND CHOTZNER, J.
Suresh Chandra Banerjee and others
—Accused—Appellants.
v.

King-Emperor—Opposite Party.

Criminal Appeals No. 531, 558 and 572 of 1926, Decided on 7th December 1927, from order of Addl. Sess. Judge, Dacca, D/- 14th June 1926.

Penal Code, S. 400—The essence of the section is the agreement habitually to commit dacoity, not the actual commission or attempted commission of dacoities — The existence of such an agreement and the participation of any person in that agreement may be inferred from the circumstances.

The word "belong" in S. 400 implies something more than a casual association. It involves the idea of continuity rather than of permanency and also of a connexion extending long enough to warrant the inference that the accused has identified himself with the gang which has for its object the habitual commission of dacoity. The essence of the section is the agreement habitually to commit dacoity not the actual commission or attempted commission of dacoities. The existence of such an agreement and the participation of any person in that agreement may be inferred from circumstances. [P 311 C 2]

*Suresh Chandra Taluqdar and Sachindra Kumar Roy, Debendra Narain Bhattacharjee and Negendra Nath Chowdhary—for Appellants.

Khundkar—for the Crown.

Chotzner, J. — The 20 appellants were tried by the Additional Sessions Judge of Dacca with a jury upon a charge under S. 400, I. P. C., and upon the unanimous verdict of the jury were convicted and sentenced to various terms of imprisonment. The trial presents some unusual features. It began on 15th April 1925 and ended on 9th June 1926. Over 300 witnesses were examined and the amount of judicial time actually devoted to the hearing was 154 days. The

learned Judge's charge to the jury which occupied 8 days dealt very exhaustively with the law and with the facts in their relation to each particular accused and reflects great credit on the patience, industry and carefulness of the learned Judge.

At the hearing of the appeal, the appellants Suresh Chandra Banerji alias Fatik, Bhim Dhupi, Gunga Charan Dutt alias Haridas, Abala Ranjan Majumdar, Nalini Ranjan Majumdar and Bama Charan Chaudhuri alias Tuina were represented by Mr. Taluqdar, Nripendra Nath Ghose alias Natu by Mr. Bhattacharjee, while the remaining (13) accused have preferred appeals from jail.

The case for the prosecution rests very largely on the evidence of the approver Surendra Mohan Ghose. According to him the appellants with others formed a gang of dacoits under the leadership of Fatik, he himself being one of Fatik's lieutenants. The scene of their operations was the districts of Dacca, Faridpur and Tippera and more particularly Bikrampur within the Munshiganj Sub-Division and they were responsible for no fewer than 18 dacoities exclusive of attempts in the years 1922 and 1923. The head-quarters of the gang was at Panchgaon, Fatik's home, and the evidence shows that the appellants for the most part reside in this area. It was, therefore, not improbable, as the learned Judge puts it, that :

there should be a gang operating in this area which has been responsible for all these dacoities.

This was supported by the fact that similar weapons and the same password were used in their commission. Evidence was also led that the accused were seen to associate together regularly—a truly remarkable circumstance when it is seen that they profess different faiths and occupy a different status in life. Such associations are shown to have been attended by an outbreak of crime, which coincided with the simultaneous disappearance of the accused from their homes.

These being the broad facts of the prosecution, it has now to be considered whether the learned Judge was right in his direction to the jury as to the value of the approver's evidence and as to that corroboration in relation to each accused upon which the statute insists. What the learned Judge says is this :

With regard to the evidence of an approver the legal position may be summed up in one sentence. It is not illegal to convict on the uncorroborated testimony of an accomplice, but it is highly unsafe to do so unless it is corroborated in material particulars. Under S. 133, Evidence Act, it is stated that 'an accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.' In S. 114, Ill. (b) it is stated that 'a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars'. You may take it then that there is nothing in the law to prevent you from convicting the accused in this case on the uncorroborated evidence of the approver Surendra Mohan Ghosh, but it would be exceedingly dangerous for you to do so. There must be corroboration of his evidence in material particulars by impartial and reliable evidence. Corroboration by an accomplice is worthless, as is corroboration by a witness whose competence or truthfulness is under suspicion. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect them with the dacoities. In other words it must be evidence which implicates them, confirming in some material particular not only the evidence that dacoities have been committed but that the accused were concerned in their commission. If an approver has been corroborated on some points you are free to believe him on points on which he has not been corroborated provided you think it reasonable. It is not necessary that an approver shall be corroborated as regards every single statement which he makes.

We think that this is substantially a correct exposition of the law. It has, however, been contended by Mr. Taluqdar that the learned Judge should have placed the character and antecedents of the approver much more elaborately before the jury and that his omission to do so is a serious defect in the charge. We find it difficult to accept this contention. The approver was before the jury for 24 days, and a mere perusal of his evidence is sufficient to show that he must have blackened himself in their eyes beyond redemption. Then on the question of the corroboration of the approver's evidence by independent testimony we cannot do better than transcribe as an example of the learned Judge's method of dealing with each individual accused that portion of the charge which relates to the case against Ananta Sarcar :

2 Ananta Sarcar—Ananta Sarcar is said to be the lieutenant of Fatik. He is first mentioned in connexion with the Kamarhowla dacoity. You will remember that he used to be the tabirkar of the master of the house. Vide evidence of Nisi Karmokar. Then his name appears in connexion with the Bidhnaï dacoity, and the search in his house by the

police. He is implicated by the approver in the Meheran dacoity, and Kalachand Banerji speaks of the improvement in his fortunes after this dacoity. In Gaodia dacoity he is again implicated by the approver, this time as the informer of the dacoity. I remind you of the evidence of Baroda Kanta Pal, Kala Chand Gope, Tufani Kapali, and Srinath Gope. In this dacoity the approver gives Ananta a specific part, in that he was armed with a ballam and struck a man who cried out in consequence of which episode a neighbour asked whether or not these dacoits had any pity. Suren also implicates him in the Abdullapur attempt. He is named in the Mankohati dacoity, and the approver's evidence is supplemented by that of Kala Chand and Kasimali Haldar, P. Ws. 210 and 246. He is also named by Suren as having taken part in the Radhanagar dacoity and the evidence of Suren is supplemented by that of Jitendra Nath Roy P. W. 288 and Abdul Aziz P. W. 72. He is implicated by the approver in all the Kuichamora attempts and in the last his evidence is supplemented by that of Kalachand Gope, and by Badidzaman P. W. 76. Suren names him in the Banori dacoity, and you also have the evidence of Maijuddin Mullah 252, and Janaki Kapali 256; Suren names him in the Banori dacoity, and you also have the evidence of Sasadhar Biswas 296. As regards Banori dacoity there is also the evidence of Ex. 198, and the evidence of Kala Chand 210. Suren names him in the Ganganagar dacoity and there is also the evidence of Brojendra Lal De 230. As regards Wari dacoity there is the evidence of Satinath Banerji 3, and Peari Kapali 245. Ananta was arrested by Eadali Chowkidar on 14th October 1923 and was produced before Sasadhar Biswas.

The same remarks as I have made in connexion with the witnesses of association before apply here as well as in all the individual cases. As regards Ananta, the evidence of the following association witnesses is put before you. Kala Chand 210, Eadali 37, Janaki Kapali 256, Dinesh Bannerji 262, Mon Mohan Kapali 244, Abbas Ali 258, Nisi Karmakar 251, Moijuddin 252, Gagan Karikar 248, Peari Kapali 245, Kasimali Haldar 246, Srinath Gope 253, Tufani Kapali 247, Manindra Nath Mukerji 264, Oli-muddin Choukidar 243, Indra Mohan De 265, Mohini Mohan Banerjee 211, Hem Ghatak 291 and Kala Chand Banerjee 272, with reference to this last witness, I remind you of the evidence of P. W. 37 as regards enmity alleged between him and the accused Ananta.

The learned Judge has dealt with the other accused in a precisely similar manner and we do not think a clearer or fuller direction could have been given. The culpability or innocence of each individual was left entirely to the jury and we cannot say that the evidence upon which they found the accused guilty was inadequate. We have now to consider the various arguments advanced by Mr. Taluqdar. He says that S. 400 contemplates the existence of one gang to which the members per-

manently belong and are associated for the purpose of habitually committing dacoity. Here the case for the prosecution is that there are three distinct gangs, and it is, therefore, urged that the trial has been vitiated by the acceptance of evidence relating to these three gangs, each of which should have been separately tried.

Now it is quite true to say as the learned Judge has done that when the section says "whoever shall belong to a gang of persons," the word "belong" implies something more than a casual association. It involves the idea of continuity rather than of permanency and also of a connexion extending long enough to warrant the inference that the accused had identified himself with the gang which has for its object the habitual commission of dacoity.

The essence of the section,

to use the learned Judge's words,

is the agreement habitually to commit dacoity, not the actual commission or attempted commission of dacoities. The existence of such an agreement and the participation of any person in that agreement may be inferred from circumstances.

When the evidence is examined it will appear that it was only one gang which was charged and proved and that the approver and the appellant Natu joined in it in time for the Meheran dacoity in December, 1922. Consequently there is no question of misreception of evidence or misjoinder of charges on the ground that the three gangs have been intermingled. In point of fact the first group of dacoities, namely Dhamaron and Maloleiya affects none of the appellants except Natu with whom we shall deal later. There is, therefore no force, in this argument.

It is next contended that the learned Judge has misdirected the jury in regard to the letter Ex. 10, which purports to have been written by the approver to his wife and to show that he is not really a dacoit but a spy in police pay. What the learned Judge says about it is this:

At the close of the cross-examination of the approver he was handed this letter and was asked whether or not it had been written by him. After seeing the letter he answered—it is not in my hand-writing and not written by me. The

letter was marked provisionally 'X'. Then the approver was asked to write at the dictation of the then pleader for the defence who was then in conduct of the case. Accordingly he wrote at the dictation of the learned pleader. Two other letters purporting to have been written to the approver by his wife were shown to him. He denied that they were in the handwriting of his wife, that he had ever received them and stated that his wife always wrote to him over the signature 'Bini'. Nothing more was heard of the letter purporting to have been written by Suren to his wife until the argument of the learned pleader for the defence. He has now asked you to compare the admitted handwriting as shown in the dictation taken down, with that of the letter purporting to have been written by Suren, and also with the entries in the Khotā book of Ram Malakar, Exs. 3 and 4 of Ex. 1 and from this comparison to find that the letter in question was actually written by Suren from the gaol. In the first place I must caution you evidence of comparison of handwriting is often extremely dangerous. Of all methods of proving a document that of comparison of handwriting by an inexperienced witness is the most unsatisfactory. Your own common sense will tell you this. If a man wishes to forge a document and make it appear to be in the handwriting of another, then he will naturally follow as closely as possible the peculiar characteristics of the other's handwriting. He will also imitate any peculiarities of expression. If he knows that the other person is in the habit of using certain expressions or of making certain mistakes in spelling, he will introduce them into the forgery in order to provide an appearance of genuineness in the forgery. In fact the essence of a successful forgery is that it should resemble the original as closely as possible. The better the forgery the more difficult it is for any person who is not a handwriting expert to distinguish it from a genuine script. In the present case the alleged writer of the letter says it is a forgery, is not written by him. The defence have asked you to compare it with his admitted handwriting and find it genuine. It is a point which is for your decision, but your decision must be made bearing in mind the caution that I have given you.

We are of opinion that the warning given to the jury was quite proper. It was plainly a matter for the jury to decide whether the letter was genuine or not and if the defence maintained it was, nothing could have been simpler than for them to have called an expert to tell them what he thought. A grievance is sought to be made from the fact that the wife was not examined, but here again the defence might have summoned her if they wanted her.

Some criticism is directed against the way in which the search of Fatik's house was conducted and it is urged that all the witnesses to the search were not called.

The search list Ex. 122 shows that a very large number of articles were found

and it was important that they should be carefully recorded with all particulars. There is, therefore, nothing suspicious in the fact that this took more than one day to do.

As regards the second point, it appears that the search took place in the presence of three witnesses one of whom was examined. It was plainly unnecessary to call every witness. It would be for the jury to say if they were satisfied upon his evidence that there was no reason to suspect any irregularity, and whether they were or were not, there was no reason to burden the record unduly.

The further suggestion made by the learned vakīl that some of the articles which were identified as stolen property at the trial were planted in Fatik's house rests on no evidence and is apparently unfounded. (The judgment then considered the evidence in the case of each accused and with certain modifications in sentences the appeals were dismissed).

Rankin, C. J.—I agree.

N K.

Appeals partly allowed.

A. I. R. 1928 Calcutta 312

SUHRAWARDY AND MALLIK, JJ.

Hatimullah and others—Defendants—Appellants.

v.

Mahamad Abju Choudhury—Plaintiff—Respondent.

Appeals Nos. 2437 to 2442 of 1924, Decided on 6th July 1927, from appellate decrees of the 1st Sub-Judge, Sylhet, D/- 23rd June 1924.

(a) *Evidence Act, S. 115—Landlord and tenant.*

Where the tenancy under the plaintiff is once denied, the tenants would not be entitled to claim on a future occasion that the tenancy under the plaintiff was subsisting.

(b) *Landlord and tenant—Forfeiture arises only when the tenant expressly repudiates the tenancy.*

The principle of forfeiture by disclaimer is that where the tenant denies the landlord's title to recover rent from him bona fide on the ground of seeking information of such title or having such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the landlord's title. But where the disclaimer is done not with this object but with an express repudiation of the tenancy under the landlord, it would operate as forfeiture. [P 315 C 1]

(c) *Transfer of Property Act, S. 111—Forfeiture may arise even when tenant does not deny tenancy but sets up title of third person.*

The English law of forfeiture has been assimilated with the law of transfer in India and has been embodied in S. 111, Cl. (g), where one of the grounds for forfeiture is said to be setting up by the lessee a title in a third person. This indicates the principle of law that a tenancy may suffer forfeiture even though the tenant may not deny his tenancy but sets up the title of a third person : *A. I. R. 1919 P. C. 4, Rbf.* [P 315 C 2]

Hemendra Kumar Das—for Appellants.

Benoyendra Nath Palit—for Respondent.

Judgment.—These six appeals are by the defendants in suits for ejectment. It is not necessary to deal with the various points involved in the suits as the only question that has been raised and discussed before us is whether in the circumstances of these cases there was a forfeiture of the tenancies by disclaimer by the defendants. It appears that there was a separate Hisya No. 14 of Taluk No. 27 under Cheak No. 5 of the Thak Map. It stood in the name of one Amirunnessa and was subsequently sold for arrears of revenue and purchased by the present plaintiff. He previously brought suits for rent against these defendants but they having denied the relationship of landlord and tenant between him and themselves he had to withdraw the suits. He then brought the present suits for recovery of khas possession on the ground that the repudiation by the defendants of the relationship of landlord and tenant between him and them operated as a forfeiture of the tenancies, if they had any. The main defence of the defendant was that the lands did not belong to the plaintiff's Taluk No. 27 but that they belonged to the Maliks of Taluks Nos. 8, 28, 30 and 32 under whom they were holding and that they were never the tenants of the plaintiff or his predecessor the owner of Taluk No. 27. The first Court found that the lands in suit appertained to Taluk No. 27 but that the defendants were bona fide tenants of the lands and that the disclaimer in the previous suit was not sufficient in law for forfeiture of the tenancies. In this view it dismissed the plaintiff's suits. The learned Subordinate Judge in appeal has dissented from the view taken by the Munsif on fact as well as on law and holding that the disclaimer was sufficient in law to operate as forfeiture he decreed

the plaintiff's suits. Against the decision of the lower appellate Court the defendants have appealed and it is argued on their behalf that the allegations made by the defendants in their written statements in the previous suit did not amount to a disclaimer such as to work forfeiture of the tenancy. In the previous suits for rent the defendants filed written statements of which a translation has been placed before us by the learned vakil for the appellants in which they said that the suits were not maintainable as there was no relationship of landlord and tenant between the plaintiff or his predecessors and the defendants and that the real owners of the lands in suit were persons whose names were mentioned in para. 4 of the written statement. In para. 10 of the written statement the defendants gave a series of denials to all the allegations made by the plaintiff and characterized the plaintiff's claim as totally false, imaginary, collusive and fraudulent. The essence of the defence in that suit was that the defendants were not the tenants of the plaintiffs or his predecessors in respect of Taluk No. 27, that the lands belonged to the other taluks and that they were holding the lands under the owners of those taluks. The learned Subordinate Judge records the following findings :

There is nothing to hold that the defendants hold the lands of Taluk No. 27 as bona fide tenants for upwards of 12 years. There can be no doubt that the defendants were the tenants of the plaintiffs; so the plaintiff, a bona fide purchaser, is entitled to recover khas possession and wasilat from the defendants who in collusion with the Maliks of other Taluks set up a hostile title and denied the plaintiff's right. If the defendants would be bona fide tenants of the lands by taking patta from the Maliks of taluks Nos. 8, 28, 30 and 32 then defence would be a plausible one. But they are in collusion with their alleged landlords and persist in setting up adverse right even after the previous decision which bind their alleged landlords as well as the defendants.

It may be noticed here that there was a previous suit between the alleged landlords of the defendants and the plaintiff's predecessors with regard to the lands in suit which was finally decided by the High Court and in which it was held that the lands in suit belonged to Taluk No. 27. On these findings all the learned discussion on the abstract question how far a disclaimer operates as forfeiture hardly arises. The findings come to this, that the defendants have not acquired

any permanent right in the lands but have been in possession of these lands in collusion with the Maliks of the other taluks not as bonafide tenants but in order to deprive the plaintiff of his land.

The learned vakil for the appellants, however, contends that in law in order that a disclaimer should operate as forfeiture it should be a disclaimer of the tenancy in general and setting up of an adverse right by the tenant in himself. In other words if the tenant denies the relationship of landlord and tenant between the plaintiff and himself and sets up a third person as his landlord, claiming and not renouncing the status of a tenant, there is no forfeiture of the tenancy in law. It is conceded that under the law prevalent in the province from which this case comes the denial of the landlord's right works forfeiture on the analogy of the English law on the subject: see the case of *Nizamuddin v. Mamta-zuddin* (1). In support of the broad proposition that has been placed before us by the learned vakil for the appellant we have been pressed with the decision in *H. Mathewson v. Jadu Mahto* (2). That case on a close examination does not support the appellants' contention. In that case the defendant in the previous suit had stated that he was not aware of the plaintiff's predecessor-in-title having any interest in the land, that the decree, auction-sale and kobala on which the plaintiff based his claim were collusive and fraudulent and that he had a jungle-bari right in the land. In his evidence the defendant said:

I have no relationship of landlord and tenant with Mr. Mathewson the plaintiff in the suit. I owe no money to him. I am a tenant of Lalit Ghose to whom I pay rent.

With regard to the defence stated in the written statement the learned Judges held following the English law on the point and the decisions of this Court that it did not amount to a disclaimer operating as forfeiture in as much as the tenant sought information, with regard to the strength of the plaintiff's title. With reference to the statement made in the cause of his deposition by the defendant the learned Judges seem to be of opinion that it might have entailed forfeiture but in that case they did not say so because they could not trust the memorandum on

the record of the tenant's deposition in that case as it was not in conformity with the provisions of the Civil Procedure Code. That case, therefore, does not support the appellants' contention. The rule with reference to this branch of the English law has been explained by Parke, B., in *Deod Gray v. Stanion* (3). At p. 702 the learned Baron observes thus :

A disavow by the tenant of the holding under the particular landlord, by words only, is sufficient.

In explanation of this dictum the learned Baron adds:

But in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant or, to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such, by requesting further information will not be enough.

This rule seems to have been based upon a consideration of not allowing a party to make inconsistent cases at different times by saying that the relationship of landlord and tenant does not exist between the plaintiff and the defendant and then saying on a future occasion that he was a tenant on the land and that he was willing to treat the plaintiff as the landlord and should not therefore, be ejected from the land. Some English authorities have held in these circumstances that the defendant is estopped. There have been several cases on this point in this Court and all of them followed the principle that when the tenancy was denied under the plaintiff he should not be entitled to claim on a future occasion that the tenancy under the plaintiff was subsisting. The cases which deal with this point are mostly cases under the Bengal Tenancy Act, where the defence of the tenant repudiating the tenancy has been given effect to by the decree of the Court. In such cases, as has been held in *Ekambar v. Hara Bewa* (4), the principle of *res judicata* comes into play. But the principle seems to be the same in cases where the defence has succeeded and in cases where the plaintiff had to abandon the suit on account of the defendants' defence; for in one case the

(3) [1836] 1 M. & W. 695.

(4) [1911] 15 C. W. N. 335=8 L. C. 660=13 C. L. J. 1.

(1) [1901] 28 Cal. 135=5 C. W. N. 263.

(2) [1908] 12 C. W. N. 525.

decision in the previous suit operates as an estoppel by judgment and in the other case the denial estops the defendant from taking an inconsistent position in a subsequent suit. The principle governing the law of forfeiture by disclaimer has been considered in many cases. See the cases of *Mallika Dasi v. Makhan Lal Chowdhury* (5), *Pratap Narain Mukherjee v. Biraj Dasi* (6) and *Annada Charan Dutt v. Mohim Chandra Ghua* (7). The principle to be deduced from all these cases is that where the tenant denies the plaintiff's title to recover rent from him bona fide on the ground of seeking information of such title or having such title established in a Court of law in order to protect himself, he is not to be charged with disclaiming the plaintiff's title. But where the disclaimer is done not with this object but with an express repudiation of the tenancy under the plaintiff, it would operate as forfeiture. One of the cases on this point, namely, the case of *Madhur v. Rajani Kanta Roy* (8), throws some light on the question which has been canvassed before us. There the defendant in a suit for rent had denied the plaintiff's title and claimed to hold under a third party. It was held that in a suit for ejectment by the landlord the defendant was debarred from pleading his tenancy and claiming possession on that ground. Though it was a case under the Bengal Tenancy Act and the plaintiff's previous suit for rent was dismissed on the defendant's objection, the principle underlying the decision in that case is applicable to the present case.

But the question may be looked at from another standpoint. In the present case it has been found by the lower appellate Court that the defendants' title had not been perfected by 12 years possession. They are at best non-occupancy raiyats with all the incidents of tenancy-at-will. As has been pointed out in the case of *Maharaja of Jeypur v. Rukmini Pattamahadevi* (9) quoting from the judgment in an English case, that denial or disclaimer by a tenant of this character need not be held to work a forfeiture, the holding being subject to the mutual will of

landlord and tenant to determine it on giving the usual notice, evidence of a disclaimer in evidence of an election to put an end to the tenancy and supersede the necessity for such notice.

On the authorities and on a common sense view of the matter, we are not prepared to accept the contention of the appellant that if the tenant does not claim a right in himself and admits tenancy under a third party, he cannot be sued as a trespasser. The English law of forfeiture has been assimilated with the law of transfer in this country and has been embodied in S. 111, Cl. (G), T. P. Act. where one of the grounds for forfeiture is said to be setting up by the lessee a title in a third person. This indicates the principle of law that a tenancy may suffer forfeiture even though the tenant may not deny his tenancy but sets up the title of a third person.

The findings of the lower appellate Court in this case are strong enough to maintain the decree passed by that Court. They are that the defendants are not bona fide tenants, that they colluded with the Maliks of the adjoining taluks to deprive the plaintiff of the lands of which he was owner and they persisted in setting up adverse title even after the decision in the previous litigation between the landlord of taluk No. 27 and the landlords of the other taluks which was binding on the landlords now set up by the defendants. It has not been found that the defendants are bona fide tenants of the land and have any right to remain on the lands. Apart from the question of forfeiture of tenancy, in the view taken by the lower appellate Court it seems that the defendants had no such tenancy as to be terminated by forfeiture.

In the result we hold that the decision of the lower appellate Court on the facts found by it is correct and these appeals are dismissed with costs.

N.K.

Appeals dismissed.

A. I. R. 1928 Calcutta 315

RANKIN, C. J., AND MITTER, J.

Ray Monmotta Nath Mitter—Plaintiff
—Appellant.

v.

Rajeswar Rai Chowdhury and another
Defendants—Respondents.

Appeal No. 2058 of 1924, Decided on 29th June 1927, from appellate decree of 3rd Sub-Judge, 24-Perganas, D/- 21st July 1924.

(5) [1905] 2 C. L. J. 389=9 C. W. N. 928.

(6) [1914] 19 C. L. J. 77=20 I. C. 823.

(7) [1917] 26 C. L. J. 261=42 I. C. 678.

(8) [1910] 14 C. W. N. 339=5 I. C. 708.

(9) A. I. R. 1919 P. C. 1=42 Mad. 589=46 I. A. 109 (P.C.).

(a) *Civil P. C., S. 100*—*The proper effect of a proved fact is a question of law.*

The proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to be a legal inference from facts and not itself a question of fact and, therefore, a second appeal lies from it : *A. I. R. 1927 P. C. 102 (P. C.), Ref.* [P 317 C 1]

(b) *Bengal Tenancy Act, S. 88*—*Receipt of rent by the agent—Landlord is not bound by every statement therein—Landlord and tenant.*

It cannot be affirmed as a general proposition of law that a landlord is always bound by every statement given in the receipts of rent by the gomastha. When an agent of the landlord has accepted from the various tenants in the occupation of a holding at one rental, proportionate parts of the rents, it does not bind the landlord to recognize a separation of the tenancy in absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the agent : *6 C.W.N. 828 ; 10 C. W. N. 216 and 16 W.R. 97, Ref. ; 25 Cal. 531, Dist.* [P 318 C 1]

(c) *Landlord and tenant—Suit for ejectment—Tenant setting up defence that he has a right of permanent tenancy must prove that he has such right—Evidence Act, S. 101.*

It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant : *A. I. R. 1924 P. C. 65 and 16 Cal. 223 (P. C.), Rel. on. ; 32 Cal. 51 (P. C.) and 28 Cal. 738, Dist.* [P 319 C 1]

(d) *Landlord and tenant—Four holdings amalgamated into one, three holdings being tenancies-at-will—Fourth holding a permanent tenure—Facts that an unaltered rent has been paid for 57 years and that there existed a pucca building on a small portion of it at some distant time are sufficient to make the amalgamated holding a permanent tenure.*

Four holdings were amalgamated into one holding. From among them, the first, second and third holdings were tenancies-at-will at the time and the fourth was a permanent holding. The position of the consolidated holding was that an unaltered rent had been paid for 57 years and there existed a pucca holding on a small portion of it at some distant time.

Held : that the mere fact of amalgamation of four holdings into one would not change the respective incidents of the holdings in the absence of a contract to the effect that it was intended to change these incidents and give a higher status to the tenant of the amalgamated holding. The fact of unaltered rent and existence of a pucca structure on a portion are not sufficient to raise the inference of permanency : *A. I. R. 1924 P. C. 65 ; 16 Cal. 223 (P. C.) ; 32 Cal. 41 ; 32 Cal. 51 and 28 Cal. 738, Dist.* [P 320 C 1,2]

N. C. Bose, A. N. Bose and Satyendra Nath Mitter—for Appellant.

Brojo Lal Chakraborty and Suresh Chandra Talukdar—for Respondents.

Judgment.—The suit in which this appeal arises was for ejectment of the respondents from some 25 cattas of land in Punjab Nayabasti, within the municipal boundaries of Calcutta. The plaintiff-appellant alleges in his plaint that the defendants-respondents are tenants-at-will liable to ejectment on a proper notice to quit and that such notice had been served upon the defendants' predecessor one Biseswar Roy Choudhury.

The claim of the respondents is that the disputed land has been held by them and their predecessors on a permanent tenure and that no notice to quit was served on them.

The Munsif of Alipur who tried the suit held that the notice to quit was properly served but decided in favour of the respondents on the ground that the respondents' tenure is permanent. The plaintiff appealed to the Subordinate Judge of 24 Pargannas who came to the conclusion that the holding in suit is permanent and that the defendants are not liable to ejectment and on this finding dismissed the plaintiff's appeal.

In second appeal the learned advocate on behalf of the plaintiff-appellant contends that the findings of fact arrived at by the lower appellate Court do not give rise to the legal inference that the tenure of the respondents is a permanent tenure. It has not been seriously contended before us by the learned vakil for the respondents that the findings of the Subordinate Judge that the respondents' tenancy was permanent, was one of fact and was binding on us in second appeal ; nor could such contention be successfully raised. The question here, as in all other similar cases, is whether the true inference from the facts is that the tenure is permanent or precarious, the burden of proof being on the tenants respondents. In this connexion I need only refer to the following observations of the Judicial Committee in a recent case.

A third question, more formidable in character, must be disposed of before their Lordships further proceed. The learned District Judge on appeal here, dismissed the respondent's suit, finding that the appellants' tenancy was permanent. It is, therefore, contended by the appellants that this finding was one of fact by the learned Judge not open to review either by the High Court on second appeal or by this Board. Now

their Lordships would be the last to seek to abridge the effect of Ss. 100 and 101, Civil P. C., or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below.

They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present, to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact, a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did: See *Dhanna Mal v. Moti Sagar* (1).

The facts found by the lower appellate Court are these: The disputed land which is now one holding originally consisted of 4 separate holdings which were subsequently amalgamated into one. The area of land, the name of the tenant and the rental payable for each holding are given in the table below.

Tenant.	Land.	Rent.			
		Rs.	As.	Gds.	K.
1. Jagannath Mistry.	7½ Cattas	3	1	1	1
2. Abhoy Charan Shah	16 "	12	0	0	0
3. Sreenath Sarkar	1½ "	1	1	1	1
4. Gopal Bairagi.	½ "	1	4	0	0

The date of creation of the first of these holdings is unknown. The other three tenancies were created after 1258 B. S. (1851 A. D.) and before 1268 B. S. (1861 A. D.). The last two holdings were amalgamated in 1268 when the rent was increased to Rs. 2-8-annas. The rent of the second holding was increased to Rs. 24 in 1265 B. S. (1858 A. D.) and the rent of the first holding was increased to Rs. 10 in 1261 B. S. (1864 A. D.). There has been no change in the rental of any of these four holdings since 1271 B. S. (1864 A. D.). On the 6th of Aghrayan 1289 B. S. (1882 A. D.) defendants' predecessor Barada Kanta Roy purchased these holdings from Anandamoyi, Dasi, wife of the tenant Abhoy Charan Saha in the benami of Rakhal Chandra Mukherjee. Biseswar was the son of Barada Kanta Roy and

the defendants are the sons of Biseswar. Notice to quit was served on Biseswar by the plaintiff. The conveyance in favour of Anandamoyi from the original tenant of these four holdings has not been produced in this case. But the conveyance in favour of Barada by Anandamoyi. Ex. "B" shows that the four holdings were regarded as two; one was the amalgamation of holdings 1, 3 and 4 with the consolidated increased rental of Rs. 12-8-annas and the other was holding No. 2 with the increased rental of Rs. 24. In Ex. B holdings were described as Kayemi Mourashi (Permanent). Ex. B also shows that the second holding of 16 cattas was Anandamoyi's dwelling house and that she had one pucca one-storied house on the same; besides there was one "Golepata" hut on the amalgamated holdings of Rs. 12-8. The lower appellate Court also referred to certain dakhilas (rent receipts from 1295 B. S. (1888 A. D.) to 1303 B. S. (1896 A. D.). In each of those dakhilas there is an entry made by the gomastha of the plaintiff that the holding was a mokarari mourashi one. No document has been produced in this case to show to what extent the gomastha had authority to bind the plaintiff by an admission of the kind made in the dakhilas as to the permanent character of the holding in question.

If these admissions can be regarded as admissions made by or on behalf of the plaintiff they would be very strong evidence in support of the defendants' case. Apparently it was considered in the lower Court that unless the plaintiff could displace the statements of his gomastha by showing his ignorance of their being made his case would be defeated or seriously damaged. Indeed the lower appellate Court goes to the length of holding that the statement in the dakhilas would conclusively prove that the holding is a mokarari mourashi holding. Although there is a column in the rent receipts showing the nature of the tenancy, in cases governed by the Transfer of Property Act, it is not usual to indicate the nature of the tenancy in the rent receipts. The admission made by the gomastha was a gratuitous admission and, may be withdrawn unless there is some obligation not to withdraw it. Ordinarily the gomastha is authorized to receive rents, to give a discharge to

(1) A. I. R. 1927 P. C. 102 = 8 Lah. 573 = 54 I. A. 178 (P. C.).

tenants for such rents and in some cases even to recognize the transferee of an occupancy holding but it certainly is not usual for a gomastha to confer any permanent right on tenants or to make any admission in respect of tenants' right which may be binding on the landlord. It is true the landlord might have proved the extent of the authority of his gomastha but in the absence of such authority it cannot be laid down as an inflexible rule that the presumption must be that the gomastha had authority for doing everything which he may do even to the detriment of his master in connexion with matters which are not properly within the scope of his employment. In this case a former Naib of the plaintiff deposed that the gomastha had no authority for writing the words "mohakarari mourashi" in the rent receipts. The lower appellate Court does not refer to this evidence. All that it says is that the onus lay on the plaintiff to prove the extent of his gomastha's authority as that fact was within the special knowledge of the plaintiff and the plaintiff has not proved it and he presumes from this that the gomastha had authority to give the description in the dakhilas as to the permanent nature of the tenancy. It cannot be affirmed as a general proposition of law that a landlord is always bound by every statement given in the receipts of rent by his gomastha. There are cases in the books which go to show that when an agent of the landlord has accepted from the various tenants in the occupation of a holding at one rental proportionate parts of the rents, it does not bind the landlord to recognize a separation of the tenancy in absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the agent. See *Maharani Beni Pershad v. Goberdhan* (2) and *Maharani Beni Pershad v. Radhin* (3).

In the case of *Bhujohurree v. Aka Golam* (4), this Court held that the purchaser of a ryoti tenure is bound to communicate with the zemindar and obtain his consent to the transfer of the tenure; without this being done, a gomastha's receipts of rent are not binding on the zemindar. On the other hand in a Full

Bench case *Pyari Mohun v. Gopal Paik* (5) it was held that a landlord was bound by a receipt given by his agent consenting to a division of the holding and a distribution of the rent payable in respect thereof, within the meaning of S. 88, Ben. Ten. Act. In this Full Bench case it was assumed that the agent was duly authorized to give such a receipt. It seems to me that no inflexible rule of law can be laid down to the effect that the landlord is bound by every statement made in the receipt. It has been conceded by the learned vakil for the respondent in this case that the entry with regard to the nature of the tenancy in a rent receipt would be a superfluous and unnecessary entry in cases of tenancies governed by the Transfer of Property Act. So this admission of the nature of the tenancy by the gomastha as I have already pointed out was a gratuitous admission. There was not here any title on which such an admission can rest. No papers have been produced to show that the landlord before the admission treated the tenancy in question as a permanent tenancy. It is to be noticed, also that this admission of the gomastha is contained in receipts for eight years ending with the year 1896 and since 1896, no receipts were granted because of the dispute between the parties as to the nature of the tenancy. The admission, therefore, being out of the way we have now to consider whether the findings lead to the inference that all these four tenancies aforesaid are permanent tenancies.

Summarizing the findings of the lower appellate Court we find the broad facts to be these :—With regard to the first holding of seven and half cattas the origin is unknown; its rent was enhanced to Rs. 10 in 1271 B. S. It was amalgamated with holdings 3 and 4 some time before 1298 B. S. (1882 A. D.), some "Golepatta" huts stood on this consolidated holding at some time. With regard to holdings 3 and 4 their origin is traceable and they were created between 1258 and 1268 B. S.; they were amalgamated in about 1268 and the rent was increased to Rs. 2-8-0 in about the same time; these two amalgamated holdings were again amalgamated with holdings 1 and 2 in about the year 1289. With regard to holdings 1, 3 and 4 rent had not remained unchanged before 1271 but there has been

(2) [1902] 6 C.W.N. 823.

(3) [1906] 10 C.W.N. 216.

(4) [1871] 16 W.R. 97.

(5) [1898] 25 Cal. 531=2 C.W.N. 375 (F.B.).

uniformity of rent since 1271. It does not appear that these three holdings were let for residential purposes; the land is homestead land within the municipality and has been used as an "Arat" i. e. for the purposes of shop. These circumstances alone, namely, unaltered rents for 57 years and one transfer of these holdings are not sufficient to raise the inference of permanency. It has not been shown that the claim of permanent tenure as asserted in Ex. "B" i. e., the kabala by Anandamoyi in favour of defendants' predecessor-in-interest Barada Kristo Roy in the benami of Rakhai Chandra Mukherji was brought home to the knowledge of the appellant or his predecessors-in-title and was acknowledged by them. There are no pucca structures in the land. It has not been shown that they were let for residential purposes. It is not shown that they were being used for residential purposes. And the fact that they were amalgamated with holding 2 on which at one time a pucca structure stood cannot give to these holdings the character of permanency.

In the case of *Nainapillai Marakayar v. Ramanathan Chettiar* (6), the Judicial Committee laid down the law in regard to the matter in hand in the following words :

It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secy. of State v. Luchmeswar Singh* (7), it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus.

And again :

A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature.

Having regard to these pronouncements we are not satisfied that the defendants have satisfied the onus of proving that

they have right of permanent tenancy in these holdings.

The learned Vakil for the respondent has relied on two decisions of the Judicial Committee *Upendra Krishna Mandal v. Ismail Khan* (8) and *Nilratan Mandal v. Ismail Khan* (9). In the first of these cases the case of the tenants rested on a series of transmissions of properties by sale and mortgage which went back as far as 1826 and the continued possession of the tenants and their predecessors-in-title at an unaltered rent and on a kabuliati which show that these transmissions of property as permanent tenancy was brought home to the landlord who recognized the right created by these documents by accepting a kabuliati. In the second case the land had been occupied by the tenants' predecessors at an unaltered rent for 100 years. They had built on it and have dealt with the property by sale and mortgage. A kabuliati and a patta were executed which brought home to the landlord, knowledge and recognition of the tenants' transmission of the property by sale in an instrument which purported to convey a permanent and inheritable right.

Reliance has been placed by the learned vakil for the respondent on the case of *Casperz v. Kedarnath Sarbadhikari* (10). That case is also distinguishable. For in that case the following facts co-existed :—

(1) Long possession by the defendants and their predecessors,

(2) the landlord's permission to the defendants' predecessors to build a pucca house upon it ;

(3) the existence of the house there for a considerable time ;

(4) the addition to the building by successive tenants,

(5) the transfers of the tenure from time to time by succession and purchase;

(6) the acquiescence of the landlord in such transfers of which he could not have been ignorant as he accepted rent from the transferees.

So far as holdings 1, 3 and 4 are concerned all these elements do not exist in the present case. For the reasons above stated the legitimate inference to be

(6) A.I.R. 1924 P.C. 65=47 Mad. 337=51 I.A. 83 (P.C.).

(7) [1889] 16 Cal. 223=16 I.A. 6=5 Sar. 275 (P.C.).

(8) [1905] 32 Cal. 41=31 I.A. 144=8 C.W.N. 889 (P.C.).

(9) [1905] 32 Cal. 51=31 I.A. 149=8 C.W.N. 895 (P.C.).

(10) [1901] 23 Cal. 738=5 C.W.N. 858.

drawn from the facts in the present case is that with regard to nine cattas of land covered by holdings 1, 3 and 4 the position of the defendants is that of a tenant-at-will.

The case with regard to holding 2 (16 cattas of land) stands on a somewhat different footing from that of other holdings. It appears from the kabala (Ex. B) by which defendants' predecessor Barada Kristo purchased the holdings along with three other holdings from Anandamoyi that this holding was her (i. e. Anandamoyi's) Bhadrasanbati (dwelling house) and that she had one pucca one storied house on this holding. This holding was created between 1258 and 1268 B. S., and we find that sometime before 1289 B. S., there were pucca structures on the holding so that at any rate the inference might be legitimately drawn that the land of this holding which was being used for residential purposes was let for such purposes. The rent had not varied for 57 years and that the transfer was recognized by the landlord and in all the circumstances it may be legitimately inferred that the appellant through his agent had notice of the existence of pucca structure on it. It has been argued on behalf of the appellant that Ex. B is not admissible in evidence against him as he was no party to the said document. But I think that this argument has no substance for the document although not inter partes is admissible in evidence as a transaction within the meaning of S. 13, Evidence Act, by which the right to this property was asserted. So that we have it that the buildings which were of a substantial character were erected so far back as 1882 and that the predecessor-in-title of the defendants lived for sometime in it. In these circumstances it is indeed difficult to say that the inference drawn by the Courts below that this holding 2 is a tenancy of a permanent character, is wrong.

If we consider the incidents of the four holdings together after amalgamation into a single holding we find that an unaltered rent has been paid for 57 years and that there existed a pucca building on a small portion of it at some distant time. These two elements alone are not sufficient to raise the presumption of permanency. But it has been possible in the present case by reason of the evidence furnished by

Ex. "B" to distinguish between the lands of holdings 1, 3 and 4 on which no permanent structures stood and the lands of holding 2 on which such structures existed. The mere fact of amalgamation of four holdings into one would not change the respective incidents of the holdings in the absence of a contract to the effect that it was intended to change those incidents and give a higher status to the tenant of the amalgamated holding. No such contract has been proved in the present case and it is not suggested that any existed. We are, therefore, left to infer from proved facts the nature of the new consolidated tenancy. The fact of unaltered rent and existence of a pucca structure on a portion, as I have already stated, are not sufficient to raise the inference of permanency. It is because of the fact that buildings existed on the 16 cattas holding that we are able to infer that the purpose for which the said land was held was a residential purpose and this fact brings the case within the purview of the decision of Sir Pichard Garth, Chief Justice, in the case of *Gangadhar v. Ayimuddin* (11), which was cited on behalf of the respondent.

The result, therefore, is that the decrees of the Courts below are set aside and in lieu thereof there will be a decree in favour of the plaintiff for ejectment from the nine cattas of land covered by the holdings 1, 3 and 4. The claim of the plaintiff for ejectment from holding 2 (16 cattas of land) will be dismissed.

The plaintiff will be entitled to mesne profits from the date on which the tenancy was determined by notice to quit. The mesne profits will be ascertained in the execution Court.

Each party will bear their costs throughout.

Rankin, C. J.—I agree.

N.K.

Decree set aside.

(11) [1882] 8 Cal. 960.

A. I. R. 1928 Calcutta 320

CHOTZNER AND LORT-WILLIAMS, JJ.

Akhoy Kumar Ghose—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revision No. 1328 of 1927,
Decided on 24th February 1928.

(a) *Calcutta Municipal Act (1923), S. 406 and 488—Accused found taking delivery of consignment of ghee discovered to be adulterated is not guilty of offence under S. 406.*

An accused was found by a Food Inspector unloading a consignment at a railway station. One of the tins which the accused said, contained ghee, appeared to the Food Inspector to contain something else. He accordingly seized the consignment and took it to the Municipal Office. Thereafter he purchased for a sum of four annas a sample of one of the tins for analysis and the analysis when made disclosed the fact that the ghee was grossly adulterated. Upon these facts, the accused was convicted.

Held: that he could not be convicted of an offence under S. 406. [P 321 C 2]

(b) *Calcutta Municipal Act (1923), Ss. 406, 424 (1)—Compulsory sale is not sale within S. 406.*

A compulsory sale made under the provisions of S. 424, Cl. (1) cannot make any person amenable to the punishment provided for under S. 488 of the Act.

Probodh Chunder Chatterjee and Bireswar Chatterjee—for Petitioner.

Suresh Chunder Chuckerbutty and Bhudhar Halder—for Opposite Party.

Judgment.—The petitioner has been convicted under S. 406 read with S. 488, *Calcutta Municipal Act of 1923*. S. 406 says:

No person shall directly or indirectly himself or by any other person on his behalf sell, expose or hawk about for sale or manufacture or store for sale any food or drug which is adulterated or misbranded.

According to the judgment of the learned Magistrate, the accused was found by the Food Inspector unloading a consignment of 16 tins at the Sealdah Railway Parcel Office. One of these tins which the petitioner said contained ghee appeared to the Food Inspector to contain something else. He accordingly seized the consignment and took it to the Municipal Office. Thereafter, he purchased for a sum of four annas a sample of one of the tins for analysis and the analysis when made disclosed the fact that the ghee was grossly adulterated. Upon these facts, the petitioner was convicted as already stated and sentenced to pay a fine of Rs. 200. The question is whether he is liable for having committed an offence under S. 406. In our opinion, he is not, for the simple reason that none of the ingredients which constitute an offence under that section has been proved against him. It has been argued by Mr. Chuckerbutty who has appeared for the prosecution that the fact of the compulsory sale of the sample for analysis

constituted a sale within the meaning of S. 406. That is an argument which we cannot for one moment accept. It is plain that, if it had not been for this compulsory sale, there would have been no sale whatever and it seems to us impossible to hold that a compulsory sale made under the provisions of S. 424 Cl. (1) can make any person amenable to the punishment provided for under S. 488 of the Act. We are, therefore, of opinion that this conviction cannot be maintained. The Rule is made absolute. The conviction and sentence are set aside and the fine, if paid, will be refunded.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 321

CUMING AND GREGORY, JJ.

Nripendra Nath Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revision No. 1164 of 1927, Decided on 15th December 1927.

Penal Code, S. 409—Accused a lessee from Government to collect rent and deposit it in treasury—Failure to deposit within agreed time is not an offence under S. 409.

The petitioner had executed a kabuliyat in favour of the Government whereby he agreed to realize the grass rent of a Mouzah payable to the Government lying within his jurisdiction and to deposit the said amount in the Government Treasury on or before the date to be fixed by the Chief Commissioner or any other authorized officer from time to time, and if he failed to deposit the grass rent from his kist within the time fixed, the Government should be competent to realize from him or from his surety or sureties the said sum in arrears according to law prescribed for the realization of arrears of rent. The petitioner failed to deposit the rent as agreed to by him.

Held: that the penalty would be that the amount would be recovered from his sureties or himself; the kabuliyat did not contemplate his being criminally prosecuted for failure to deposit the amount realized. The position of the petitioner was not that of a servant but a lessee. [P 322 C 1]

Probodh Chandra Chatterji and Jnananath Borah—for Petitioner.

Khundkar—for the Crown.

Judgment.—This rule has been granted on ground 3 of the petition which runs as follows:

For from the terms of the kabuliyat it would appear that no criminal offence could be said to have been committed by

the accused even if he failed to credit the amount realized by him.

The fact would appear to be these: The petitioner had executed a kabuliyat in favour of the Government of Assam as a collector of grazing fees. He collected three sums Rs. 28, Rs. 24 and Rs. 24 which he did not remit to the Treasury. On this finding he has been convicted on three counts under S. 409. He argues now that even if he failed to pay in these amounts to the treasury he cannot be held criminally liable. All that the Government can do if he fails to pay into the treasury the amount he has realized is to proceed against him and his sureties by the procedure prescribed for the realization of arrears of rent. The relevant portions of the kabuliyat are as follows:

I shall realize the grass rent of the Mouzah payable to the Government lying within my jurisdiction and I shall deposit the said amount in the Government Treasury on or before the date to be fixed by the Chief Commissioner or any other authorized officer from time to time. If I fail to deposit the grass rent from my kist within one month time fixed the Government shall be competent to realize from me or from my surety or sureties the said sum in arrears according to law prescribed for the realization of arrears of rent.

Clause 2 merely provides the amount of the surety. Cl. 4 deals with his remuneration which is to be a commission or a fixed salary. Reading this kabuliyat it seems to me to be quite clear that the Moujadar was justified in thinking that if by any chance he failed to deposit the grass rent realized by him the penalty would be that the amount would be recovered from his sureties or himself by a certain procedure and that the kabuliyat did not contemplate his being criminally prosecuted for failure to deposit the amount realized. The position of the Moujadar seems to me to be really not that of a servant but a lessee.

In view of the terms of the kabuliyat it seems to me that it is not open to Government to prosecute the petitioner in the criminal Court for failing to deposit the money he has realized. They seem to limit their remedy to the method prescribed in Cl. 2.

The result is that the finding and sentence must be set aside and the accused acquitted. The same order will govern Revision Case 1165.

S.J.

Accused acquitted.

A. I. R. 1928 Calcutta 322

MUKERJI AND MITTER, JJ.

Sanjua Urao—Defendant—Appellant.
v.

Matadin Agarwalla and others—Plaintiffs—Respondents.

Appeal No. 101 of 1925, Decided on 16th June 1927, from appellate decree of Sub-Judge, Dinajpur, D/- 1st September 1924.

Bengal Tenancy Act—Notification No. 964, T. R., dated 5th November 1898 extending Bengal Tenancy Act to Western Duars—A darchukanidar can establish that he is an occupancy tenant.

The plaintiffs were the holders of a jote, a chukani tenancy held by one C under whom the defendants alleged they were darchukanidars. The chukani was sold for arrears of rent and was purchased by the plaintiffs who served a notice on the defendant under S. 167, Ben. Ten. Act for annulling the encumbrance and thereafter instituted a suit for khas possession. The defence was that the defendants had occupancy rights in the lands and so were protected from eviction.

Held: that though a darchukani tenancy created by a chukanidar who had no right to create the same would not be recognized by law and would not be binding on the jotedar, yet considering the true meaning and effect of Notification T. R. dated 5th November 1898, Cl. (4), by which the Bengal Tenancy Act was extended to the Western Duars from 1st January 1899, the defendant should have a chance of establishing that he was a tenant whose tenancy was fit to be recognized in law and that as such tenant he had acquired a right of occupancy which protects him from eviction.

[P 323 C 2, P 324 C 1]

Atul Chandra Gupta and Satish Chandra Sinha—for Appellant

Braja Lal Chakravarti and Asita Rangan Ghose—for Respondents

Judgment—This appeal has arisen from a suit which was instituted for recovery of khas possession. The plaintiffs were the holders of a jote in the Western Duars, under which there was chukani tenancy held by one Chakli Bewa, under whom the defendants allege they were darchukanidars. The chukani was sold for arrears of rent and was purchased by the plaintiffs who served a notice on the defendant under S. 167, Ben. Ten. Act for annulling the encumbrance and thereafter commenced this action. The defence was that the defendants had occupancy rights in the lands and so were protected from eviction.

The suit has been decreed by both the Courts below. One of the defendants has appealed.

The appellant's contention, to put it quite shortly, is that the Courts below have misconceived the terms of the notification by which the Bengal Tenancy Act was extended to the Western Duars, and, upon an erroneous view thereof, have not tried to find out the incidents of the defendant's darchukani tenancy and have thus omitted to decide the real points that arise in the case.

One of the questions that were raised in the trial Court in defence to the suit was whether by reason of an order of the Deputy Commissioner, dated 23rd October 1922, the status of the defendants was raised to that of chukanidars. It was pleaded that by reason of the purchase of the chukani by the plaintiffs, the defendants had acquired this higher status. The contention is clearly unsupportable and it was overruled by the trial Court and has not been pressed since then.

The main question in the case is whether the defendants who are darchukanidars have acquired a right of occupancy. The trial Court held that under the terms of the lease granted to the plaintiffs the latter were not entitled to create any tenancy in the lands excepting chukani tenancies, that the defendant's alleged tenancy was created not by the plaintiffs or their predecessors but by the chukanidars, the predecessors of Chakli Bewa, that the darchukani tenancy of the defendants was not created with the consent of the plaintiffs or their predecessors and that a darchukanidar in Western Duars had no right whatsoever in the lands. The Subordinate Judge, on appeal, has endorsed more or less the same view. He has held that the jotedar in Western Duars is in no way bound to recognize darchukanidars, and that according to the settlement proceedings which were approved by the Government and according to the forms approved for granting leases to chukanidars the latter are expressly debarred from letting out in darchukani lands granted to them, and so the darchukanidar could not acquire a right of occupancy.

The Bengal Tenancy Act (8 of 1885) was extended to the Western Duars with effect from 1st January 1899, by notification No. 964 T. R., dated 5th November 1898, subject to the restrictions and modifications specified in four clauses, of which Cl. (iv), which only is relevant, ran in those words:

Where there is anything in the said Bengal Tenancy Act which is inconsistent with any rights or obligations of a jotedar, chukanidar, darchukanidar or other tenant of agricultural land as defined in settlement proceedings, heretofore approved by Government or with the terms of a lease heretofore granted by Government to jotedar, chukanidar, darchukanidar, adhiar or other tenants of agricultural land, such rights, obligations or terms shall be enforceable notwithstanding anything contained in the said Act.

The clause is not very happily worded, but its meaning is plain enough. The darchukanidars in the Western Duars prior to the introduction of the Bengal Tenancy Act had no recognized status: the creation of darchukani tenancies has been expressly forbidden in the lease granted by Government to the jotedars as well as in the form approved by Government to be used for granting leases to chukanidars, and their tenancies were altogether ignored in the settlement proceedings that were had at the instance of the Government. Prior to the introduction of the Bengal Tenancy Act in the Western Duars, the rights of the tenants were regulated almost entirely by the contracts under which they held and there could be no question of any right of occupancy accruing under any statute. The forms of leases used ever since 1888 appear to have forbidden the creation of any sub-lease by a sub-tenant under the jotedar. A darchukani tenancy created by a chukanidar who had no right to create the same would not be recognized by law and would not be binding on the jotedar. There may, however, be conceivable cases where the sub-lease in favour of a darchukanidar was a good and valid one, by reason of there having been no restriction in the powers of the chukanidar or jotedar as regards the creation of the darchukani tenancy, and to the case of such a darchukanidar the provisions of the Bengal Tenancy Act having applied from 1st January 1899, the rights and privileges of an occupancy raiyat may have accrued. In the case of such a darchukanidar, the question may arise whether, notwithstanding that he holds under a chukanidar, he is not a raiyat, rather than an under-raiyat, and being a raiyat whether he has not acquired a right of occupancy just as any other raiyat to whom the Bengal Tenancy Act applies. On this question, the way in which the jote has been recorded in the settlement proceedings that took place

prior to the Notification of 1898 would be relevant. If his tenancy has been ignored in the settlement proceedings he will have to account for the omission or prove a valid tenancy subsequent to the said proceedings. If it has been recorded in some shape or other he will obviously be in a better position.

The Courts below appear to have gone mainly, if not entirely, upon the rights of darchukanidars in general as recognized or rather in the settlement proceedings. In so far as they have done so, they appear to have misconceived the true meaning and effect of Cl. (iv) of the Notification. For this, however, in all probability it was not the Courts but the appellant himself, who was to blame, and it is exceedingly likely that the superior ingenuity of his legal advisers in this Court has given his defence a shape in which it was not presented before. As far as can be gathered from the materials on the record the appellant seems to have heretofore contented himself with casting his lot in common with all darchukanidars in Western Duars and did not attempt to make out a special case for himself. It is also true that the chances of the appellant being successful in establishing a special case for himself are rather slender. But it is not possible to say that the case that is now put forward is one that is inconsistent with the averments in the written statement or one that may not be allowed to be established upon those averments.

We are accordingly of opinion that the appellant should have a chance of establishing that he is a tenant whose tenancy is fit to be recognized in law and that as such tenant he has acquired a right of occupancy which protects him from eviction. For this purpose the origin and incidents of the appellant's alleged tenancy will have to be enquired into. The onus of proving the necessary facts will be on the appellant. Both parties will be allowed to adduce such further evidence or place before the Court such further materials as they may desire to do on this question.

As it will be convenient to have the matter decided by the lower appellate Court having regard to the nature of the further evidence or materials, if any, that are likely to be forthcoming, we merely set aside the decision of that Court and send down the case to it for

being dealt with as above. Costs of this appeal will follow the event of the decision by the lower appellate Court.

N.K.

Case remanded.

A. I. R. 1928 Calcutta 324

MUKERJI, J.

Narayan Chandra Borah—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1004 of 1927, Decided on 8th March 1928.

Opium Act, S. 9 (c) and (f)—*Accused convicted for having possessed opium in excess of quantity shown in the stock register and hidden in the premises—Cakes of opium supplied by the treasury proved to be often of over weight—Excess not proved to be due to selling under weight—Conviction was set aside.*

Accused was convicted for having possessed a quantity of opium in excess of the quantity shown in the stock register and hidden in the premises. It was found that cakes of opium supplied by the treasury were often over weight. The conviction of the accused was based on the fact that the excess was not reported to the authorities, nor shown in the stock register but was kept hidden.

Held: that no offence had been proved on the part of the accused in possessing the opium as he did. There is no rule enjoining a duty on a licensee to reweigh the quantity of opium supplied by the treasury and enter in the stock register the actual weight and not the weight which the treasury has declared. If he kept his accounts on the footing of the weight as given by the treasury, it could hardly be said that any rules were contravened.

Held: further that no assumption, that the accused came by the excess by selling short weight to customers could be made against him. [P 325 C 2]

Probodh Ch. Chatterjee—for Petitioner.

Khundkar—for the Crown.

Judgment.—This rule has been issued to show cause why the conviction of and the sentence passed on the petitioner should not be set aside or such other or further orders should not be passed as to this Court may seem fit and proper on grounds Nos. 3, 4 and 5 of the petition.

The petitioner is a salesman in a licensed opium shop. On a surprise visit being paid to the shop by an Inspector of Excise two irregularities appear to have been noticed; 1st, that the petitioner had sold a short weight of opium to a customer, and 2nd, a quantity of opium 27 tolas 9 as in weight was found in excess of the quantity shown in the

stock register, and it was found hidden in the premises. On these irregularities charges under Cls. (c) and (f), S. 9, Opium Act, were laid against the petitioner. The Sub-Divisional Magistrate convicted the petitioner under both the clauses. The owner of the shop was jointly tried with the petitioner and was acquitted; and with him we are no longer concerned. Against his conviction aforesaid the petitioner appealed to the Sessions Judge who set aside the conviction under S. 9, Cl. (f), Opium Act, holding that the evidence relating to the shortweight sale was not satisfactory. He, however, upheld the conviction under S. 9, Cl. (c), and reduced the sentence originally passed on the petitioner.

Grounds Nos. 3, 4 and 5 of the petition upon which the rule has been issued are that the petitioner was not in possession of the opium, that if he possessed it, it was possessed under a license and that the charge is defective.

It has been found by the learned Sessions Judge that cakes of opium supplied by the treasury are often overweight; and of six cakes taken at random none was underweight, but all were overweight, the excess averaging about $1\frac{1}{2}$ tolas in 80 (=1 sr.). On this finding it would be essential to superadd a further finding that it was not possible for the petitioner or his master to have acquired the 27 tolas 9 as by accumulation of the excess supplied by the treasury, before it can be said that this quantity which was found in the shop was not covered by the license. There is no such finding in the judgment of the Sessions Judge; and indeed on the materials adduced on behalf of the prosecution it is not possible to arrive at such a finding. The Sessions Judge has based the conviction on the fact that the excess was not reported to the authorities, nor shown in the stock register, but was kept hidden. The clause runs:

Any person who in contravention of this Act or of rules made and notified under S. 5 or S. 8 possesses opium &c.

None of the facts on which the learned Sessions Judge has relied can be found to contravene any of the provisions of the Act. The charge framed against the petitioner does not set out which rule or rules framed under S. 5 or S. 8, the petitioner has contravened by not reporting the excess to the authorities, or not

showing it in the stock register or keeping it hidden. This should have been stated in the charge if it was intended to prosecute the petitioner for being in possession of the excess in breach of any such rules. It is obvious that before the petitioner can be convicted for being in possession in contravention of a rule, he should be told which rule he is alleged to have contravened. The question therefore arises whether a retrial should be ordered so that the petitioner may be retried on a charge properly framed. Now, I have been taken through the conditions of the license and the rules framed under the Act, but I am not satisfied that there has been a breach thereof on the part of the petitioner in possessing the opium as he did. I do not find any rule enjoining a duty on the petitioner to reweigh the quantity of opium supplied by the treasury and enter in the stock register the actual weight, and not the weight which the treasury has declared. If he keeps his accounts on the footing of the weight as given by the treasury, it can hardly be said that Rr. 30 and 31, are contravened. Failure to report the excess or keeping the opium hidden is perhaps even less thought of by the rules. It has also been urged that it is possible that the petitioner came by the excess by selling short weight to customers, but I do not see my way to make such an assumption against the petitioner, the more so as the positive case of short weight that was made against the petitioner has failed.

The result, in my opinion, is that the rule should be made absolute. The conviction of the petitioner is accordingly set aside. The fine if paid should be refunded.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 325

PAGE AND GRAHAM, JJ.

(*Sheikh*) *Salim* — Defendant — Appellant.

v.

Hajira Bibi—Plaintiff—Respondent.

Appeal No. 363 of 1926, Decided on 15th July 1927, from appellate order of Officiating Sub-Judge, Dacca, D/- 13th May 1926.

Civil P. C., S. 105 (2)—Appeal from decree on a preliminary issue—Case remanded for decision on merits—Decree passed on merits after remand—Order of remand is not appealable.

A suit was brought to recover damages upon the footing that the defendant had dispossessed the plaintiffs from the land of which the plaintiffs were entitled to possession. The trial Court held that the suit was not maintainable without the establishment of the plaintiffs' title to the property, and upon that preliminary issue passed a decree dismissing the suit on the 6th November 1925. The plaintiffs appealed, and by the order of 13th May 1926 the appellate Court reversed the decree of the trial Court and remitted the case to the trial Court to be reheard upon the merits. The case having been returned to the trial Court was re-heard on 7th August 1926 and was contested by the parties on the merits. On 13th August 1926 a decree was passed in favour of the plaintiffs. Thereafter, on 24th August 1925, the defendant preferred an appeal to the High Court from the order of remand which had been passed on 13th May 1926.

Held: that it was not open to the defendant in the circumstances to prefer an appeal against the order of remand, inasmuch as that he did not take any objection to the order of remand and he did not prefer an appeal against the final decree: 32 Cal. 1023; 12 C. W. N. 590; 15 C. W. N. 830; 36 Cal. 762; 17 C. W. N. 868; 30 All. 479 and 37 Mad. 29, *Foll.* [P 327 C 1]

Held: further, that the ratio decidendi of the above cases was not affected by the Code of 1908: 15 C. W. N. 830, *Foll.* [P 327 C 1]

Prakash Chandra Pakrasi—for Appellant.

Bhupendra Kishore Bose—for Respondents.

Page, J.—This is an appeal from an order of 13th May 1926 passed by the learned Officiating Subordinate Judge of Dacca, by which he remanded the case for re-hearing before the learned Munsif of Dacca. The suit was brought to recover damages upon the footing that the defendant had dispossessed the plaintiffs from the land of which the plaintiffs were entitled to possession. The trial Court held that the suit was not maintainable without the establishment of the plaintiffs' title to the property, and upon that preliminary issue passed a decree dismissing the suit on 6th November 1925. The plaintiffs appealed, and by the order under appeal of 13th May 1926 the learned Subordinate Judge reversed the decree of the trial Court, and remitted the case to the trial Court to be re-heard upon the merits. The case having been returned to the trial Court was re-heard on 7th August 1926. It appears that the defendant applied for an adjournment of the case, and that at the retrial the suit was contested by the parties on the merits.

On 13th August 1926 the learned Munsif passed a decree in favour of the plaintiffs. Thereafter, on 24th August 1926, the defendant preferred an appeal to this Court from the order of remand which had been passed on 13th May 1926.

A preliminary objection to the hearing of the appeal has been raised by the respondents which is to the following effect: The learned vakil for the respondents contends that, although the appeal to this Court which has been preferred from the order of remand is within the time limited for appealing from such an order, it is not open to the defendant in the circumstances that I have narrated to prefer an appeal against the order of remand. In my opinion the preliminary objection must prevail, for in this Court the point is concluded by authority against the appellant: see *Madhu Sudan Sen v. Kamini Kanta Sen* (1), *Baikuntha Nath Dey v. Salimulla Bahadur* (2), *Janaki Nath Ray v. Promotha Nath Roy* (3), *Mackenzie v. Narsingh Sahai* (4), *Ugra Narayan Singh v. Basanta Narain Singh* (5), *Uman Kunwari v. Jarbandhan* (6) and *Lakshmi v. Maru Devi* (7).

In all these cases except *Baikuntha Nath Dey v. Nawab Saltmulla Bahadur* (2), the appeal against the preliminary decree or the interlocutory order was presented after the final decree had been passed, and the fact that a final decree had been passed having been brought to the notice of the appellate Court at the hearing of the appeal from the preliminary decree or interlocutory order, it was held that, the final decree having been passed, the appeal against the preliminary decree or interlocutory order could not be maintained: *Per Chatterjea and Walmsley, JJ., in Ramnath Singh v. Basanta Narain Singh* (5).

It was contended by the learned vakil for the appellant that the earlier cases were distinguishable because under the previous Code it was permissible to challenge the order of remand on appeal from the decree passed at the retrial, whereas under S. 105, sub-S. (2) of the Code of 1908 the only mode in which it is permissible to contest an order of remand is by a direct appeal against the order. It

(1) [1905] 32 Cal. 1023=9 C. W. N. 895.

(2) [1907] 12 C. W. N. 590=6 C. L. J. 547.

(3) [1911] 15 C. W. N. 830=10 I. C. 514.

(4) [1909] 36 Cal. 762=1 I. C. 413=10 C. L. J. 113.

(5) [1913] 17 C. W. N. 868=19 I. C. 630=18 C. L. J. 209.

(6) [1908] 30 All. 479=5 A. L. J. 447=(1908) A. W. N. 195.

(7) [1914] 37 Mad. 29=12 I. C. 664=21 M. L. J. 1063.

has been held, however, in *Janaki Nath Ray's* case (3) that the ratio decidendi of the earlier cases was not affected by the Code of 1908. I agree with the view which was expressed by Chitty and N. Chatterjea, JJ., in that case. Now, in *Madhu Sudan Sen v. Kamini Kanta Sen* (1) Maclean, C. J., observed that

if a party desire to avail himself of the privilege conferred by S. 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit;

a fortiori he ought to prosecute an appeal against the order of remand if he knows that it is the only way in which he can contest the order of remand, and that it will not be open to him thereafter to challenge its validity at the retrial. In my opinion, the real ground upon which the view taken by the Calcutta High Court is founded is that expressed by Stephen, J., in *Baikuntha Nath Dey v. Nawab Salimulla Bahadur* (2).

The basis of the decision in *Madhu Sudan Sen v. Kamini Kanta Sen* (1) may be regarded as being the consent of the appellant to the proceedings subsequent to remand, implied by his not appealing against the order of remand during those proceedings.

It was open to the defendant in the present case to appeal against the order of remand, or to accept the order of remand and to take his chance of proving successful at the retrial as he had been when the case had for the first time been heard. The defendant did not protest against the validity of the new trial, nor did he refuse to take any part in that proceeding. On the contrary, it appears that he contested the suit at the rehearing on the merits, that in the event a decree was passed against him, and that he has not preferred an appeal therefrom. I do not think that it was open to him, after having taken his chance of succeeding upon the merits at the retrial and when the day had gone against him, to give the go-by to the proceedings which terminated in a decree against him at the retrial, and thereafter to prefer an appeal against the interlocutory order of remand which was the foundation of the jurisdiction of the learned Munsif to rehear the case. A litigant finding himself in a situation such as that in which the appellant was placed must elect whether he will accept or repudiate the validity of

the remand order. In my opinion, in the circumstances obtaining in the present case the appellant must be treated as having accepted the order of remand, and was not at liberty to prefer the present appeal.

The result is that the appeal is dismissed with costs.

Graham, J.—I agree. The question whether the appeal is competent or not appears prima facie to be concluded by the decision of this Court in the case of *Madhu Sudan Sen v. Kamini Kanta Sen* (1). That case was decided in the year 1905. But the learned vakil for the appellant has argued that S. 105, sub-S. (2), Civil P. C., which introduced a change in this section as it formerly stood (it was previously S. 591), has altered the position, and that, though the decision referred to above was good law under the Code as it then stood, it no longer represents sound law under the existing Code. The point emphasized is that under the former Code the order of remand could be challenged either by way of appeal against the remand, or by appealing against the decree, whereas now, under sub-S. (2) of this section, if the order of remand is not challenged in an appeal therefrom, the appellant is precluded from subsequently disputing its correctness. It is further contended that the appellant has in the circumstances which obtained in this case a dual and not an alternative remedy, and that it is open to him to exercise both these rights.

In my opinion, this contention is not well founded and cannot be allowed to prevail. It is true that a change has been made in S. 105, Civil P. C., but I do not think that the alteration has materially affected the merits of this question. The appellant having accepted the order of remand without exercising the right which he had of appealing against the same, and having submitted to the decision of the Court cannot, it seems to me, be allowed to turn round and say that, despite his failure in the suit, he is still entitled to challenge the order of remand. As regards sub-S. (2), S. 105, which has been relied upon by the learned vakil for the appellant, that sub-section, so far from helping the appellant seems rather to furnish an additional argument against him, since if it is not open to him under the present law to challenge the order of remand in an appeal against the

decree unless he had appealed therefrom, it was all the more incumbent upon him to lose no time in challenging that order by appealing against it instead of remaining silent and allowing the suit to be tried out. Finally it may be observed that, so far as this Court is concerned, the matter is concluded by authority more recent than the year 1908, namely, the case of *Janaki Nath Ray v. Promotha Nath Roy* (3) and others decided in 1911.

For these reasons I agree with my learned brother that the preliminary objection succeeds and the appeal must be dismissed.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 328

SUHWARDY AND GRAHAM, JJ.

Maharaj Bahadur Sing of Baluchar—
Appellant.

v.

Sachindra Nath Roy and others—
Respondents.

Appeals Nos. 447 and 474 of 1925, Decided on 30th November 1927, from original order of Sub-Judge, Murshidabad, D/- 17th August 1925.

(a) *Civil P. C., O. 21, R. 66—Judgment-debtor's failure to put forward any objection even after receipt of notice debars him from raising it at any subsequent stage of proceeding.*

If a judgment-debtor, after receipt of notice under O. 21, R. 66, or of the knowledge of the contents of the sale proclamation before it is issued, neglects to take any objection to the proceedings he should not in justice be allowed to take such objection at the sale or afterwards: 12 *Mad.* 19 (P.C.); 9 *Cal.* 656 (P.C.); 14 *C.L.J.* 541; 28 *All.* 273; 38 *Mad.* 387; and 3 *I. A.* 230, *Rel. on.* [P 331 C 1]

(b) *Civil P. C., O. 21, R. 90—Mere undervaluation does not entitle a judgment-debtor to have the sale set aside unless he has sustained injury.*

In order that the ground, that the properties were undervalued in the sale proclamation and therefore, the sale ought to be set aside, should succeed, it is not only necessary that the judgment-debtor should prove that the properties were undervalued in the sale proclamation but that by such undervaluation he has sustained injury. [P 331 C 1]

(c) *Execution Sale—Setting aside—It is not wise and desirable to interfere with Court sales on slender grounds.*

It is not wise and desirable to interfere with Court sales on grounds not strong enough. As a matter of ordinary experience, Court sales are not popular and if the impression is created in the minds of the public that such sales can be set aside on slight grounds it will take away a great deal from the security which an act of

the Court ought to give to its proceedings, much to the prejudice of the judgment-debtors.

[P 332 C 2]

(d) *Civil P. C., O. 21, R. 90—Decree-holder's willingness to return property to judgment-debtor for the price at which it was bought is a circumstance which may be taken into consideration whether judgment-debtor has suffered any injury at the sale.*

The circumstance that the decree-holders offered to return the properties to the judgment debtor at the prices for which they bought them but the offer was not accepted, may be taken into consideration in judging whether the judgment-debtor has really suffered any injury by the sale: *A. I. R. 1922 Cal.* 589, *Ref.* [P 332 C 2, P 333 C 1]

Naresh Chandra Sen Gupta and Urukramdas—for Appellant.

Jogesh Chandra Roy, Anilendra Nath Roy Choudhuri and Basanta Kumar Mukherji—for Respondents.

Suhrawardy, J.—These two appeals arise out of two execution proceedings in execution of a decree obtained by the respondent opposite party against the appellant and another. The properties involved in these appeals were sold in execution of the decree and the judgment-debtor's objections under O. 21, R. 90, having failed he has preferred the present appeals. Four properties were put up for sale. Lot 1 was withdrawn as a formal defect was discovered in the sale proclamation in respect of that property. The sale of property No. 2 was set aside by consent. The sale of lots 3 and 4 has been confirmed by the Court below and Appeal No. 474 of 1925 refers to those lots. Lot 1 was subsequently sold and the sale having been confirmed by the Court below the judgment-debtor has preferred Appeal No. 447 of 1925 in respect of that lot. I will take up for consideration Appeal No. 474 in which most of the papers bearing on both the appeals have been printed. Lot 3 is a garden called Amarbagh. Lot 4 is a piece of land in the town of Berhampur with a small stable on it. In the sale proclamation lot 3 was valued at Rs. 200 and it was purchased by the decree-holder for Rs. 650. Lot 4 was valued at about Rs. 300 in the sale proclamation and was purchased by the decree-holder at the sale for Rs. 950. The appellant, in his application under O. 21, R. 90, raised two principal objections, namely, that the values of the properties mentioned in the sale proclamation were very low, the proper value of lot 3 being about Rs. 1,500 and of

lot 4 Rs. 2500, and hence the properties were sold at a very low price; and secondly, that the sale processes were not properly published and were fraudulently suppressed. I will first examine the first ground of objection, namely, the undervaluation of the properties and the consequent sales thereof at inadequate prices. In order to fully realize the value of the objection it will be necessary to refer to certain proceedings in the execution case in the Court below.

The Privy Council decree was obtained in 1921 and the application for execution thereof was made on 28th April 1922. On 20th May 1922 writs of attachment were issued in respect of various properties situated in different districts. On 13th June 1922 the writs of attachment were returned served and by the order of that date notice under O. 21, R. 66, was ordered to be issued fixing 5th July 1922 for return. That notice appears to have been served on 20th June and on 5th July 1922 the judgment-debtor appeared on notice and prayed for time to file objections. The Court granted 10 days time to the judgment-debtor for filing objections and on the same date ordered the issue of sale proclamation under O. 21, R. 66 fixing 17th August for sale of the attached properties. On 15th July 1927 judgment debtor 1 (the appellant before us) filed a petition of objection under S. 47, Civil P. C. The only grounds of objection mentioned in that petition were that the decree-holders were not entitled to interest on the sum decreed and that they were not entitled to the costs of the first Court. There was also the general objection that the properties were not liable to be sold in execution of the decree and that the decree could not be executed against the judgment-debtor. These objections were disallowed by the execution Court on 2nd August 1922 except with reference to a certain matter with which we are not at present concerned. On that date namely, 2nd August 1922, the appellant's son filed a claim on the ground that he being a member of the Mitakshara family was interested in the properties ordered to be sold. That claim was rejected on that very date. Then, on the 8th August 1922, one Narpatt Singha (brother of the judgment-debtor Maharaj Bahadur) ap-

plied for a declaration of his mortgage lien on lots 1 and 3 of the attached properties for a sum of a lac of rupees with interest. The Court directed the nazir to inform the fact of the claim to intending purchasers at the time of sale. Thereafter the appellant's son instituted a title suit and in that suit prayed for stay of the sale pending the decision of that suit, which was granted. There was an appeal to this Court from the order staying the sale, which was decreed and the order staying the sale was set aside. Thereafter on the application of the decree-holders for the issue of fresh sale proclamation it was issued fixing 15th September for the sale of the attached properties. On 15th September the appellant presented a petition in which he complained for the first time of the lowness of the prices mentioned in the sale proclamation and also objected to the sale on the ground of want of proper publication of the sale processes. All these objections were overruled except the objection with reference to lot 1 which was exempted from sale. The properties were sold on that date and purchased by the decree-holders as stated above.

On 6th October 1923 the appellant filed an application under O. 21, R. 90, praying for setting aside the sale on the ground of the value of the properties mentioned in the sale proclamation being low and of fraudulent suppression of the sale proclamation. This application was rejected by the executing Court on 6th June 1925 and hence this appeal. I have given a detailed account of the proceedings taken in the Court below in connexion with the execution to show that the appellant must have been aware of the contents of the sale proclamation and the date on which it was first issued, namely in July 1922. It is also difficult to believe that he was unaware of the issue of the sale proclamation and of its publication when his son and brothers were objecting to the properties being sold on various grounds which showed an intention on the part of the judgment-debtor to present all obstructions to the sale of the properties. It was on the date of sale, namely, 15th September 1923 that he for the first time raised the objection that the properties were undervalued in the sale proclamation. Under O. 21, R. 66 the Court is

required to give notice to the decree-holder and the judgment-debtor for the purpose of settling the contents of the sale proclamation including the approximate price of the properties asked to be sold. After settling these points the Court is required to issue sale proclamation for publication. If any party omits on notice under O. 21, R. 66, to put forward any objection it seems just and equitable that it should not be allowed to be raised at a subsequent stage of the proceeding and specially just on the day when the sale was going to be held. In the case of *Giridhari Singh v. Hardeo Narain Singh* (1), there was a material error in the sale proclamation, namely, the Government revenue in respect of the property directed to be sold was mentioned much less than it actually was. The judgment-debtor appeared and applied for postponement of the sale and agreed to the attachment and notification of the sale being maintained. Subsequent to the sale the judgment-debtor applied for the setting aside of the sale on the ground that the Government revenue was wrongly mentioned in the sale proclamation and of the consequent inadequacy of the price. Their Lordships of the Judicial Committee held that the irregularities complained of were sufficient to set aside the sale; but since in the application for postponement the judgment-debtor omitted to raise this objection and practically admitted that the notification was correct they refused to set aside the sale. The strongest case upon this point is the case of *Arunachellum v. Arunachellam Chetti* (2). In that case the judgment-debtors had an opportunity of objecting to the sale, but they lay by and after the sale, but before it was completed, they presented a petition for setting aside the sale on the ground that the sale of the whole property was bad and that only a portion of it should have been sold. Their Lordships of the Judicial Committee, in holding that the judgment-debtors should not be allowed to raise the objection at that stage, made the following observation:

It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property

attached and about to be sold which he knew well but of which the execution creditor or the decree-holder might be perfectly ignorant, that he should take no notice of that, allow the sale to proceed and then come forward and say the whole proceedings were vitiated. That in their Lordships' opinion cannot be allowed.

Their Lordships also referred to the case of *Olpherto v. Mahabir Pershad* (3), where it was laid down that if there was really a ground of complaint and if the judgment-debtors would have been injured by proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. This view has been in several cases expressed of which it is enough to refer to the case of *Pran Singh v. Janardan Singh* (4), where Mookerjee, J. made the following observation:

No doubt, if the judgment-debtor after notice of the proceedings does not object in the sale proclamation at that stage (when the sale proclamation is settled), a subsequent objection by him on the ground of inaccuracy or insufficiency of description is not likely to be entertained by the Court.

A similar view was taken in the cases of *Behari Singh v. Mukut Singh* (5), *Raja of Kalahasti v. Maharaja of Venkatagiri* (6). In the present case on the facts and circumstances of it I have no doubt left in my mind that the judgment-debtor was aware from July 1922 of the contents of the sale proclamation and the prices of the properties mentioned therein. He had ample opportunities to take objection on the ground of misstatement of value in the sale proclamation but he lay by and allowed the sale proceedings to proceed until the date of sale. The learned advocate appearing for the appellant distinguishes the cases referred to above on the ground that in the above cases the judgment-debtor was held not entitled to object to the sale after the sale whereas in the present case the appellant objected to the sale on the ground of wrong mention of the value in the sale proclamation before the sale. On principle I do not see any difference between the two cases. The objection in the present case as regards under-valuation of the properties in the sale.

(3) [1882] 9 Cal. 656=10 I.A. 25=11 C.L.R. 494=4 Sar. 417 (P.C.).

(4) [1911] 14 C. L. J. 541=13 I. C. 337

(5) [1906] 28 All. 273=3 A. L. J. 140=(1906) A. W. N. 3.

(6) [1915] 38 Mad. 387=21 I. C. 389=25 M. L. J. 198.

(1) [1875] 3 I.A. 230=26 W. R. 44=3 Suther 294=3 Sar. 637 (P.C.).

(2) [1887] 12 Mad. 19=15 I.A. 171 (P. C.).

proclamation was first made on the date of the sale and immediately before the sale. If the judgment-debtor is allowed to object on such a ground at any stage of the execution proceedings before the sale there can never be any finality of those proceedings. In my judgment if a judgment-debtor after receipt of notice under O. 21, R. 66 or of the knowledge of the contents of the sale proclamation before it is issued neglects to take any objection to the proceedings he should not in justice be allowed to take such objections at the sale or afterwards. I am, therefore, of opinion that the judgment-debtor ought not to be allowed to object to the sale on the ground that the properties were undervalued in the sale proclamation.

Though in the above view it is not necessary to consider the other objections raised on behalf of the judgment-debtor but as the points were fully argued before us it is better that we should express an opinion on the other grounds. It is urged that the properties were undervalued in the sale proclamation and therefore the sale ought to be set aside. In order that this ground should succeed it is not only necessary that the judgment-debtor should prove that the properties were undervalued in the sale proclamation but that by such undervaluation he has sustained injury, namely, that the properties were sold at inadequate prices. In other words, the undervaluation of the properties in the sale proclamation is a material irregularity and such irregularity caused injury to the judgment-debtor. Now lot No. 3 is said to be worth Rs. 1500. It is said to be a mango orchard; but from the appellant's evidence it appears that it cannot be a very valuable property. The sumarnabis and tehsildar (accountant and collector) of the appellant admits in his evidence that there is no house within it and no gardener has been attached to it within the last 30 years. There is a tank in it which has no banks and, there are some fruit trees in the garden the fruits of which were sold by the appellant once or twice within the last few years. I may mention here as I shall have occasion to remark hereafter that the appellant did not put himself into the witness-box and did not produce any papers to show the profits be made out of this property. Taking these facts into

consideration it is difficult to hold that the value of the property given in the sale proclamation is grossly inadequate. Reference has been made in this connexion to the leading case on this point viz., the case of *Saadatmund Khan v. Phul Kuar* (7). The facts of that case were that the property therein was worth Rs. 10,000 but in the sale proclamation the value was mentioned to be Rs. 800 and it was advertised for sale for realizing a debt of Rs. 500 only. Their Lordships said with reference to the facts of that case that it was indeed something more than the kind of irregularity which was commonly alleged for it was a misstatement of the value of the property which was so glaring in amount that it could hardly have been made in good faith, and which, however, it came to be made, was calculated to mislead possible bidders. A similar observation was made by their Lordships in the case of *Tekait Krishna Prasad Singh v. Moti Chand* (8), where a property of which the annual income was about Rs. 5,000 was valued in the sale proclamation at Rs. 2000. Their Lordships observed on the evidence that it was a gross undervaluation and that their Lordships had no doubt that the decree-holder had procured the insertion of this valuation for the purpose of making possible a purchase by him at that low figure.

Now in the present case can it be said that the misstatement of the value of the property was so glaring in amount that it could hardly have been made in good faith (*Saadatmund Khan's* case), or it was a gross undervaluation inserted by the decree-holder for the purpose of making possible a purchase by him at a low figure (*Tekait Krishna's* case)? The difference between the value mentioned by the judgment-debtor and that mentioned in the sale proclamation is not so great as to be either a 'glaring undervaluation' or a 'gross misstatement'. In this connexion I may mention, and I will refer to this fact again, that before the lower Court the decree-holder offered to return these properties at the prices at which he had purchased them but the offer was not accepted. A simi-

(7) [1898] 20 All. 412=25 I. A. 146=7 Sar. 380 (P. C.).

(8) [1913] 40 Cal. 635=19 I. C. 296=40 I. A. 140 (P. C.).

dar offer was made before us and it was not availed of.

Now as to the value of lot No. 3, there is only oral evidence and it is very easy for a witness to come and say that the value of the property was so much. The appellant has kept back best evidence on this point. If he had offered himself for examination the real state of the property and the value which he had paid for it and other matters could have been brought out. He further kept back his papers which would have shown what profits he made out of this property. In the absence of this evidence I am unable to accept the oral evidence of the witnesses who come and glibly say that the property is worth from Rs. 1,500 to Rs. 2,000. The learned advocate for the appellant has laid great stress upon the fact that the property which was valued in the sale proclamation at Rs. 200 was purchased by the decree-holder at Rs. 650 and, according to the learned advocate, that was a clear evidence of undervaluation in the sale proclamation. It is difficult to make the deduction from this circumstance alone which the learned advocate draws from it. At the time of the sale the decree-holder might have thought that the property was worth the amount for which he purchased. But admitting that the price paid by the decree-holder was about three times the amount mentioned in the sale proclamation, the undervaluation was not so gross as to amount to irregularity.

Then admitting that it was a material irregularity, the appellant to my mind has failed to prove that he suffered any injury from the undervaluation of the property. When we take into account the condition of this property as disclosed in the evidence of the judgment-debtor himself and the fact that at the time of the sale a claim of the appellant's brother to the extent of a lac of rupees with interest was published at the time of the sale, the value fetched at the sale cannot be said to be in any way inadequate.

We, now come to lot No. 4. With regard to this property the evidence is that it has an area of 3 cattas and that there is a structure there which is called a stable with two rooms—one about 4 cubits wide and another a cubit and a half, in not a very habitable condition. The judgment-debtor had exam-

ined some witnesses and produced some documents to prove the value of certain properties in the locality. Exhibit I shows that 1 catta and 12 chittaks of homestead land with a brick built house standing thereon was sold for Rs. 1,025 in 1889. Ex-D is another sale-deed which shows that 1½ cattas of jamai land was sold for Rs. 500. This is all the tangible evidence we have got; but, it is difficult to say on the materials on the record that the value of lot 4 is much more than what it fetched at the sale. There is no evidence that anyone was willing to purchase this property for more than what it was for sold for at the sale; and there is the further fact, to which I have already referred, namely, that the respondents are still willing to return this property if the price for which they have purchased it is paid back to them.

In this connexion I should like to observe that it is not wise and desirable to interfere with Court sales on grounds not strong enough. As a matter of ordinary experience we know that Court sales are not popular, and if the impression is created in the minds of the public that such sales can be set aside on slight grounds it will take away a great deal from the security which an act of the Court ought to give to its proceedings, much to the prejudice of judgment-debtors.

All the considerations to which I have referred with reference to lot 3 apply to this lot also and it is not necessary to refer to them. I am accordingly of opinion that it cannot be said definitely on the evidence on the record and in view of the circumstances of this case that this lot 4 was sold at a much lower price and thereby the judgment-debtor has suffered loss. Three facts, to which I have already referred, stand out very prominent when one tries to discover if the appellant has any real grievance in the matter. One is that the evidence is so vague that it is very difficult for one to act upon it. There is no evidence that there was any person willing to purchase the properties and for higher prices. The second fact to which I have referred is that the decree-holders offered to return the properties to the judgment-debtor at the prices for which they bought them. We have authority that this circumstance may be taken into consideration in judging whether the

judgment-debtor has really suffered any injury by the sale. *Bejoy Singh Dudhuria v. Asutosh Goswami* (9). The third circumstance which seems to be the most important is the absence of the appellant from the witness-box and holding back the best evidence. Take, for instance, the service of the notice under O. 21, R. 66, for the purpose of settling the sale proclamation, we have the evidence of the peon. He says that he went to the house of the judgment-debtor and found his darwan, Hulas Singh, at the gate and he was told that the judgment-debtor was upstairs. He wanted to serve the notice on the judgment-debtor but he was prevented by the darwan from entering the house. He sent information to the appellant through Hulas Singh and he was told that the appellant had asked him to hang up the notice on the outer door. Along with this notice on the appellant the peon also served a notice on another judgment-debtor, Surja Kumar Adhikari, said to be the manager of the judgment-debtor. The peon says that he found Surja Kumar in the appellant's house; but he having refused to take the notice on being informed of its contents he served it by hanging it over the gate of the appellant's house. It is strange that neither the judgment-debtor nor his darwan Hulas Singh nor his manager Surja Kumar Adhikari has come to the witness-box and denied the service of notice. It cannot, therefore, be doubted that the notice was properly served upon the appellant.

In the view I take of the questions I have discussed above it is not necessary to enter into the evidence relating to the publication of the sale proclamation. I must admit that the evidence is not very satisfactory on behalf of the decree-holders. But considering that that evidence was given some time after the publication and also the fact that the respondents had to examine a number of officers of Court of different places, the evidence may be accepted as satisfactory against the evidence of the appellant which is almost nil. The evidence adduced by the appellant must, in the circumstances, be negative; but it is the evidence of persons for whom it was so very easy to deny facts. For instance, there is the tailor Belait Khalifa who, according to the serving peon was present at the time of

the service of the sale proclamation. But he comes on behalf of the appellant and denies such service. If there was no service or there was fraudulent suppression of sale proclamation the respondent's first witness would not have mentioned the name of this witness as being present on the occasion. The Court below was impressed with the demeanour of respondents' witnesses and some of them appear to be more respectable. There is an ugly fact which does not speak well for the respondents. At the time of the sale the bid sheet shows that there were present only the respondents' pleader and a person who was the tadbirkar of the respondents. It was foolish on the part of the decree-holders to have made a show of bid at the sale, but that is what they did. We may take it that there was no bidder at the sale except the decree-holders. But, I as have said, there was no material irregularity or consequent injury to the appellant; the insufficiency of the evidence with regard to the publication of the sale on behalf of the decree-holders does not very much affect the case. To sum up my conclusion: I find against the judgment-debtor because I hold that notice under O. 21, R. 66 was served upon him and he neglected, if he had any real grievance, to take any objection as to undervaluation in time. He has further failed to prove that the properties were sold, considering that the sale was a Court sale with the right of future litigation, at inadequate prices. He has also failed to prove that he suffered any real injury on account of the properties being sold at inadequate prices. When we take into consideration the fact that a title suit with regard to this property by his son is still pending and that the claim of his brother to the extent of a lac of rupees is still hanging over them. I am not satisfied further with the bonafides of the judgment-debtor in this case. In my judgment this appeal (474 of 1925) ought to fail and should be dismissed with costs 5 gold mohurs.

As regards Appeal No. 447 of 1925: all that I have said with reference to service of notice under O. 21, R. 66 applies to this case. I hold that notice was served upon the appellant and he failed to take objection on the ground of undervaluation in time. He, therefore, should not be allowed to take this objection at this stage. Apart from that circumstance the

(9) A. I. R. 1924 Cal. 589.

facts of this case are different from the other case and are such as not to entitle the appellant to any relief. The appellants pleader in the lower Court conceded that the appellant was unable to prove any material irregularity in the conduct of the sale. This admission may or may not be binding upon the appellant, but it is quite justified in the circumstances of the case. Lot 1, which is the subject-matter of the appeal, is a patni taluk with a rent of Rs. 1705 a year. It was purchased by the respondent at Rupees 25,000, being 15½ times the annual profit. I should say that in a Court sale the price fetched was quite adequate, when we take into consideration the fact as appears from the bid sheet in this case that the nazir proclaimed at the time that there was a claim for a lac of rupees with interest of the appellant's brother over this property. I need not in detail examine the evidence of publication in this case as I find that the appellant sustained no injury by the sale. The evidence moreover is not such as to induce me to hold that the sale proclamation was not properly published. In fact the evidence adduced by the respondents is much stronger. All the other circumstances which have induced me to hold against the appellant in the other appeal apply with equal force in this case. I accordingly dismiss this appeal with costs 5 gold mohurs.

Graham, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 334

MUKERJI, J.

Hriday Nath Sarkar—Principal Defendant—Appellant.

v.

Niroda Sundari Dasya and another Plaintiff and pro forma Defendant—Respondents.

Appeal No. 1854 of 1925, Decided on 5th January 1928, from appellate decree of 1st Sub-Judge, Pabna, D/- 21st April 1925.

(a) *Legal Practitioner*—Compromise empowered by vakalatnama—It is uncommon for pleaders to enter on this authority into compromise, especially in cases where pardanashin ladies are concerned.

Though a clause authorizing a pleader to compromise is to be found in vakalatnamas that are ordinarily filed, it is exceedingly uncommon for pleaders to take the responsibility

of entering into a compromise on the strength of the authority conferred by it, the more so in cases where illiterate pardanashin ladies are concerned. Those who assert that this was the position have got to discharge an exceedingly heavy burden indeed and the least that could be expected of them is that they should examine the pleader himself. [P.335 C 2]

(b) *Evidence Act, S. 115*—Compromise beneficial to a party's interest—Party not taking advantage—Compromise does not constitute estoppel.

Even if the compromise is beneficial to a party's interest, but he has not taken any benefit out of or under it, that compromise does not constitute an estoppel debarring him from challenging it. [P 336 C 1]

Monmatha Nath Roy, Dwijendra Krishna Dutt for **Surjya Kumar Aich**—for Appellant.

Sasadhar Roy and Jatindra Nath Sanyal—for Respondents.

Judgment.—The suit in which this appeal has arisen was one for setting aside a compromise decree. The suit in which that decree was passed was title Suit 704 of 1922 in which defendant 1 of this suit was the plaintiff, defendant 2, who is the plaintiff's husband, was originally the sole defendant, and the plaintiff was added as defendant 2 therein on the objection of her husband that she was the owner of some of the properties involved.

The Court of first instance dismissed the suit. The lower appellate Court has reversed that decision. Hence the appeal by defendant 1.

The plaintiff challenged the validity of the compromise alleging that she is an illiterate pardanashin lady, that she sent a vakalatnama through her husband to be filed in the suit, but gave no authority to anybody, either verbally or in writing, that she was all along under the impression that the suit was pending and that she did not know anything about the compromise and so the same was not binding on her. The defence was, amongst others, that the plaintiff had duly executed the vakalatnama that was filed, that her husband was looking after the suit and had authority to settle the terms of the compromise and to give instructions to the pleader who had appeared on her behalf, that she was perfectly aware of the compromise all through and that she was benefited by the compromise and had also approved of it. The issues framed in the suit, however, betray a lamentable lack of care on the part of those respon-

sible for the framing thereof, and the Court evidently did not consider the pleadings at the time when they were framed.

The pleadings give rise to a number of questions which must be answered one way or the other before the suit can be properly disposed of. They are: First: Was the pleader who filed the compromise petition authorized to compromise the suit and did he agree to the compromise acting under such authority? Second: Was the plaintiff's husband authorized to compromise the suit on her behalf and did he act in the matter of the compromise on the strength of such authority? Third: Was the compromise entered into by the plaintiff herself or with her knowledge and consent or approval? These three questions have got to be kept separately in view, and if any of them is answered in the affirmative the plaintiff's suit must fail.

The main arguments that have been addressed in support of this appeal have sought to elicit an answer in the affirmative in respect of each of the aforesaid three questions, while the respondent has endeavoured to support the findings of the Subordinate Judge and has urged that those findings are sufficient to entitle the plaintiff to the decree she has obtained.

Now as regards the first of these questions the Subordinate Judge appears to have fallen into an error in supposing that the vakalatnama (Ex. A) does not authorize the pleader to compromise the suit but only empowers him to ask for permission to compromise. This view is based upon a misreading of the terms of the vakalatnama. The difficulty, however, in the appellant's way is that there is nothing to show that the pleader purported to compromise the suit on his own responsibility and acting on the authority conferred on him by the vakalatnama. The pleader has not been examined as a witness in the case. The appellant says that as the plaintiff in her plaint denied having given any authority, verbal or written, to anybody to compromise the suit though she admitted having sent a vakalatnama through her husband, as soon as he has succeeded in showing that the vakalatnama contains the necessary authority, his burden is discharged, and it is for the plaintiff to prove that the pleader did not act on that

authority. This position, no doubt, is correct; but then it has not been proved that the plaintiff was aware of this clause in the vakalatnama when she executed it—a matter with regard to which the burden of proof was on the appellant and which he has not discharged. The finding of the trial Court upon which the appellant relies, so far as this matter is concerned and which is to the effect that Ex. A was the vakalatnama which the plaintiff had executed, does not go near enough to what the appellant has got to establish to fix the plaintiff with knowledge of this particular clause. Moreover though a clause of this description is to be found in vakalatnamas that are ordinarily filed, it is exceedingly uncommon for pleaders to take the responsibility of entering into a compromise on the strength of the authority conferred by it, the more so in cases where illiterate pardanashin ladies are concerned. Those who assert that this was the position have got to discharge an exceedingly heavy burden indeed and the least that could be expected of them is that they should the examine pleader himself.

As regards the second question the Subordinate Judge has found that it does not appear that the plaintiff, to quote his words,

either expressly or impliedly clothed her husband with plenary authority to compromise the suit on her behalf.

The arguments that have been advanced on behalf of the appellant did not seriously challenge the correctness of this finding.

So far as the third question is concerned it is sufficient to state that the finding of fact at which the Subordinate Judge has arrived is that the compromise was made without the knowledge and consent of the plaintiff.

A further contention was advanced, though rather faintly, which was to the effect that the plaintiff was benefited by the compromise, and in support of this contention reliance was placed on a finding of the Munsif which does not appear to have been touched by the Subordinate Judge. The Munsif says:

Defence witness 1 explains how she (i.e., the plaintiff) has enjoyed the benefit of the compromise. In my opinion the explanation is very satisfactory. Moreover the Court would not have sanctioned the compromise after two days' contest if the compromise had not bene-

fited the present plaintiff who was a pardanashin lady; it had a sacred duty to perform.

I am inclined to think that what the learned Munsif meant to say was merely that the compromise was beneficial to the plaintiff—a matter which is neither here nor there in the present suit. Even if the compromise was beneficial to her interest, so long as she has not taken some benefit out of or under it which would constitute an estoppel debarring her from remedy, it does not matter in the least. Of this estoppel there is nothing on which it may be founded.

The appeal, in my judgment fails and it is accordingly dismissed with costs.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 336

RANKIN, C. J., AND C. C. GHOSE, J.

Corporation of Calcutta—Complainant—Petitioner.

v.

Ananta Dhar and another—Accused—Opposite Party.

Criminal Revn No. 87 of 1928, Decided on 27th March 1928, from acquittal order of Municipal Magistrate, Calcutta.

Calcutta Municipal Act (1925), S. 488 (2), Sch. 17, R. 7—Re-thatching of roof with leaves and allowing it to remain in contravention of the requirements of R. 7 is not a continuing offence.

Where the owner of a hut put new golpatta leaves upon the old framework of the roof of his hut and the charge against him on that occasion was that he had entirely re-thatched the roof of the hut with new golpatta, and thereafter another prosecution was instituted and it was contended on behalf of the Corporation that because the accused had not pulled down the golpatta roof or altered it in accordance with the requirements of R. 7, Sch. 17, he was guilty of a continuing offence.

Held: that he was not guilty of continuation of the offence within S. 488 (2), as allowing the roof to remain is not a continuation of the offence of making the roof: *Marshall v. Smith* 8 C. P. 416, Cons. [P 337 C 1]

B. L. Mitter, Sures Chandra Taluqdar, Mohendra Kumar Ghose and Gopendra Krishna Banerji—for Petitioner.

Prabodh Chandra Chatterji—for Opposite Party.

Rankin, C. J.—In this case a rule was issued at the instance of the Corporation of Calcutta requiring the opposite party to show cause why a certain order of acquittal passed by the Municipal Magistrate in favour of the opposite

party should not be set aside on the ground that the Magistrate had misconceived the law and acquitted the accused on an erroneous hypothesis and assumption.

It appears that the opposite party is the owner of a hut consisting of certain premises in Calcutta and that after the commencement of the Calcutta Municipal Act of 1925 he put new golpatta leaves upon the old framework of the roof of his hut. He was accordingly prosecuted under R. 7, Sch. 17, Municipal Act, the Clause 1, whereof says that external roof of walls of buildings shall not, after the commencement of this Act, be made of grass, leaves, mats, canvas or other inflammable materials.

It appears that the charge against him on that occasion was that he had entirely re-thatched the roof of the hut with new golpatta. Thereafter the prosecution with which we are now concerned was instituted and it was contended on behalf of the Corporation that because the opposite party had not pulled down the golpatta roof or altered it in accordance with the requirements of R. 7, Sch. 17, he was guilty of a continuing offence within the meaning of the Calcutta Municipal Act and was liable to a daily fine of Rs 5. The Magistrate has held that the fact that the opposite party has not pulled down the golpatta leaves is not in continuation of the offence previously committed by him under R. 7 above mentioned.

The relevant section for the present purpose is first of all S. 488, Calcutta Municipal Act. It prescribes that certain penalties mentioned in the third column of a schedule thereto shall be incurred by persons who contravene any provision of the sections or rules of the Act mentioned in that schedule and also by any person who fails to comply with any lawful direction under any of the sections mentioned. Thereafter it prescribes by the second clause:

whoever, after having been convicted of any offence referred to in Cls. (a), (b), or (c), sub-S. (1) continues to commit such offence shall be punished for each day after the first during which he continues so to offend, with fine which may extend to the amount mentioned in this behalf in the fourth column of the said table.

The question is, therefore, whether or not this case comes within the terms of Cl. (2), S. 488, i. e., whether the opposite party continued to commit the offence of

which he was previously convicted under R. 7, Sch. 17. This matter must be considered upon the basis of R. 7 which I have mentioned and the language of Cl. (2), S. 488. In view of the explanation attached to Cl. (2), S. 488, it appears to me to be erroneous to put any stress upon the particular words in the second column of the table which is governed by S. 488. I, therefore, pass over the phrase "construction of external roofs or walls of buildings with inflammable materials" which is to be found in that table and go to the fountain head, that is to say, the term of R. 7 itself. It is to be observed that that section is not expressed to say that in the case of external roofs or walls of buildings erected after the commencement of this Act the same shall not consist or be suffered to consist of inflammable materials. It says that external roofs shall not, after the commencement of this Act, be made of inflammable materials; and the offence which was committed by the opposite party for which he was rightly convicted was the offence of making the roof with an inflammable material. The leading case on this subject is the case of *Marshall v. Smith* (1) and in that case, which has never been dissented from in England, it was held under a very similar clause that the offence consisted in the building of the wall. It was also held that a mere failure to pull down a wall or rebuild it in accordance with the statutory requirements was not a continuation of that offence. In consequence of that decision S. 158, Public Health Act, 1875, was made to provide that where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any byelaw to a penalty the existence of the work during its continuance in such a form and state as to be in contravention of the byelaw shall be deemed to be a continuing offence.

No such provision has been incorporated into the Calcutta Municipal Act and if, therefore, we are to hold that the conduct of the opposite party in suffering the roof to remain is a continuation of the offence of making the roof, we have to do a certain amount of violence to the language of Cl. (2), S. 488. It is plain as a matter of right reason that suffering the roof to remain is not a continuation of the offence committed, i. e., of making

the roof. When one looks at the scheme and the language of the table which follows S. 488 one notices that the daily fine is one of Rs. 5, and no doubt it does occur to one that while a person may after conviction continue to erect a roof of inflammable materials a daily fine of Rs. 5 does not seem to be a very adequate or convenient method of coping with that particular form of persistency in illegal conduct. At the same time it is possible to have a case where a person continues to erect or make a roof with inflammable materials after conviction and it cannot, therefore, be said that the Court is obliged by the frame of the table to extend the proper and ordinary meaning of the words "continues to commit such offence" found in Cl. (2), S. 488. I quite appreciate that it is a serious matter for the Corporation to be told that they have not the power to obtain a conviction in a case of this sort under Cl. (2), S. 488. Also I am the last person to be unduly influenced by any archaic notions as to a strict construction to be applied to a statute which deals with many very complicated matters. Speaking for myself, if I am satisfied that the meaning of what the legislature has said is to make this kind of conduct a continuation of the offence under R. 7 mere correctness of language would not deter me from giving effect to the intention of the legislature.

In the present case, however, I am not of opinion that there is sufficient in the language employed by the legislature to justify the Court in regarding this kind of conduct as a continuation of the offence within the meaning of Cl. (2), S. 488. It seems to me that if the Corporation has not sufficient power, where any works are erected contrary to the Act, to order them to be removed and in default of compliance to remove them itself at the expense of the owner, the sooner it takes power to act in that way the sooner it will be equipped with what is necessary to protect the city from conflagration. Again, if it is thought useful to have the power of a daily fine in such a case the sooner the Corporation goes to the legislature for a clause on the lines of S. 158, Public Health Act, 1875 the better. It is not only difficult but it is in some respects objectionable that a matter of this sort should be dealt with by a Court of law

(1) [1873] 8 C. P. 416=42 L. J. M. C. 108=28 L. T. 538.

straining the plain words "continues to commit such offence" so as to supply the Corporation with a somewhat drastic power. In my judgment, the result of a consideration of the Calcutta Municipal Act is that I am satisfied that the view taken by the Magistrate is not only consistent with authority but is correct, and I think that this rule ought to be discharged.

C. C. Ghose, J.—I agree.

R.D.

Rule discharged.

A. I. R. 1928 Calcutta 338

DUVAL AND MALLIK, JJ.

Fazlur Rahman—Plaintiff—Appellant.
v.

Sardar Ali and others—Defendants—Respondents.

Appeal No. 2107 of 1924, Decided on 6th January 1927, from appellate decree of 2nd Sub-Judge, Chittagong, D/- 28th June 1924.

(a) *Civil P. C., Ss. 65 and 66—Purchase at auction sale—Sale not confirmed—New code coming into operation in the meantime—The title of the purchaser does not become absolute and no suit under S. 66 can be maintained.*

An auction sale, at which a benamidar purchased for the plaintiff, took place on 8th August 1908 when the Code of 1882 was in force. Under S. 316 of that Code the property purchased in execution of the decree vested in the purchaser on the confirmation of the sale; but the sale was not confirmed until 6th January 1909 when the Code of 1882 had ceased to operate and had been superseded by the Code of 1908. In a subsequent suit against transferees from the benamidar it was argued that, under S. 65 of the new Code, on the confirmation of the sale the title to the property is to vest back with retrospective effect from the date of the sale and by the confirmation of the sale under S. 65 of the new Code the plaintiff's title to the property accrued on 8th August 1908 and, therefore, S. 66 of the Code had no application but S. 317 of the old Code would apply.

Held: that as on 1st January this sale had not become absolute, the plaintiff's right had not accrued and as the plaintiff's right did not accrue on 1st January he was clearly bound by S. 66 of the new Code and if he was bound by S. 66 the plaintiff cannot maintain the suit: 47 Cal. 1108 and A. I. R. 1928 Cal. 85, Dist. [P 339 C 1]

Narendra Kumar Das—for Appellant.

Chandra Sekhar Sen—for Respondents.

Duval, J.—In this case the plaintiff sued for declaration of his title to and for possession of, certain land. His case

was that he purchased it in auction sale in the benami of defendant 6 on 8th August 1908 and that subsequently he got possession in the name of his benamidar who was in possession for some time, but that in 1915 his benamidar sold the land to defendants 1 and 2 and he was dispossessed. He brought a case under S. 9, Specific Relief Act, and lost it and so he brought this suit. The defence set up in the written statement of the vendees was that the plaintiff was never in possession and that defendant 6 was not a benamidar and that the suit is barred under 66, Civil P. C. Defendant 6, who purported to sell the property has put in a written statement stating that he was a benamidar. After issues were framed the first Court tried the issue as to whether the suit lay in view of the provisions of S. 66, Civil P. C., and held that it did not. This finding has been upheld in appeal. The second appeal is directed on this point only.

Now the sale took place, as we have stated, on 8th August 1908. At that time the Code of 1882 was in force and under S. 316 of that Code the property purchased in execution of the decree vested on the confirmation of the sale; but the sale was not confirmed until 6th January 1909 when the Code of 1882 had ceased to operate and had been superseded by the Code of 1908. Under S. 65 of the present Code, on the confirmation of the sale, the title to the property is to vest back with retrospective effect from the date of the sale. The argument, therefore, addressed to us is that by the confirmation of the sale under S. 65 of the new Code the plaintiff's title to the property accrued on the 8th August 1908 and, therefore, S. 66 of the Code has no application but that S. 317 of the old Code applies. The chief difference between the two sections is that whereas under the old Code a suit would lie against the heirs or assignees of a benamidar though not against the benamidar under S. 66 of the new Code, no suit would lie against any one claiming a title under the certificated purchaser. The learned vakil for the appellant has referred to two decisions of this Court, being the case of *Promotho Nath Pal v. Mohini Mohan Pal* (1) and the case of *Makarali v.*

(1) [1920] 47 Cal. 1108=31 C. L. J. 463=58 I. C. 327=24 C. W. N. 1011.

Sarfaddin (2) to support his argument. But in both those cases the sale was confirmed before the new Code came into force; that is to say, before 1st January 1909, though in one of them the sale certificate did not issue until after the new Code came into force and there it was held that the real purchaser could maintain a suit against the transferee as his right had already accrued under the old Code. The present Code, however, is clearly different. No doubt S. 65 of the new Code states that when the sale has become absolute the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. But the question really before us is whether on 1st January 1909, when the new Code came into force, the plaintiff's right had accrued as a purchaser through the benami of defendant 1. In my opinion it had not. In this connexion reference must be made to S. 6, General Clauses Act, which says that when an Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears the repeal shall not affect any right acquired or accrued under any enactment so repealed.

The only point, therefore, is whether as a matter of fact on 1st January the plaintiff's right had accrued. Now, even if we take S. 65 as dating back the right, it is clear that on 1st January this sale had not become absolute and so the plaintiff's right had not accrued. Now, if the plaintiff's right did not accrue on 1st January he is clearly bound by S. 66 and if he is bound by S. 66 the plaintiff cannot maintain this suit.

In this view, therefore, I would dismiss the appeal with costs.

Mallik, J.—I agree.

S.J.

Appeal dismissed.

(2) A. I. R. 1923 Cal. 85=50 Cal. 115.

A. I. R. 1928 Calcutta 339

MUKERJI, J.

Ashita Ranjan Bose—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 54 of 1928, Decided on 20th April 1928, from order of Sessions Judge, Assam Valley Districts.

Assam Labour and Emigration Act (6 of 1901), S. 213—*Emigration or assisting in the emigration is not an abetment within S. 213—Penal Code S. 107.*

Emigration or assisting in the emigration cannot be taken as forming an abetment of the offence of illegal recruitment within S. 213 of the Act. S. 213 expressly refers to abetment as meant by the Penal Code. [P 341 C 2]

Suresh Chandra Taluqdar—for Petitioner.

Debendra Narain Bhattacharji—for the Crown.

Judgment.—This Rule has been issued to show cause why the conviction of the petitioner and the sentence passed on him should not be set aside on ground 2 mentioned in the petition. The petitioner has been convicted under S. 164 read with S. 213, Act 6, 1901 (*Assam Labour and Emigration Act*) and has been sentenced to pay a fine of Rs. 200. The order of conviction and sentence was passed, in the first instance, by a Magistrate at Dibrugarh, and the same has been confirmed on appeal by the Sessions Judge of the Assam Valley Districts. Ground 2 of the petition upon which this Rule has been issued runs in these words :

For that the assumption of the learned Sessions Judge that a recruiting Sardar must accompany every batch of coolies and the imputation of the petitioner's guilty knowledge therefrom are wrong.

There was a considerable amount of confusion in the proceedings that took place in the Courts below in connexion with this case and a perusal of the record discloses certain facts which I shall presently narrate and which will speak for themselves.

The petitioner was an agent of Messrs. Midland Bose and Co. at a place called Amingaon. Messrs. Midland Bose and Co. are the forwarding agents of tea labourers recruited in different parts of India. Certain coolies were recruited for the Madhuting Tea Estate by one B. K. Banerji who, however, did not have a license for recruitment of coolies. The said coolies were dispatched by Messrs Midland Bose and Co. to Amingaon and the petitioner received those coolies and sent them to the Madhuting Tea Estate. These shortly are the facts of the case upon which the petitioner was tried. The Manager of the Madhuting Tea Estate was at first put upon his trial when it was discovered that the said B. K. Banerji had no license to recruit coolies and he was convicted. Thereafter

it appears that a complaint was lodged in the Court of the Magistrate at Dibrugarh by somebody whose initials cannot be deciphered in these words :

To the Magistrate, Dibrugarh, Sir. I have the honour to apply for summons against the following accused under Ss. 164/213, Act 6, 1901. The history of the case is herewith put up.

The name of the accused was given as "A. R. Bose of Amingaon, agent to Messrs. Midland Bose and Co." The history of the case which is said to have been put up along with the complaint consists of a sheet of paper which is headed as containing :

points in respect of and relevant to the illegal recruitment of coolies by B. K. Banerji and the assistance rendered in these transactions by A. R. Bose.

It refers to four challans by their numbers and dates and states that the said A. R. Bose assisted and caused to emigrate the coolies mentioned in the said challans in contravention of Act 6 of 1901. On this complaint, summons appears to have been issued against the petitioner under Ss. 164/213 of the Act. No copy, however, of this summons is to be found in the record. But the summons, that were issued on the witnesses are available and they show only that the offence for which the petitioner was being tried was an offence under the Emigration Act. There is no reason to suppose that the summons that was issued against the petitioner was in different terms. However that may be, an offence under S. 164 read with S. 213, Act 6, 1901 is an offence relating to a summons case and S. 242, Criminal P.C., evidently applies to the trial of such a case. It does not, however, appear from the record that the substance of the accusation that the prosecution desired to make against the petitioner was made known to him in accordance with the provisions of S. 242, Criminal P. C. If, in point of fact, the provisions of this section were not complied with, then that would in itself be a ground for setting aside the whole trial. I am not sure, however, whether the said provisions were complied with or not. All that can be said is that there is no record with reference to this matter amongst the papers that are before me. Thereafter, it appears, one witness was examined on behalf of the prosecution, namely U. C. Burdaloi, who happened to be the

Manager of the Madhuting Tea Estate. It is really upon the evidence of this witness, coupled with the documentary evidence that was adduced in the case that the conviction of the petitioner is based. It may be mentioned here that of the four challans that are referred to in the history of the case that was filed along with the petition of complaint, the one which concerns the present case is Challan No. 172 bearing date the 17th April 1926, the challan relating to the dispatch of 16 coolies. From the note as regards the history of the case, it would appear that the petitioner was charged with having assisted in the emigration of the said 16 coolies referred to in challan No. 172. That substantially may be taken to be the case that was put forward against the petitioner by the prosecution in the trial Court. In the judgment which the learned Magistrate passed convicting the petitioner under S. 164 read with S. 213 of the Act, he, first of all, set out the facts relating to the parts taken in the affair by the Manager of the Madhuting Tea Estate, and B. K. Banerji and Messrs. Midland Bose and Co. Having done so, he stated the facts that the accused received the coolies illegally as the emigrating agent B. K. Banerji had no license for recruitment of coolies and that the accused forwarded the said coolies from Amingaon to the Madhuting Tea Estate.

The learned Magistrate then stated in his judgment that the accused must have been well aware that the Madhuting Tea Garden had sent no licensed recruiter for recruitment of the coolies and thereafter he recorded a finding to the effect that no recruiting sardar accompanied the coolies to Amingaon and that when the accused dispatched them from Amingaon no garden sardar was sent along with the coolies. From these findings the learned Magistrate ultimately recorded a general finding to the effect that the accused took part in the illegal recruitment with full knowledge that the recruitment was illegal. Reading the judgment of the learned Magistrate as a whole, it seems to me that he did not keep in view the distinction between the different kinds of offences that are contemplated by S. 164 of the Act. That section runs in these words :

Whoever knowingly recruits, engages, induces or assists or attempts to recruit, engage, induce

or assist any person to emigrate in contravention of any of the provisions of this Act, etc.

If the case that was put forward against the petitioner in the petition of complaint was to be adhered to, the only question which the Magistrate had to determine was whether the petitioner had assisted in the emigration of the coolies because the petition of complaint read with the history of the case did not refer to any abetment on the part of the petitioner in the recruitment itself. Emigration is defined in S. 2, Cl. (e) of the Act and whether the definition confines the meaning of the word to the departure of the coolies from a particular point or whether emigration consists in the entire process of the journey made by the coolies from the point from which they depart till they reach the garden for which they are recruited, it is quite clear that the process of emigration is entirely different from the process of recruiting and S. 164 makes that distinction perfectly clear, for it says "recruits any person to emigrate." In my opinion, there can be no question that the process of recruiting must terminate before the process of emigration begins. The learned Magistrate does not appear to have kept this distinction in view at the time when he convicted the accused. One thing, therefore, is quite clear that it was not possible for the petitioner to ascertain with any degree of precision what exactly was the case that he had to meet at the trial that was held against him. Assuming, however, that the word "recruitment" has been used by the learned Magistrate in his judgment in a general sense and as not different from the word "emigration" but as consisting of one and the same process, the learned Sessions Judge, it appears, in dealing with the case, had confined his attention entirely to the recruitment that was made of the coolies. Para. 2 of the learned Sessions Judge's judgment makes this point perfectly clear. What the learned Judge says therein is this, and here I quote his own words from his judgment :

It is common ground that the recruitment was illegal and that the appellant assisted in such recruitment. It was argued that there was no evidence that he did so knowingly. The learned Public Prosecutor pointed out in reply that there is no evidence that any competent or approved person within the meaning of S. 44 (S. 76) of the Act accompanied the party. It being admitted that no garden sardar accompanied them and the nature of the escort being

a matter particularly within the observation of the appellant, if only for his own protection, I hold there is sufficient ground for finding that the appellant knew the labourers to be illegally recruited.

Now, it is clear to my mind that the learned Sessions Judge was convicting the accused of having abetted the illegal recruitment of the coolies knowing that such recruitment was illegal. To this view, there are two objections. In the first place, that was not the case upon which the accused was tried, the case against him having been, as I have already stated, one of assisting in the emigration of the coolies; and secondly, if emigration or assisting in the emigration be taken as forming an abetment of the offence of illegal recruitment, then it cannot be an abetment which is contemplated by S. 213 of the Act, for it is clear that this is not a form of abetment—an abetment after the fact—which the Indian Penal Code takes cognizance of. S. 213 expressly refers to abetment as meant by the Indian Penal Code. For these reasons, I am of opinion that there has been no proper trial of the case as against the petitioner nor have any facts been established which would call for any further trial of the petitioner. The rule should, in my opinion, be made absolute and I order accordingly. The conviction of the petitioner and the sentence passed on him are set aside and the fine, if paid, will be refunded.

N.K.

Conviction set aside.

A. I. R. 1928 Calcutta 341

RANKIN, C. J., AND MITTER, J.

Krista Kishore Bose—Petitioner.

v.

Pancharam Maity—Opposite Party.

Civil Revn. No. 760 of 1927, Decided on 17th August 1927, from order of 2nd Sub-Judge, Howrah, D/- 7th May 1927.

Civil P. C., O. 17, R. 2, and O. 26, R. 8—Application to set aside ex parte decree—Defendant asking for his examination on commission—Application granted and evidence taken—Defendant not present on the day fixed for hearing of the case though ordered—No instructions to the pleader—Case dismissed for default—Case is governed by O. 17, R. 2—Court is under no obligation to read evidence on commission.

On an application to set aside the ex parte decree the defendant asked for his examination on commission. The prayer was granted, and the parties were directed to come ready on the day fixed, on which day the evidence

taken on commission was recorded in the report but the pleader who had been appearing for the defendant said that he had no instructions. Defendant was also absent. Thereupon the Judge treated the matter as a case of default and dismissed it.

Held: that the dismissal was right as the case was governed by R. 2, O. 17. [P 342 C 2]

Held, further, that the Court was under no obligation to read evidence on commission and to decide the case upon it if there was no appearance on behalf of the defendant at the hearing: 36 Cal. 566, *Dist.* [P 342 C 2]

Debendra Nath Mondal and Satyendra Nath Mitter—for Petitioner.

Santosh Kumar Pal—for Opposite Party.

Rankin, C. J.—This is a point of practice. It appears that there was a mortgage suit which was decreed *ex parte* on 25th November 1925. The defendant who is the applicant before us to-day brought his application under O. 9, R. 13, Civil P. C., on 5th January 1927 to have that *ex-parte* decree set aside and the suit restored for hearing. That application having been filed and registered on 12th February it appears from the order sheet the case was adjourned to 5th March 1927. In the meantime a petition supported by an affidavit was made by the defendant asking for his examination on commission, but in the end the case was adjourned to 26th March for hearing and again to 30th April and the present applicant filed a petition with a medical certificate and again prayed for his examination on commission on the ground of illness. This time the application was granted on the term that the execution of the commission would not be a ground for any further adjournment and the parties were directed to come ready on the day fixed. The commissioner finished his work on 30th April 1927, and on that day it was ordered

on both parties' prayer for time let the case be adjourned to 7th May 1927 for hearing. Parties must come ready on that day.

On the day in question—7th May 1927—the position was this that the evidence taken on commission was recorded in the report, but the pleader who had been appearing for the defendant said that he had no instructions. Thereupon the learned Judge treated the matter as a case of default. He said:

The applicant does not appear on calls. His pleader states that he has no instructions in the case to-day. The opposite party is present. Let the case be dismissed for default with costs Rs. 8.

Now, the learned advocate for the petitioner contends before us that that course was improper and that what should have been done was this: that evidence taken on commission together with any other evidence which the plaintiff might adduce should have been considered and the case should have been decided on its merits though in the absence of the defendant. That question turns upon two other questions: the first is whether or not the case before us in the events which happened was governed by R. 2, O. 17 of the Code or by R. 3. On that question it seems to me that the case is within R. 2. It is quite true that in the order as recorded it appears that the adjournment was made on the application of both parties. It is quite true that there is that notice that parties would get no further adjournment in the words "parties must come ready on that day." Still I do not think that that is what is contemplated by the terms of R. 3. R. 2 begins by:

where on any day to which the hearing of the suit is adjourned

(it does not say at whose instance it is adjourned)

the parties or any of them fail to appear:

Rule 3 says:

Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit.

It seems to me that default of appearance in a case of general adjournment before hearing is within R. 2, and that R. 3 is directed to a case where a party is definitely given time in order that he may take a certain step which it is necessary for him to take if he is to prosecute his case, and fails to take that step.

However that may be, a further question arises in this case whether the deposition on commission was evidence on the record of the Court in the sense that the Court was under an obligation to read it and to decide the case upon it even if there was no appearance at the hearing of the defendant. On that question we have been referred to the case of *Dhanu Ram v. Murli Mahto* (1) where it is said that it is not the practice in the mofussil to make a formal tender of the evidence taken on commission. It seems to me, however, that for the purpose of

(1) [1909] 36 Cal. 566=11 C. L. J. 150=1 I. C. 366=13 C. W. N. 525.

the present question before us it is necessary to look somewhat accurately on what is said by the Code and in that connexion the language O. 26, R. 8, which is in the form of S. 390 of the previous Code must be regarded. R. 8 says that evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless

certain facts are present, for example, the person who gave the evidence is beyond the jurisdiction of the Court or the Court in its discretion dispenses with the proof of any of the circumstances and authorizes the evidence to be read notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same, so that, before the evidence taken on commission can be read, the Court has either to be satisfied by proof of certain facts or to be satisfied that the case is such that it should dispense with the proof of those facts. It seems to me that the case *Dhanu Ram v. Murli* (1) is open to some comment as regards a certain part of the reasoning in the judgment of the learned Judges. It is there said:

Where, therefore, as in the case before us, the circumstances mentioned in S. 390 which would exclude the deposition from being read as evidence in the suit do not exist, there is no reason why the deposition should be formally tendered before it can be treated as evidence in the cause.

In that passage the learned Judges seem to have inverted the character of S. 390 to which they were referring. In that section it is not laid down that certain circumstances shall exclude the deposition from being read as evidence. That section says that unless with the consent of the other party a commission shall not be read as evidence unless there is either proof of certain circumstances which would make it evidence or the Court gives dispensation from such proof. I am not disposed at the moment to make any observation as to what the practice in mofussil Courts may be for any other purpose; but reading O. 26, R. 8, and O. 17, R. 3 as they stand for the purpose of giving a construction to the Code, I am not satisfied that even in a case which is otherwise within O. 17, R. 3, it would be right to say that the Court is obliged to dispose of the case by looking at the evidence upon commission. In my judgment, the Court in this case has adopted the right practice and this Rule must be discharged with costs—hearing fee—one gold mohur.

Mitter, J.—I agree.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 343

DUVAL, J.

Lila Singh—Plaintiff—Appellant.
v.

Chandra Badan Singh and others—
Defendants—Respondents.

Appeal No. 1801 of 1925, Decided on 9th January 1928, from appellate decree of Addl. Dist. Judge, Cachar, D/- 6th April 1925.

Landlord and Tenant—Ejectment suit—To succeed, landlord must prove his title.

In a suit for ejectment, the fact that the tenants have not been able to establish a clear title is no ground for the landlord getting a decree unless he can prove his title. [P-341 C 1]

Paresh Lal Shome—for Appellant.

Satyendra Kishori Ghose—for Respondents.

Judgment.—This appeal arises out of a suit which was originally brought to recover possession of 12 cottahs and 2 chittaks of land on the allegation that it was part of a *dag* No. 115 of Re-settlement patta No. 5. The plaintiff's case was that he was in possession of this land all along, but in April 1919 the defendants dispossessed him. The defence was that this land appertained to a neighbouring *dag* No. 94 of patta No. 11 of a khasra settlement, and had been purchased as far back as 1897, but during the last re-settlement operation the plaintiff wrongly got it included within his patta. The defendants also alleged that in 1919 the plaintiff dispossessed them and there was a criminal case which was referred to a panchayat for enquiry and they got the land back. The first Court decreed the suit, but in appeal it was pointed out that the local inspection by the amin was unsatisfactory and so the case was sent back for further hearing after a fresh enquiry by a qualified commissioner. The commissioner duly made his report and in the result the lower Court then decided that the plaintiff would get a decree for 7 cottahs 4 chittaks of land, the amount which appeared under the re-settlement of 1918 to have been included in plot 115. In appeal the learned Additional District Judge has found that the plaintiff has been unable to prove his title to this land at all and so has dismissed the suit.

In second appeal it is urged that after remand the question of plaintiff's title

did not arise and that as the record-of-rights is in favour of the plaintiff, the onus is on the defendants to prove their title and they have to rebut the entry in the record. The only evidence that the plaintiff has been able to adduce is the two pattas of 1900 and 1918, the record-of-rights not conferring, as the Assam Land and Revenue Regulation clearly states, any title at all. Now it has not been shown either that the plaintiff held this land under the patta of 1900 and as to the patta of 1918 there is nothing in his evidence to show that the defence set up is not the fact. The fact that the defendants have not been able to establish a clear title is no ground for the plaintiff getting a decree unless he can prove his title.

In this view the appeal must be dismissed with costs.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 344

GRAHAM AND CAMMIADE, JJ.

on difference

CUMING, J.

Ambar Ali—Petitioner.

v.

Piran Ali and others — Opposite Parties.

Criminal Revn. No. 645 of 1927, Decided on 10th and 29th November 1927, from order of E. A. C., Sylhet, D/- 6th December 1926.

Criminal P. C., S. 145 — (Cuming and Cammiade, JJ.) Actual possession means actual physical possession — Symbolical possession obtained through a civil Court is not actual possession — (Graham, J.) Possession must be lawful.

Cuming and Cammiade, JJ.—In a case under S. 145, what the Magistrate has to determine is who is in actual possession at the time or within two months of the proceeding and to declare him to be entitled to possession.

Actual possession means actual physical possession. Actual possession is not necessarily lawful possession. It may be the possession of a trespasser without any title whatever. The person who has obtained what is known as symbolical possession through a civil Court is not necessarily in actual possession.

[P 347 C 1]

Graham, J.—Possession means lawful possession and not possession taken by force in defiance of law. No Court ought to recognize such possession.

[P 344 C 2]

Radhica Ranjan Guha for Hemendra Kumar Das—for Petitioner.

Manmatho Nath Rao (Jr.) for Nripen-dra Ch. Dass—for Opposite Parties.

Graham, J.—In this case a rule was issued calling on the Deputy Commissioner of Sylhet and the opposite party to show cause why the order of the Extra Assistant Commissioner of Sylhet dated 6th December 1926 under S. 145, Criminal P. C., declaring the 2nd party (now the opposite party) to be entitled to retain possession of certain land should not be set aside on the ground that the learned Magistrate erred in law in not upholding the possession delivered to the petitioner (1st party) under a civil Court decree against the opposite party Piran Ali.

On the particular facts in this case the Magistrate's order is in my opinion manifestly wrong, and he ought, I think, to have maintained the decree of the civil Court, and the possession given by it subsequent thereto: *Atal Hazra v. Uma Charan* (1), *Akhoy Mondal v. Basu Rai* (2), *Kunja v. Khetra* (3). The petitioner, 1st party, obtained possession of the land in question through the civil Court on 23rd July 1925, and it is clear that the opposite party No. 1. [Piran Ali (opposite parties 2 and 3 are his sons) has throughout wilfully ignored the decree, and is treating the litigation as if it had never taken place. In my judgment it is not right that the criminal Court should support him in this attitude.

The view taken in the Courts below seems to be that, however much right may be on the side of the 1st party, the only thing that counts is actual possession; and that, possession being with the 2nd party, that party must succeed, no matter how that possession may have been obtained. I cannot persuade myself that this is sound law. Possession as I understand the word, means lawful possession, and not possession taken by force in defiance of law. No Court ought in my opinion to recognize such possession as is claimed here by the 2nd party. The law is proverbially an ass, but I do not think it can for a moment countenance such a state of things as must necessarily follow if the decision, which has been arrived at in this case, is affirmed. The land in question was formerly in dispute between the parties,

(1) [1916] 20 C. W. N. 796=33 I. C. 822=28 C. L. J. 555.

(2)-A. I. R. 1923 Cal. 176.

(3) [1902] 29 Cal. 208=6 C. W. N. 38.

and one of them went to the civil Court, and in due course obtained a decree followed by possession. The 2nd party ignoring that decision again took possession of the land, and upon the 1st party complaining to the Magistrate he is informed that though he has right on his side, the 2nd party is in de facto possession and, that being so, is entitled to retain such possession until evicted in due course of law. In other words the 1st party, having already been successful in the civil litigation, is to be again compelled to have recourse to the civil Court, and that within about a year of the passing of the decree (the police report was dated 29th May 1926). From the point of view of the 1st party the position seems to be a hopeless one, and the result appears to be due to making a fetish of possession. No doubt it is true that in cases under S. 145, Criminal P. C., possession of the land in dispute is the only point to be decided. But it must, I think, be lawful possession which the Court can recognize, and not the possession of a trespasser and wrong doer.

There is another aspect of the matter. The section relates to disputes regarding land. In this instance the dispute had been finally decided in the civil Court. That being so, there was not, properly speaking, any dispute, the Magistrate had no jurisdiction, and the proper course would, it seems to me, have been to take steps under S. 107, Criminal P. C., against the aggressive party or parties.

For the above reasons I would make the rule absolute on the ground on which it was issued, and set aside the order declaring the 2nd party to be in possession of the land, leaving it to the Magistrate to proceed under S. 107, Criminal P. C. if the adoption of that course is deemed to be necessary.

As my learned brother is of a different opinion the case will be laid before the Chief Justice in order that it may be referred to a third Judge.

Cammiade, J.—Briefly the facts found by the Magistrate are as follows:

The land in dispute is the holding of Piran Ali, the second party. It was sold in execution of a decree and was purchased by the decree-holder, Mathura Nath Das. The sale was confirmed on 10th May 1923; Mathura sold his rights

to the first party by two deeds executed respectively in October and November 1923. The first party obtained delivery of possession through Court on 8th July 1925. The property consists of about 14 bighas of land, comprising arable lands and two homesteads in the occupation of the second party. The latter were not removed from the homesteads at the time delivery of possession was given. All that the peon did was to read his writ and plant a bamboo on the arable land. Aus paddy was standing on that land at the time possession was delivered. The second party reaped this paddy. The first party instituted criminal proceedings, which were dismissed. The second party then grew winter paddy on the land and harvested it. The first party attempted to take possession in April and was resisted. He then applied for possession under the provisions of S. 145, Criminal P. C.

These being the findings, the Magistrate was, in my opinion, right in declaring that the second party were in possession.

The law provides summary remedies for the recovery of possession when the party in possession is ousted unlawfully. These remedies are provided in S. 145, Criminal P. C., and S. 9, Specific Relief Act. A person entitled to these remedies must apply to the Court within the time prescribed; and, if he fails to apply within such time, he can only fall back on the ordinary remedy, namely a suit.

It is expressly provided in S. 145 that the Magistrate will uphold the possession of the person whom he finds to be in possession, except in cases when one of the parties had been ousted from possession within two months of the date of the Magistrate's order passed under the first sub-section of that section. In this case, the Magistrate's order is dated 3rd June 1926. As the Magistrate has found that the second party had been in possession at least from the month of August previous, no other order was possible except the one the Magistrate has passed. In these circumstances I would discharge this rule.

Cuming, J.—This rule was granted on the following ground:

That the learned Magistrate erred in law in not upholding the possession delivered to the petitioner under the civil Court decree against the opposite party, Piran Ali.

Owing to a difference of opinion between my learned brother Graham and my learned brother Cammiade the case has been laid before me for decision

The facts will appear to be these :

The land in dispute was originally the holding of Piran Ali, the second party. The land was mortgaged. The mortgagee obtained a decree on his mortgage, sold the property and purchased it himself. He sold his interest to the present first party and the first party applied to the Court and was put in possession on 23rd July 1925 by the planting of a bamboo. In other words he was given symbolical possession. The second party remained in actual possession. Then, on 30th April 1926, the first party applied to the Magistrate. Proceedings were drawn up under S. 145. The Magistrate found the second party in possession and declared him entitled to possession.

Against this order the rule has been obtained.

The first party argues that as possession was delivered to him on 23rd July 1925 by the civil Court the Magistrate is bound to maintain that possession.

The opposite party contends that all the Magistrate has to determine is who is in actual possession at the time or within two months of the proceeding and to declare him to be entitled to possession. Each party has cited numerous rulings to support his contention. The first party relies on the cases reported: *Shama Sundari v. Jardine, Skinner and Co* (4), *Rai Mohan Roy v. J. P. Wise* (5), *Ranee Gunge Coul Association Ltd. v. Hemlal* (6), *In re. Chutraput Singh* (7), *Gobind Chunder Moitra v. Abdul Sayad* (8), *Akhoy Mondal v. Basu Rai* (2), *Atal Hazara v. Uma Charan* (1), *Gulraj v. Bhatoo* (9), *Kedar v. Lalit* (10) and *Gordan Sims v. Johurry Lal* (11), while the second party relies on *Lowsan Santal v. Kali Charan Santal* (12), *Atul v. Sri Nath* (13), *Hazari Khan v. Nafar*

Chandra (14), *Rakhal Dolui v. Nakham Lal* (15), *Kuladd v. Danesh* (16), *Shahabaj v. Bhajahari* (17). A consideration of these decisions undoubtedly would go to show that the rulings cited by each party support the view he would have taken and in this view the matter probably should go before a Full Court. But as a Judge sitting alone, I have no power to make such a reference. So far as I am concerned this is perhaps fortunate, for in view of the contrary decisions I am able to approach the question unfettered by former decisions and to decide it on the plain and simple words of the section itself. With great respect to the learned Judges who are responsible for some of the decisions I cannot but feel that the exact words of the section and the purpose for which it was enacted have been sometimes lost sight of. The aim and object of the section is in my opinion the maintenance and preservation of the public peace and nothing else. No rights are to be decided under it. It is no doubt for reason that the revisional power of the High Court was expressly excluded under the Code before 1923. I will, therefore, cite the material portions of the section which are these:

Whenever a District Magistrate, Sub divisional Magistrate or Magistrate of the 1st Class is satisfied from a police report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof within his jurisdiction he shall make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court in person or by pleader within a time to be fixed by such Magistrate and put in written statements of their respective claim as respects the facts of actual possession of the subject in dispute.

The word "actual" requires to be heavily underlined. It is the omission I think to consider the meaning of the word "actual" which has led to the numerous conflicting rulings in this Court.

Sub-sections (2) and (3) are not material.

Sub-section (4) runs:

The Magistrate shall *without reference to the merits of the claim of any such party to a right to possess the subject of dispute peruse . . . and if possible decide whether any and which*

- (4) [1866] 6 W. R. Cr. 10.
- (5) [1871] 16 W. R. Cr. 24.
- (6) [1875] 24 W. R. Cr. 17.
- (7) [1879] 5 C. L. R. 200.
- (8) [1881] 6 Cal. 835=8 C. L. R. 217.
- (9) [1905] 32 Cal. 796.
- (10) [1906] 2 C. L. J. 147.
- (11) [1901] 5 C. W. N. 563.
- (12) [1904] 8 C. W. N. 719.
- (13) [1919] 23 C. W. N. 982=53 I. C. 933=30 C. L. J. 123.

- (14) [1918] 22 C. W. N. 479=40 I. C. 718=18 Cr. L. J. 718.
- (15) A. I. R. 1927 Cal. 701.
- (16) [1906] 33 Cal. 83=2 C. L. J. 271=10 C. W. N. 257 (F.B.).
- (17) A. I. R. 1922 Cal 364=49 Cal. 177.

of the parties was at the date of the order before mentioned in such possession of the said subject.

Proviso (1) may be also noted. It is not necessary to cite it at length. The material portions of this sub-section are the words I have underlined (italicized). What is abundantly clear is, therefore, that what the Magistrate has to decide is, who is in actual possession.

The words 'such' possession obviously refer to the actual possession mentioned in sub-S. (1). He is not to decide the merits of the claim of the parties to a right to possess the subject of dispute. The section specifically states he is not to. What then does actual possession mean. As I understand it, it means actual physical possession. It means the possession of the person who has, if I may put it so, his feet on the land, who is ploughing it, sowing or growing crops on it entirely irrespective of whether he has any title or right to possess it. Actual possession is not the same as a right to possession nor does it mean lawful or legal possession. If the Code had meant lawful or legal possession I presume it would have said so. The very fact that the expression actual possession is used shows that the legislature was contemplating a possession other than lawful or legal. This is clear from sub-S. (4) for the Magistrate is not to determine who has a right to possess.

The person who has obtained what is known as symbolical possession is not necessarily in actual possession. If he were, the expression "symbolical" would be meaningless. If the Magistrate must maintain, as has been held in some decisions, the possession given through the civil Court he must at once do what the section expressly says he shall not, namely, determine who has a right to possession and to whom the civil Court has given possession, in other words determine the right to possession.

Actual possession is not necessarily lawful possession. It may be the possession of a trespasser without any title whatever.

The Magistrate is expressly prohibited from determining whether the possession is lawful or not, in other words, whether the person in possession has any title or right and to say that the Court has to decide whether the possession is lawful or not, that is to say, that the Court is

to do the very thing which the section expressly prohibits him from doing.

To contend that because the civil Court has decided who has a right to possession that there is no longer any dispute is to ignore realities.

There is no doubt possibly no dispute as to title. But that does not prevent there being a dispute as to who is in possession. What the civil Court had decided in this case was who had a right to possession, not who was in possession. It is not correct to say that in these circumstances the decree-holder or person having a right to possession has no remedies. He had. They will be found in O. 21, Rr. 97, 98, 99, Civil P. C. It is for the decree-holder to avail himself of the provision of the Code to obtain real and effectual possession. I, therefore, agree with my learned brother Cammiade. The rule stands discharged.

N.K.

Rule discharged.

A. I R 1928 Calcutta 347

CUMING AND MUKERJI, JJ.

Rama Nath Panu—Plaintiff—Appellant.

v.

Harish Chandra Biswas and another—Principal defendant and Plaintiff—Respondents

Appeal No. 536 of 1925, Decided on 12th January 1928, from appellate decree of Addl. Sub-Judge, Howrah, D/- 22nd January 1925.

Bengal Tenancy Act, S. 148-A—A suit to fall under S. 148-A must be for the entire rent due and not a suit for the cosharer's share of the rent only—Plaint should be looked at to see whether a case does or does not satisfy the test.

A suit which is not one primarily for the whole of the rent due for a tenancy. To discover whether a case does or does not satisfy this test it is necessary to look at the plaint itself, a suit which is primarily for the rent due on the plaintiff's own share is not a suit within the meaning of S. 148-A even though the plaintiff cosharer prays in the plaint that if the defendant objects to pay the plaintiff's share of the rent separately then the cosharer landlord's share should also be included. *Case law referred to.*
[P 348 C 2]

M. N. Roy (Sr.), Byomkesh Basu for *Surjya Kumar Aich*—for Appellant.

Prokash Chandra Majumdar and Satindra Nath Roy Chowdhury for *Jitendra K. Guha*—for Respondents.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for a declaration of his title and confirmation of possession or in the alternative for recovery of possession of the land in suit.

His case briefly was that the disputed lands were held by one Hem Chandra Pachal, defendant 2, as a nontransferable occupancy holding at an annual rental of Rs. 147 odd under the pro forma defendants 5 to 10, that in execution of a decree for rent obtained by defendant 5 under S. 148-A, Ben. Ten. Act, against defendant 2 the said holding was put up to sale and was purchased by plaintiff 1 for Rs. 80 on 22nd November 1920. That he obtained possession through Court and let out a portion of the land to plaintiff 2. An objection was filed by defendant 1, under R. 100, O. 21, Civil P. C., and the objection was allowed. Hence this suit. The case for defendant 1, who alone contested the suit, was that he had purchased the holding from defendant 2 on 22nd June 1913. His case was that the decree under which the holding was sold and purchased by the plaintiff was not a rent decree but a money decree and that nothing passed by the sale in execution of that decree except the right, title and interest of defendant 2 which had already passed to him by the sale on 22nd June 1913.

The Court of first instance decreed the plaintiff's suit with costs, holding that the decree in execution of which the plaintiff purchased was a rent decree. This finding was reversed on appeal, the learned Subordinate Judge holding that the decree under which the plaintiff purchased was not a rent decree but only a money decree and that nothing but the right, title and interest of the judgment-debtor passed to the plaintiff.

The sole point which has been urged in the appeal is whether the decree under which the plaintiff purchased was a rent decree, or in other words, whether the suit in which the decree was obtained was a suit properly framed under the provisions of S. 148-A, Ben. Ten. Act. Mr. Roy who appears for the appellant has referred us to a number of cases: the cases of *Nandalal v. Kala Chand* (1), *Brohmandannath Deb v. Hem Chandra Mitter* (2), *Baikuntha Nath Sen v. Rama-*

pathi Chatterjee (3), *Profulla Chandra Gosh v. Baburam Mandal* (4) *Jagabandhu Nandi v. Abdul Hamid Mea* (5) and *Gangamani Biswas v. Raba Ali* (6).

For the purpose of this appeal it is not necessary to deal with these rulings in extenso. As far as I can see one principle emerges from these decisions, and that principle is that the test as to whether a suit has or has not been properly framed under S. 148-A, Ben. Ten. Act, is whether the suit is intended to be a suit for the entire rent or not. If the suit is intended for the entire rent due and not merely a suit for the plaintiff's share of the rent only, then the suit would fall under S. 148-A, Ben. Ten. Act, and the decree made in it would be rent decree. To discover whether a case does or does not satisfy this test it is necessary to look at the plaint itself. In the present case the plaintiff stated first that he was the $4\frac{1}{2}$ -annas shareholder and that the remaining $11\frac{1}{2}$ -annas belonged to his cosharer landlords. He further overruled that he and his cosharer landlord realized their respective portion of the rent separately. He then stated that the defendant occupies some 6 bighas 12 cottahs odd land of which the total annual rent was Rs. 14-7-10 $\frac{1}{2}$ gandas. Further he stated that the cosharer landlords, Nos. 2 to 6, were asked to join in the suit but they refused, that they were asked to state how much rent was due to them from the tenant and the tenant was also asked to state how much rent was due to the cosharer landlords but they refused to state. Hence the plaintiff was entitled to get a decree for his share of the rent under S. 148-A, Ben. Ten. Act. It was then stated that Rs. 16 odd was due from the tenant on account of his share of the arrears of rent for the years 1323 to 1326 B. S., that he had repeatedly asked for the payment of the rent due but he had not obtained it. Hence he brought the suit, that he might be given a decree for Rs. 20-15-9 gandas. He further prayed that if the defendant objected to pay the plaintiff's share of the rent separately then the plaintiff prayed to include the cosharer landlords' share as shown in the first column of the schedule and that in such a case plain-

(3) [1918] 27 C. L. J. 101=45 I. C. 767.

(4) A. I. R. 1921 Cal. 289.

(5) A. I. R. 1925 Cal. 82.

(6) A. I. R. 1925 Cal. 106=51 Cal. 935.

(1) [1910] 15 C. W. N. 820=8 I. C. 50.

(2) [1914] 18 C. W. N. 1016=23 I. C. 981.

tiff would pay the remaining cost of stamp that would be due to the Court. I think it is quite obvious reading the prayer (b) that the plaintiff's case does not satisfy the test which I have already set forth. It is quite clear from prayer (b) that the suit was not one primarily for the whole of the rent due for the tenancy but was one primarily for the rent due on the plaintiff's own share; for he states that if the defendant objects to pay the plaintiff's share of the rent separately then the plaintiff prays to include the cosharer landlord's share as shown in the first column of the schedule. In other words, the suit was for the rent of his own share only and not for the whole rent due. Therefore, the plaint does not satisfy the test which I have already set forth. That being so it is clear that the decree obtained in the suit was not a rent decree but merely a money decree and that nothing passed to the plaintiff under the sale in execution of the decree but the right, title and interest of the judgment-debtor. That being so, the appeal fails and is dismissed with costs

Mukerjee, J.—I agree.

N.K.

Appeal dismissed.

* A. I. R. 1928 Calcutta 349

SUHWARDY AND GRAHAM, JJ.

Ramesh Chandra Patranabis — Auction-purchaser—Appellant.

v.

Birajasundari Gupta and others — Respondents.

Appeal No. 25 of 1926, Decided on 20th December 1927, from appellate order of Sub-Judge, Mymensingh, D/-15th September 1925.

(a) *Civil P. C., O. 21, R. 90—Party committing fraud must prove that other party had knowledge of facts constituting fraud.*

Where fraud is committed by any party, it lies upon him to show that the other party had a clear and definite knowledge of the facts constituting fraud at a date beyond the statutory period : 18 C. L. J. 128 ; 18 C. W. N. 1266 and A. I. R. 1921 Cal. 251, *Foll.* [P 349 C 2]

(b) *Civil P. C., O. 21, R. 92—Sale conveys interest only of parties to the suit—Auction-purchaser cannot lay claim to the shares of persons not affected by the sale.*

The sale purports to convey the interest of parties to the decree and does not affect the shares of those who are not bound by the decree. Because the sale in so far as the interests of one of the judgment-debtors are concerned is vitiated, the entire sale cannot on

that account be set aside. Though auction-purchaser cannot lay claim to the shares of persons who are not affected by the sale he will get good title in respect of the shares of parties whose interest is legally conveyed by the sale. [P 351 C 1]

* (c) *Civil P. C., O. 21, R. 90—Sale cannot be set aside in part on the ground of irregularity or fraud—It must be set aside in its entirety.*

Order 21, R. 90, speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularity or fraud ; and a sale which is affected by such defects cannot be set aside in part. An execution sale is either wholly good or wholly bad ; it cannot be good and bad at the same time : 32 Cal. 296, *Rel. on.* ; A. I. R. 1926 Cal. 1219 ; A. I. R. 1924 *Mad.* 431 and 14 C. W. N. 128, *Dist.* [P 351 C 2]

Sarat Chunder Roy Choudhury and Birendra Kumar Dey—for Appellant.

Gunada Charan Sen and Annada Charan Karkoon—for Respondents.

Biraj Mohan Majumdar—for Deputy Registrar.

Suhrawardy, J. — This second appeal arises in connexion with execution proceedings and is by the auction-purchaser in execution of a decree for rent by the landlord against 65 tenants. The tenure was sold on 24th July 1922 in execution of the decree. On 21st August 1922 two judgment-debtors, Manoranjan Dhar and judgment-debtor No. 55, filed an application to have the sale set aside. That application was dismissed on 4th April 1923. The sale was then confirmed and symbolical possession delivered to the auction-purchaser on 27th February 1924. On 27th March 1924 the respondent, judgment-debtor No. 56, filed an application under O. 21, R. 90 and under S. 47, Civil P. C., to have the sale set aside on the ground of irregularities and fraud. The Munsif in the execution Court overruled all the objections to the sale made by the respondent and dismissed her application. He found that the application was barred by limitation, that the sale-processes were properly served and that though the properties were not sold at adequate prices there was service of notice on the respondents under O. 21, R. 66 and the defect was cured. On appeal the learned Subordinate Judge found that the previous application for setting aside the sale made by Manoranjan and another was collusive, that the sale-processes were fraudulently suppressed and that the respondent had sustained substantial

injury in consequence thereof. As to limitation, the learned Subordinate Judge held that he was satisfied on the petitioner's evidence that she had no knowledge of the sale until there was delivery of possession to the auction-purchaser. He further found that the property sold also belonged to a deceased defendant and to some other defendants against whom no decree was passed and as there was no determination of the extent of the shares of those defendants he set aside the entire sale.

Two points have been urged before us in appeal on behalf of the appellant. The first is that there is no sufficient finding by the Subordinate Judge to bring the case under S. 18, Lim. Act, and, therefore, the respondent's application must be held to be barred by limitation. It is argued that the Subordinate Judge has not found that it was on account of the fraud of the decree-holder or the auction-purchaser that the respondents were kept out of the knowledge of the sale and that under Art. 166, Lim. Act, unless time is extended by the operation of S. 18 of that Act, the period within which such application should be made must be counted from the date of sale. No doubt the Subordinate Judge has not said in so many words that it was due to the fraud of the decree-holders that the respondents were kept out of the knowledge of the sale. But reading the judgment of the learned Judge as a whole one can have no doubt that that was what he meant to find. He first discusses the evidence with regard to the service of the various sale-processes and comes to the conclusion that there was fraudulent suppression of the writs of attachment and sale-proclamation as well as of the other processes in execution; and then, in considering the question of limitation, he observes that the evidence adduced by the appellant for proving applicant's knowledge of the sale is of the most worthless kind and it bears the stamp of concoction. After considering the evidence the learned Subordinate Judge enters his finding on this point in these words:

I am satisfied from the petitioner's evidence that she had no knowledge of the sale until there was delivery of possession to the auction-purchaser. I find accordingly that the application is not barred by limitation.

Reading the two findings together it

is manifest that what the Subordinate Judge means to say is that there was fraudulent suppression of sale processes by the decree-holder and consequently the petitioner before him was kept out of the knowledge of the sale. But it is argued by the learned advocate appearing for the appellant that the Subordinate Judge has wrongly placed the onus of proving the petitioner's knowledge upon the decree-holder or the auction-purchaser. This contention must be overruled, in view of the decision of the Judicial Committee in the case of *Rahimbhoy Habibbhoy v. Turner* (1), where their Lordships in essence held that where fraud is committed by any party it lies upon him to show that the other party had a clear and definite knowledge of the facts constituting fraud at a date beyond the statutory period. The principle in this case has been followed in this Court in execution proceedings in the cases of *Arjun Das v. Gunendra Nath Basu* (2) and *Bhusar Mani Das v. Profulla Kristo Deb* (3). The objection on the ground of limitation must accordingly fail.

The next point is of some novelty and does not seem to have come up for consideration in any reported case. The reason may be that it is a matter of daily occurrence in the mofussil Courts and it has never been thought of sufficient importance to merit consideration. But, as it has been raised it should be examined. The point is that the Court below had no jurisdiction to set aside the entire sale on the application of one of 65 judgment-debtors. As regards the remaining judgment-debtors, two of them had made an application to set aside the sale and failed and the right of the other judgment-debtors to have the sale set aside is at the present moment barred by limitation. It is, therefore, submitted that the effect of setting aside the entire sale is to give the benefit of it to parties who are estopped from questioning the sale or whose right to question it has been extinguished by limitation. Now, the findings of the Subordinate Judge about the application by Manoranjan and another is that it was

(1) [1893] 17 Bom. 341=20 I. A. 1=6 Sar. 256 (P. C.).

(2) [1918] 18 C. W. N. 1266 = 27 I C. 294=20 C. L. J. 341.

(3) A. I. R. 1921 Cal. 251=48 Cal. 119.

a collusive affair brought about by fraud and collusion to which the auction-purchaser (the present appellant) was also a party. As regards the fraud in connexion with the publication of the sale processes, he records his findings in these words :

After a careful consideration of the evidence on the record and all the circumstances I find that there was fraudulent suppression of the writ of attachment and sale proclamation as well as of other processes in execution and that the petitioner has sustained substantial injury in consequence thereof.

The learned Subordinate Judge has set aside the whole sale on the ground that in so far as the interests of judgment-debtor No. 27 who had died during the pendency of the rent suit and whose heirs were not substituted on the record and of the defendants against whom no decree was passed were concerned, the sale was a nullity. On this point he observed :

The sale purported to be of the interests of all the judgment-debtors and I think, the omission to substitute the heirs of the judgment-debtor No. 27 vitiates the sale not only to the extent of his share about which there has been no determination, but in toto. The sale must, therefore, be set aside.

This view cannot be supported in law because the sale purports to convey the interest of parties to the decree and does not affect the shares of those who are not bound by the decree ; but the entire sale cannot on that account be set aside. The auction-purchaser in the circumstances cannot lay claim to the shares of persons who are not affected by the sale. But there is no reason why he should not get good title in respect of the shares of parties whose interest is legally conveyed by the sale.

Though the ground upon which the learned Subordinate Judge set aside the sale is not tenable, the question still remains whether on the findings arrived at by him the sale should be set aside in toto or in so far as it affects the respondents' interest in the property sold. The findings are that there was fraudulent suppression of the processes in connexion with the sale and that there was substantial injury inasmuch as the property was sold much below its proper price. Now these findings affect the entire sale. It cannot be said that a part only of the sale was affected by fraudulent suppression of the sale processes. O. 21, R 90 says :

Where any immovable property has been sold in execution of a decree, the decree-

holder, or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it.

The rule as it stands does not contemplate a partial setting aside of a sale. In fact it means, if it means anything, that if a sale is bad on the ground of material irregularity or fraud, it can be set aside at the instance of any party whose interest is affected by the sale. Nor does the section, as it stands, give any indication whatsoever that all parties whose interests are affected by the sale must join in an application to have the sale set aside. Take, for example, the case of a judgment-debtor and his mortgagee. The value of the equity of redemption not being much, the judgment-debtor may not deem it to his benefit to question the sale. But the mortgagee who is directly affected by it may apply to have the sale set aside, and if on his application the sale is set aside it seems to me that it must be set aside in its entirety because it is impossible to maintain that the sale is to be held good to the extent of the interest of the judgment-debtor which is indefinite. Various other complications may arise if it is held that where the sale is bad on account of irregularities in the conduct of the sale it can be set aside in part. In the case of a joint decree where the shares of the different defendants cannot be defined, if one of the defendants succeeds in proving to the satisfaction of the Court that the sale is fit to be set aside, the Court can only give him proper relief by setting aside the entire sale as it is not possible in the circumstances to set it aside in part, inasmuch as the interest of the successful defendant is not ascertainable. As at present advised I am quite clear in my mind that Q. 21, R. 90 speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularity or fraud; and a sale which is affected by such defects cannot be set aside in part. An execution sale is either wholly good or wholly bad; it cannot be good and bad at the same time.

Reference has been made to the decision to which I was a party in the case of *Rampada Nag v. Kanai Ray* (4) where

it has been broadly stated that a sale can be partially set aside; and reliance was placed in that case on the decisions in *Khairajmal v. Daim* (5) and *Gopala Ayyar v. Ramanuja Chariar* (6). On an examination of the facts of all these cases it appears that what was meant in *Rampada Nag's* case (4) by the observation that a sale can be partially set aside is that in the circumstances of that case the sale did not affect the right of the objecting party. In that case it was found that the real question to be decided in that case was whether notice under O 21, R. 22, was served on the judgment-debtors. It appears from a perusal of the judgment that a preliminary objection was taken on behalf of the respondent that no second appeal lay inasmuch as it was an application under O. 21, R. 90. That objection was overruled on the ground that non-service of notice under O. 21, R. 22 was a question which could only be raised under S. 47, Civil P. C. There are some observations made in that case which may support the appellant's contention, but the main ground on which the decision is based is that where a notice under O. 21, R. 22 is not served on the judgment-debtor his interest is not affected by the sale.

In *Khairajmal's* case (5) the facts were that the plaintiffs were not affected by the execution sale under which the defendants claimed to have purchased the property as the purchasers there occupied the character of mortgagees; and their Lordships of the Judicial Committee observed that though the sale could not then be set aside or treated as void by reason of mere irregularity of procedure in obtaining the decree or in execution thereof yet the Court had no jurisdiction to sell the property of persons who were no parties to the proceedings or properly represented on the record. It was accordingly held that against such persons the decree and the sale under it were void even without any proceeding to set them aside. The observation of their Lordships in that case lends some colour to the view that if the sale was void by reason of irregularity of procedure the Court would have the jurisdiction to set aside the entire sale. In the case of *Raja Gopala Ayyar*

v. Ramanuja Chariar (6) the defect discovered was nonservice of notice under O. 21, R. 22. The learned Chief Justice, who presided over the Full Bench after quoting a passage from the judgment of the Privy Council in *Khairajmal's* case (5) observed that it was a direct authority for the proposition that in such a case it was not necessary to apply to the Court to set aside the sale. In his Lordship's judgment the petitioner could proceed without applying to set aside the sale so as to avoid the limitation imposed by Art. 166, Limitation Act. He could, according to the learned Judge's view, bring a suit for possession of the property sold to the extent of his share but for the provisions of S. 47, Civil P. C. It was accordingly a case in which the party could not apply to have the entire sale set aside on the ground on which he rested his case, but was entitled to claim relief to the extent of his share affected by the sale. On behalf of the respondent reference has been made to the decision in the case of *Gangadhar Sarkar v. Khaje Abdul Aziz* (7), where it was held that at the instance of one of several co-owners of a putni taluk a sale of the taluk could be set aside as contemplated by S. 14, Reg. 8 of 1819. That decision is based upon the wording of a particular statute and I do not propose to base my judgment on the ratio of that case though on principle it does lend support to the view which I have taken; especially where their Lordships observed:

The sale cannot of course be set aside in part, but there appears to be nothing to prevent a co-sharer suing alone to set aside a sale.

Further, it will not be wrong to seek for analogy the principle underlying the proviso to O 9, R. 13 or to refer to the inherent power of the Court to pass proper order in the interest of justice.

As regards the previous application by two of the judgment-debtors, it has been found by the Court below that it was a collusive proceeding. But even if it were otherwise I think the Court below would have been justified in setting aside the entire sale on the findings arrived at by it.

The result of all these considerations is that we confirm the order of the Court

(6) A. I. R. 1924 Mad. 431=47 Mad. 288 (F. B.).

(7) [1909] 14 C. W. N. 138=2 I. C. 77=11 Cr. L. J. 34.

(5) [1904] 32 Cal. 293=32 I. A. 28=9 C.W.N. 201=8 Sar. 734 (P. C.).

below though not on the ground stated by it. This appeal accordingly fails and is dismissed with costs: 3 gold mohurs.

Graham, J.—I agree. There can be no doubt on the findings arrived at by the Court of appeal below that the sale must be set aside so far as judgment-debtor 56 is concerned. The question then arises whether the learned Subordinate Judge is right in setting aside the entire sale. In my opinion he was. The sale cannot in my judgment be set aside in part so as to make it partly good and partly bad. It must stand or fail as a whole. It is either good or bad. It cannot in the nature of things be both good and bad. If it is set aside at the instance of some of the judgment-debtors, or of one of the judgment-debtors, that order will enure to the benefit of the other judgment-debtors. The adoption of a contrary view would lead to complications. I agree with my learned brother that the appeal should be dismissed.

R.D.

Appeal dismissed.

*** A. I. R. 1928 Calcutta 353**

MITTER, J.

*Kanto Mohan Mullick and others—
Plaintiffs—Appellants.*

v.

*Jadab Chandra Khara and others—
Respondents.*

Appeal No. 38 of 1926, Decided on 14th February 1928, from appellate decree of Addl. Dist. Judge, Zillah Midnapore, D/- 31st August 1925.

** Evidence Act, S. 13—Suit for rent—Decree by another cosharer is not admissible as to rate of rent.*

A decree obtained by a cosharer landlord in a previous suit is not admissible in evidence as to rate of rent in a subsequent suit for rent by another cosharer landlord. It does not follow that because one cosharer was suing for the particular amount as representing his share of the rent, necessarily other cosharers would be getting the same amount if the shares were identical or a proportionate amount, unless there was one contract by which the tenancy was created: 22 C. W. N. 304, *not foll.*: 22 Cal. 533, (P. C.), *Dist.*: 25 Cal. 522, (F. B.) and A. I. R. 1923 P. C. 1, *Foll.*: [cf. A. I. R. 1928 Cal. 335=S. A. No. 2452 of 1925—Ed.]

[P 354 C 2]

Narendra Chandra Bose and Hemendra Chandra Sen—for Appellants.

Manmatha Nath Roy and Surya Kumar Aich—for Respondents.

Judgment.—The suit in which this appeal arises was brought by the plaintiff for recovery of 9 annas 12 gds. share of rent at the rate of Rs. 7-2-6 per annum. The plaintiff's allegation is that the rent in 76 annas share is Rs. 11-14-9. The plaintiff claimed rent for the years 1327—30 B. S., with cess and damages. Defendants 1 and 2, who contested the suit, dispute the jama payable by them in the 16 annas share as claimed by the plaintiff and stated that the jama in the 16 annas share was Rs. 8-4 as.-16½ gds. The Court of first instance, on a consideration of the evidence, both oral and documentary, held that the jama payable in plaintiff's share was as claimed by the plaintiff, and that the rent for the period in suit was admittedly in arrears, and decreed the suit with costs against the answering defendants and ex parte against the rest. An appeal was taken by the defendants to the lower appellate Court and the only point for determination before that Court was as to what is the jama payable by the defendants to the plaintiff. The learned Additional District Judge who heard the appeal considered the evidence in the case and held that the presumption in favour of the plaintiff arising out of the entry in the record-of-rights, which states the jama in the 16 annas share to be Rs. 11, odd as claimed by the plaintiff, has been rebutted by several documents, to wit, Exs. A, B, C, D and E, and he found that the plaintiff is entitled to get the jama admitted by the defendants. He, accordingly, modified the judgment of the Munsif and decreed the suit at the rate of Rs. 8-4 as.-16 gds.-2 karas for the 16-annas, and Rs. 4-15 as.-13 gds.-3 karas in plaintiff's share and he allowed damages at 25 per cent. with proportionate costs. A second appeal has been taken to this Court by the plaintiff.

A preliminary objection has been taken to the hearing of the appeal by the learned advocate for the defendants-respondents. It is argued that, as the Court granted a decree to the plaintiff at the admitted rate, there was no decision on the question of the amount of jama within the meaning of S. 153, Ben. Ten. Act. Reliance has been placed in support of this contention on the decision in the case of *Nekejaie v. Nanda Dulal Bamkeja* (1). That case on its facts is distinguishable

(1) [1897] 1 C. W. N. 711.

from the present case. There the Court held that the plaintiff's evidence was not reliable and that the defendant should consequently get a decree at the admitted rate. There was no decision on the evidence as to what the rate was. The case, as will appear from the report, proceeded on the defendant's admission. In the present case, the lower appellate Court had to displace the finding of the Court of first instance that the jama was not what the plaintiff alleged but was a different jama. In arriving at the conclusion that the jama was different from what the plaintiff alleged, the lower appellate Court considered the evidence, both oral and documentary, and came to the conclusion that the jama was what the defendants allege. In other words, the jama corresponded to the figure admitted by the defendants. It is not a case where the Court merely proceeded on the admission of the defendant. The Court had to decide that the conclusion of the Court of first instance that the jama was as the plaintiff claimed was not the right conclusion. Consequently, it cannot be said in the present case that there was no decision on the amount of rent. In this view, I do not think there is any substance in the preliminary objection which must, accordingly, be overruled.

On the merits it has been argued by the learned advocate for the appellant that the lower appellate Court has committed an error of law in deciding the appeal on inadmissible evidence. It is said that Exs. A, C and D are decrees which were obtained by plaintiffs' cosharers against the defendants, and as the plaintiff, who represents the estate of the late Babu Manik Lal Seal was not a party to the said suit, the decrees were not inter partes and, consequently, are not admissible in evidence. Reliance has been placed in support of this contention on two decisions of this Court in the cases of *Abdul Ali v. Raj Chandra Das* (2), and *Prem Chand Mandal v. Official Trustee of Bengal*, 27, C. W. N. p. 56, of the notes portion. The learned advocate for the respondent has relied on a decision of this Court in the case of *Byomkesh Chakravarti v. Jagadishwar Roy* (3). The first two decisions support the appellant's case. The last deci-

sion, which takes the contrary view, was an ex-parte decision in an appeal in which the respondents were not represented. I think that, having regard to the decision of the Full Bench in the case of *Tepu Khan v. Rajani Mohan Das* (4), and the recent decision of the Judicial Committee in the case of *Naresh Narayan Roy v. Secy. of State* (5), it must be held that these decrees are not admissible in evidence. As will appear from the case in 25 Cal., the reason for holding that such decrees were not admissible in evidence depended on one circumstance, namely, that the subject-matter of the two suits were not identical. In the present suit the parties are concerned with the share of rent which the plaintiff is entitled to get. It has been argued by the learned advocate for the appellant that there is no evidence to show that there was no contract creating the jama. That is a very important circumstance. It does not follow that because one cosharer was suing for the particular amount as representing his share of the rent necessarily other cosharers would be getting the same amount if the shares were identical or a proportionate amount unless there was one contract by which the tenancy was created. The following observations of the Judicial Committee of the Privy Council in the case to which I have just referred are pertinent to the present question :

This was a recovery by a cosharer as against the Secretary of State of her right in the lands for which the plaintiff is suing in the present suit. It is not in itself conclusive, because the plaintiff was not a party to that suit. Objection, indeed, was made in that suit by the Secretary of State that the Rani could not sue without making other cosharers parties; and the answer made by the Court was that it was unnecessary as the judgment would only decide her right, and would not be binding either in favour of her or against other cosharers. It was rejected by the High Court even as evidence; and this rejection might have been right, if it stood alone. But it was followed by a deed of partition, dated 13th December 1909, between the Rani, an officer of the Court of Wards acting for the present plaintiff, then an infant, and a representative of the Secretary of State, whereby the tract marked yellow was divided between the three parties according to their several shares or supposed shares.

From these observations it will appear that the inclination of their Lordships'

(2) [1906] 10 C. W. N., 1084.

(3) [1917] 22 C. W. N. 804=40 I. C. 442.

(4) [1898] 25 Cal 522=2 C. W. N. 501 (F. B.).

(5) A. I. R. 1923 P. C. 1=50 Cal. 446=50 I. A. 121 (P. C.).

opinion was that the findings in the suit by a cosharer landlord in respect of the identical strip of land would not strictly be evidence; but having regard to the fact that the Secretary of State acted on the decree, their Lordships held that it might be treated as good evidence in the case. The learned advocate for the respondents argued that, having regard to the decision of the Judicial Committee in the case of *Ramranjan Chuckerbutty v. Ram Narain Singh* (6). Such decrees by cosharer landlords, as were admitted and acted upon by the learned Additional District Judge in this case, could be treated as evidence, however weak the value of such evidence might be.

But the distinction between *Ramranjan Chuckerbutty v. Ram Narain Singh* (6) and the present case lies in the fact that the observations of the Judicial Committee were limited to cases where the subject-matter of the previous judgment was identical with the subject-matter of the suit in which those judgments were sought to be offered as evidence, and their Lordships held that under S. 13, Evidence Act, such judgment could be treated as evidence of a transaction within the meaning of that section. Here the suit by the cosharers was in respect of his own share of the rent in the previous suit to which the present plaintiffs were not parties. Consequently the decrees A, C and D did not refer to the same subject-matter to which the present suit relates. That was a distinction which was noticed in the Full Bench case in *Tepu Khan v. Rajani Mohan Das* (4) and the majority of the Full Bench held that, where the subject-matter of the previous judgments were not identical with the subject-matter of the suit in which such judgments were sought to be introduced as evidence, the earlier judgments could not be held admissible. With regard to Ex. E, it appears that it is a decision on the question of status of the present defendant and is not relevant on the question as to what is the amount of the jama. That decision also must be excluded from evidence. It appears that the record-of-rights is in plaintiff's favour and it will be for the defendant-respondent to establish whether there is sufficient evidence, after Exs. A, C, D and E are excluded from consideration to rebut

the presumption of the correctness of the record-of-rights.

The result is that the decree of the lower appellate Court is set aside and the case remitted to him for re-hearing the appeal on the rest of the evidence which remain after excluding the documents A, C, D and E from consideration in the light of the observations indicated above. Costs of this appeal will abide the result.

D.D.

Case remanded.

* A. I. R. 1928 Calcutta 355

MULLICK, J.

Kanta Mohan Mullik and others—
Plaintiffs—Appellants.

v.

*Gopi Nath Santra and others—*Respon-
dents.

Appeal No. 2452 of 1925, Decided on 15th February 1928, from appellate decree of 1st Sub-Judge, Midnapore, D/- 19th August 1925.

* *Evidence Act, S. 13—Rent suit—Decree by another cosharer landlord is admissible.*

A decree obtained by a cosharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another cosharer landlord: 22 C. W. N. 304 and 22 Cal. 533 (P. C.), *Foll.*: 10 C. W. N. 1084, *Doubted.* [*cf.* A. I. R. 1928 Cal. 353=S. A. 38/26—*Ed.*]. [P 356 C 2]

*Narendra Chandra Bose and Hamendra Chandra Sen—*for Appellants.

*Bijan Kumar Mukerji and Sadhan Chandra Roy Chowdhury—*for Respondents.

Judgment.—This suit out of which this appeal arises was one for recovery of arrears of rent. The plaintiffs claimed rent on the allegation that the annual jama of the holding was Rs. 45-13-6. The defence inter alia was that the rental of the holding was not Rs. 45-13-6 as alleged by the plaintiffs, but Rs. 34-13-9 only. The trial Judge gave effect to this defence and decreed the plaintiffs' suit in part on the basis of the rate admitted by the defendants. The matter was then taken to the lower appellate Court by the plaintiffs but with no better success there. The plaintiffs have come up to this Court in second appeal.

To establish their case that the rental was Rs. 45 odd the plaintiffs filed an ex-

(6) [1895] 22 Cal. 533=24 I. A. 60=6 Sar. 530 (P. C.).

parte decree obtained by another co-sharer landlord who had claimed rent on the allegation that the rental of the holding was Rs. 45-13-6. The learned Subordinate Judge held that this decree obtained by a cosharer landlord was not admissible in evidence, and, finding also that even if this decree would be taken as admissible there was a contested judgment in a subsequent case to show that the previous decree was no longer of any value, the learned Judge came to the conclusion that the plaintiffs were not entitled to any rent beyond what was admitted by the defendants. Both the learned vakils appearing for the appellants as well as the respondents, and myself have searched in vain for the contested judgment referred to by the learned Subordinate Judge in his judgment. There is no such document to be found anywhere in the record of the case. The second ground on which the learned Judge relied, namely, that there was a contested judgment going against the previous rent decree must, therefore go.

The whole controversy before me centred round the question whether the exparte decree obtained by a cosharer landlord was admissible in evidence or not. The learned Subordinate Judge has held, as I have said before, that it was inadmissible, and for this he relied on the Full Bench case of *Surendra Nath Pal v. Brojo Nath Pal* (1), which had followed the Full Bench decision in *Gujja Lal v. Fatteh Lal* (2). But in another Full Bench case in *Tepu Khan v. Rajani Mohan Das* (3), their Lordships observed that the dictum in the cases in *Gujja Lal v. Fatteh Lal* (2) and *Surendra Nath v. Brojo Nath* (1), (referred to above) had been materially qualified by the observations of their Lordships of the Judicial Committee in *Ram Ranjan Chakravarty v. Ram Narain Singh* (4). In the 1925 Cal case it was held that a previous decree obtained by a cosharer landlord would be admissible in evidence in a subsequent litigation if the subject-matters of the two suits would be identical; otherwise not. The learned vakil for the respondents contended that

the subject-matter in the suit from which this appeal arises was not identical with, but different from that in the previous suit in which the exparte decree had been obtained by a cosharer landlord, and in support of this contention he cited the case of *Abdul Ali v. Raj Chandra Das* (5). The facts of the case in *Abdul Ali v. Raj Chandra Das* (5) were very much similar to the facts in the present case. But their Lordships when they held that the previous decree obtained by a cosharer landlord was not admissible in evidence as to the rate of rent in a suit brought by another cosharer landlord on the ground that the subject-matters of the two suits were different gave no reasons why they considered that the subject-matters in the two suits were not identical. It is difficult to understand how it can be said that the subject-matters in the two suits were different. The amounts claimed were no doubt different and the claimants also were not the same. But the real dispute in the two suits was as to what the amount of the rental was. Their Lordships of the Judicial Committee in *Ram Ranjan Chakravarty v. Ram Narain Singh* (4), at p. 542, held that the judgment in a previous suit would be evidence for the purpose of showing what the amount of the rent was. It is to be observed also that in a case that was decided in this Court subsequent to the decision in *Abdul Ali v. Raj Chandra Das* (5), namely, in the case of *Byom Kesh Chakravarty v. Jagadiswar Rai* (6), it was held that a decree obtained by a cosharer landlord is admissible in evidence as to the rate of rent in a subsequent suit for rent brought by another cosharer landlord. On a consideration, therefore, of the authorities on the point and specially of the observations of their Lordships of the Judicial Committee in *Ram Ranjan Chakravarty v. Ram Narain Singh* (4) I am of opinion that the learned Subordinate Judge was wrong in law when he held that the decree in the previous suit was inadmissible in evidence. In my opinion the decree was admissible, and that being so, the case must go back to the lower appellate Court to have the appeal reheard.

The result is that the judgment and the decree of the lower appellate Court

(1) [1886] 13 Cal. 352.

(2) [1881] 6 Cal. 171=6 C. L. R. 439.

(3) [1898] 25 Cal. 522=2 C. W. N. 501.

(4) [1895] 22 Cal. 533=22 I. A. 60=6 Sar 530 (P. C.).

(5) [1906] 10 C. W. N. 1084.

(6) [1917] 22 C. W. N. 304=40 I. C. 442.

are set aside and the case is remitted to that Court for its determination according to law after admitting in evidence the ex-parte decree which had been obtained by another co-sharer landlord. Costs will abide the result.

D.D.

Case remanded.

A. I. R. 1928 Calcutta 357

MUKERJEE, J.

Radha Kishan—Accused—Petitioner.

v.

Chairman of the Gauhati Municipality—Opposite Party.

Criminal Revn. Petn. No. 40 of 1928,
Decided on 20th March 1928.

(a) *Assam Municipal Act* (1923), S. 221—*Person against whom sanction is not obtained cannot be convicted.*

G was the agent of *M* who dealt in mustard oil which was found to be not genuine. Order for prosecution was sanctioned against *G* alone, but during trial *M* appeared and took upon himself the responsibility. *G* remained absent. *M* was convicted under S. 221.

Held: that the order obtained for prosecution was against *G* alone and, therefore, *M* could not be convicted. [P 359 C 1]

(b) *Assam Municipal Act* (1923), Ss. 220 to 223—*Attention of sanctioning officer should be directed to person or persons to be proceeded against.*

Sections 220 to 223 involve that the attention of the officer, who is to give order or consent to the institution of the proceedings, should be directed to the person or persons against whom such proceedings are to be instituted, though a general order or consent to the prosecution may be made. [P 353 C 1]

(c) *Assam Municipal Act* (1923), S. 30—*Chairman can delegate his powers only by written order—Act done by Vice-Chairman with Chairman's express or implied consent is not invalid.*

A written order is essential for delegation of authority to the Vice-Chairman by the Chairman of the Municipality, but if there is no such delegation, an act done by the former shall not be invalid if done with the express or implied consent of the latter previously or subsequently obtained. [P 359 C 1]

Kshitish Chandra Chakravarti and *Panchnan Ghosal*—for Petitioner.

Order.—This rule has been issued to show cause why the conviction of the petitioner under S. 221, sub-S. (1), Cl. (e) read with sub-S. (3), *Assam Municipal Act* (1 of 1923), and the sentence of a fine of Rs. 100 passed on him under that section should not be set aside on grounds 1, 2 and 3 of the petition.

Ground 1 is to the effect that the trial Court had no jurisdiction to try the case against the petitioner inasmuch as the complaint that was originally made and on the basis of which the case was started was not a complaint made against the petitioner, but was a complaint against the petitioner's gomastha, Gajananda Das and that the Deputy Commissioner had given his consent to the institution of proceedings against Gajananda Das and not against the petitioner. Ground 2 is much to the same effect as ground 1. Ground 3 purports to challenge the validity of the order or consent of the Municipal Board in respect of the prosecutions that is required by S. 318 of the Act.

The Health Officer of the Gauhati Municipality submitted a report to the Chairman of that Municipality in which it was stated that, on 8th March 1927, the said Health Officer has purchased a quantity of mustard oil from Gajananda Agarwalla of the Radha Krishna Oil Mill Company and that on examination of the said sample, in accordance with the provisions of the Act, it was discovered that the stuff was not genuine. By the said report the Health Officer asked that sanction might be accorded to a prosecution under S. 221 of the Act. It appears that the Chairman, on receipt of the said report, endorsed it over to the Vice-Chairman with the following remarks:

V. O. Please see whether prosecution will stand on these cases. Reports are contradictory as it appears to me.

The next endorsement is that of the Vice-Chairman who simply forwarded the papers to the Deputy Commissioner "for favour of prosecution." The Deputy Commissioner as far as can be made out from the papers that I have before me, returned the papers to the Vice-Chairman with a request to report whether a prosecution would stand. The Vice-Chairman, therefore, reported to the Deputy Commissioner that a prosecution would lie under the *Assam Municipality Act*, 1923. On that the Deputy Commissioner passed an order which ran in these words:

Prosecution sanctioned. Summons to accused under S. 221 of Act 1 of 1923. To Srijut T. Bhuyan, S. D. M., for disposal.

On the basis of this order that was passed by the Deputy Commissioner, Gajananda Agarwalla, whose name appeared in the report that was originally

made by the Health Officer as aforesaid, was put upon his trial before the aforesaid Sub-Deputy Magistrate. On the date fixed for the hearing of the case the said Gajananda Agarwalla did not appear and the petitioner being present in Court, and he apparently taking upon himself the responsibility of any transaction that might have been made by Gajananda and in respect of which the case was to go on, the Sub-Deputy Magistrate proceeded to try the petitioner for an offence under S. 221, sub-S. (1) read with sub-S. (3) of the Act and eventually convicted and sentenced him as already mentioned.

The validity of the proceedings against the petitioner has been challenged upon the grounds that are set out in the rule to which I have already referred. Shortly put, it is urged that the proceedings as against the petitioner were illegally started inasmuch as the sanction that had been given by the Deputy Commissioner was in respect of the prosecution, not of the petitioner, but of his gomastha, Gajananda Agarwalla, and that, in the absence of an order or consent of the Deputy Commissioner in respect of proceedings against the petitioner, the petitioner could not be lawfully tried. It has also been contended that, with regard to the other sanction that is required by law, namely, the order or consent of the Municipal Board, it is only the Chairman who is competent to grant it unless he has delegated his powers in that respect to the Vice-Chairman and that inasmuch as, in the present case, no such delegation has been proved, the Vice-Chairman was not competent to order or give consent to the initiation of the prosecution.

So far as the first of these contentions is concerned, what has been said in the explanation that has been submitted to this Court by the learned Extra Assistant Commissioner is that the original complaint as disclosed in the report of the Health Officer was directed against all persons of the Radha Krishna Oil Mill who could be proceeded against for offences under S. 221 and, therefore, included the petitioner who, on the statement that he made in the course of the trial, is the owner or one of the owners of the Radha Krishna Oil Mill, and that the sanction that was accorded for the

prosecution of Gajananda could be availed of for the purpose of the prosecution of the petitioner. Now, S. 221, Assam Municipal Act (1 of 1923) makes punishable the doing of certain acts, and sub-S. (3) of that section says that any person who contravenes any of the provisions of sub-S. (1) or sub-S. (2) shall be punished, etc. The present case is one in which it is alleged that sub-S. (1) of S. 221 has been contravened because the accused person, whoever he was, directly or indirectly, himself or by any other person on his behalf, sold or exposed for sale mustard oil which is mentioned in Cl. (e) of that sub-section. S. 224 says that no proceedings shall be instituted under Ss. 220 to 223—S. 221 being one of those sections—without the order or consent of the Deputy Commissioner or the Sub-Divisional Magistrate. The law contemplates that, with regard to proceedings to be started in respect of matters coming within the purview of Ss. 220 to 223, the Deputy Commissioner or the Sub-Divisional Officer will take into consideration the facts of each particular case and come to a conclusion as to whether proceedings should or should not be started. This necessarily involves that the attention of the officer who is to give his order or consent to the institution of the proceedings should be directed to the person or persons against whom such proceedings are to be instituted. While I do not agree with the petitioner's contention that a general order or consent to proceedings under any of these sections against any person or persons who may be concerned in the acts may not be made or given, I am of opinion that the order that was actually passed in the present case by the Deputy Commissioner and the terms of the report on it was endorsed preclude the supposition that the Deputy Commissioner meant to do anything else than consenting to or ordering the prosecution of Gajananda Das.

The fact that, in the report that was submitted by the Health Officer, Radhakrishna Oil Mill was mentioned is not sufficient to disclose that any offence was committed by the owner or owners of the Mills: all that was said was Gajananda Das had committed the offence and the order passed by the Deputy Commissioner cannot be read as authorizing the summoning of anybody else than Gajananda Das. In my opinion it was not open to

the trial Magistrate to attach the order or consent that had been previously obtained for the proceedings against Gajamanda Das to the prosecution of anybody else. The first contention, therefore, is well founded.

Then, as regards the other contention of the petitioner, namely, as to the competency of the Vice-Chairman to sanction the prosecution of the petitioner, the position seems to be this: Under S. 318 of the Act no prosecution for an offence under the Act can be instituted without the consent of the Board. Under S. 29, the Chairman is authorized to exercise all the powers by the Act in the Board for the transaction of the business connected with the Act or for the purpose of making any order authorized thereby. S. 30 empowers the Chairman to delegate his powers in this respect by a written order to the Vice-Chairman subject to certain restrictions. There is a proviso to that section which says that nothing done by the Vice-Chairman which might have been done under the authority of a written order from the Chairman shall be invalid for want of defect of such written order if it be done with the express or implied consent of the Chairman previously or subsequently obtained.

Section 30, therefore, means that a delegation by a written order is essential; but, if there is no such delegation, an act done by the Vice-Chairman shall not be invalid if done with the express or implied consent of the Chairman previously or subsequently obtained. In the explanation that has been submitted by the learned Extra Assistant Commissioner, it is stated that there is in existence a general order of the Chairman in writing authorizing the Vice-Chairman to prosecute people for offences under this Act. No details, however, of this general order have been given in the explanation and there are no sufficient materials on the record from which it can be ascertained whether there was in this case any express or implied consent of the Chairman, previously or subsequently obtained within the meaning of the proviso to S. 30. Were this, however, the only ground on which the proceedings could be held to be defective, possibly, I would not have interfered in view of the fact that the objection to the validity of the Vice-Chairman's order was not a point that was made at any time in the course of the trial. The other contention, to which

I have already referred, in my opinion, is more substantial, and on it this Rule should in my judgment be made absolute. I accordingly set aside the conviction of the petitioner that is complained of in this Rule and direct that the fine, if paid by him, be refunded.

A L./R.K.

Conviction set aside.

* A. I. R. 1928 Calcutta 359

C. C. GHOSE AND JACKSON, JJ.

Mohendra Chundra Nath Ghosh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 272 and 273 of 1928, Decided on 3rd May 1928.

(a) *Copyright Act (3 of 1914), S. 7—"Copy" defined.*

A copy has been defined as that which comes so near the original as to suggest the original to the mind of the spectator. It is always a question of fact that the Court will examine the degree of resemblance: (1905) 1 Ch. 519 and A. I. R. 1925 Cal. 220, *Foll.* [P 360 C 1]

* (b) *Copyright Act (1914), S. 7—Infringement of copyright of pictures—Offending pictures must be copies of substantial portions of copyright pictures.*

In deciding whether there is an infringement of copyright in pictures, the question is whether the offending pictures are copies of substantial portions of the copyright pictures. The figures may have been reduced in the offending pictures and slight modifications may have been introduced or the clothes and colours may have been different but it is sufficient if the main figures have an identical pose. [P 360 C 1]

Brojendra Mitter and Preonath Dutt—for Petitioners.

Langford James, Jatish Chunder Guha and Suresh Chander Taluqdar—for the Crown.

C. C. Ghose, J.—These are two Rules calling upon the Chief Presidency Magistrate of Calcutta to show cause why the conviction and sentence under S. 7, Indian Copyright Act (Act 3 of 1914), made and passed on the petitioners, should not be set aside on the ground that on the facts there was no infringement of the copyright of the complainant in the pictures referred to herein.

The case for the prosecution is that the complainant is the owner, inventor or designer of certain pictures being Exs. 1, 4 and 7, and that the offending pictures, Exs. 13, 14 and 15, are infringements of the copyrights in respect of the ori-

ginal pictures. The Magistrate has, after careful consideration, come to the conclusion that the case for the prosecution is correct, and has accordingly convicted the petitioners, and has sentenced them each to pay a fine of Rs. 100 or in default to suffer simple imprisonment for a period of one month.

The complainant alleges that the offending pictures, Exs. 13, 14 and 15, are copies of his said original pictures and that it is immaterial whether the copy in each case is or is not of the same size as the original pictures. Now, what is a copy? A copy has been defined as that which comes so near the original as to suggest the original to the mind of the spectator: per Kekewich, J., in (1905) 1 *Ch.* 519. It is always a question of fact that the Court will examine the degree of resemblance: see *Imperial Tobacco Co. v. Atlantic Tobacco Co.* (1). It is argued, however, that the three pictures, Ex. 1, 4 and 7, are representations of a familiar subject in Vaishnav literature and, unless there is in the offending pictures similarity in the scheme, treatment and design, there can be no infringement: see 8 *Hals* 197. In this case, the learned Chief Presidency Magistrate has gone into the question very carefully and there are good grounds for his conclusion that the offending pictures have been produced by taking copies of Ex. 1, 4 and 7 by having them retouched, i. e., painted over in different colours and using these retouched pictures as originals for making negatives, blocks and pictures by the ordinary three colour process. No doubt the sentiment expressed in the copyright pictures is common in Vaishnav literature, but the question is whether the offending pictures are copies of substantial portions of the copyright pictures. In my view there can be only one answer to this question and it is in the affirmative. The figures may have been reduced in the offending pictures and slight modifications may have been introduced, or the clothes and colours may have been different, but there can be no doubt whatsoever that the main figures have an identical pose. These are not, in my opinion, coincidences due to the pictures being produced to represent common stock ideas. If once that conclusion is reached, it is difficult to see on what grounds the orders made by

the Magistrate can be challenged. In my opinion, the petitioners have failed to show any grounds for interfering with the orders complained of and I would accordingly discharge these rules.

Jackson, J.—I agree.

R.D.

Rules discharged.

A. I. R. 1928 Calcutta 360

WALMSLEY AND B. B. GHOSH, JJ.

Mohesh Chandra Deb Nath — Defendant—Appellant.

v.

Mathura Chandra Deb Nath and others — Plaintiffs—Respondents.

Appeal No. 77 of 1923, Decided on 25th May 1925, from original decree of 3rd Sub-Judge, Mymensingh, D/- 20th January 1923.

Will—Custom—A raiyat cannot bequeath his non-transferable occupancy right—Custom.

In Bengal a raiyat having a nontransferable right of occupancy cannot bequeath that right: 42 *Cal.* 254; 18 *C. W. N.* 1294; and 22 *C. W. N.* 474; *Foll.*: 42 *Cal.* 172 and 24 *C. W. N.* 818, *Expl.* [P 361 C 1]

Kali Kinkar Chakraverty — for Appellant.

Tarak Chandra Chakraverty and Prafulla Chandra Chakraverty — for Respondents.

Walmsley, J.—This appeal is preferred by the defendant. He is the eldest son of Mucharu who died leaving five sons, including the appellant and a widow. One of the sons, namely Dhirendra, died childless after his father and his interest passed to his mother Soudamini. The other three sons and the mother brought the suit out of which this appeal arises against the defendant Mohesh for partition of the properties left by Mucharu claiming a share of 4/5ths for themselves and admitting the defendant's share to be 1/5th. Mohesh in defence set up a will executed by Mucharu in January 1918, about three weeks before his death, and, after the institution of the present suit, he applied for probate of that will and succeeded in obtaining probate, after a struggle, on 13th January 1922. In this case, Mohesh contends that the will of which he has obtained probate gives him a one-fourth share in the money-lending business and a share of six-annas odd in the

jote properties left by Mucharu and that a decree for partition must not override the provisions of the will.

So far as the money-lending business is concerned, the learned Judge of the Court below has accepted the defendant's proposition that he is entitled to the share allotted to him by the will. The appeal relates to the jote properties only. In regard to them, the learned Judge has held that the will did not operate to disturb the ordinary mode of devolution. It is contended before us on behalf of the defendant-appellant, that the learned Judge was wrong in taking this view and that the defendant ought to be allowed the share mentioned in the will. There is no provision in the Bengal Tenancy Act on the question whether a raiyat having a non transferable right of occupancy can bequeath that right. S. 26 of the Act alludes to what happens when the raiyat dies intestate, but that is all. Consequently the matter is one which has to be determined by custom and usage. In regard to that, there is no evidence in this case. The learned Subordinate Judge has referred to three decisions of this Court upon the question whether such a raiyat ordinarily has a right to bequeath his occupancy jote. One of the cases is the case of *Amulya Ratan Sarkar v. Tarininath De* (1), which was followed shortly afterwards by the case of *Kunja Lal Roy v. Umesh Chandra Roy* (2). In both these cases it was held that such a raiyat had not the right to bequeath his jote interest. The same view was adopted in the case of *Umesh Chandra Dutt v. Joynath Das* (3), where Mr. Justice Chatterji, in delivering his judgment, referred to the argument that the Full Bench decision in the case of *Dayamayee v. Ananda Mohun* (4) had effected the question and expressed his view that it had not done so. I refer to that case because it has been contended before us that the principle of the rulings I have mentioned has been changed, first by the decision in *Dayamayee's* case (4) and then by the decision of the Special Bench in the case of

Chandra Binode Kunda v. Alla Bux Dewan (5).

I fully agree with what Mr. Justice Chatterji said with reference to the argument based on *Dayamayee's* case (4). With regard to *Chandra Binode's* case (5) our attention has been drawn to the judgment delivered by Mukherji, J., in that case, and it is urged that he himself cast a doubt on his own decision in *Amulya Ratan's* case (1). To my mind, that is a complete misreading of the learned Judge's judgment. He said that it was not necessary to refer to *Amulya Ratan's* case (1). He did not say why; but I think it is clear that he regarded the question involved in *Amulya Ratan's* case (1) as lying outside the question then under consideration. The conclusion in *Chandra Binode's* case (5) was that the case of *Bhiram Ali v. Gopi Kanta* (6) was erroneously decided and that the decision of the Full Bench in *Dayamayee v. Ananda Mohan* (4) could not be supported in so far as it affirmed the principle enunciated therein. An examination of *Bhiram Ali's* case (6) shows that the question raised by it had not the remotest connexion with a raiyat's power of bequeast. I am, therefore, of opinion that the decision of the Special Bench has not weakened the authority of the decision which I have mentioned and I hold that in this cases the learned Judge of the Court below has taken a correct view of the matter and that his decision must be affirmed. The appeal is accordingly dismissed with costs. Hearing fee, ten gold mohurs.

B. B. Ghosh, J.—I agree.

S.J. *Appeal dismissed.*

(5) [1920] 24 C. W. N. 818=58 I. C. 353 = 31 C. L. J. 510 (F.B.).

(6) [1897] 24 Cal. 355=1 C. W. N. 396.

* * A. I. R. 1928 Calcutta 361

SUHWARADY AND CAMMIADÉ, JJ.

Gahar Ali Houladar—Defendant 7—Appellant.

v.

Abdul Owahab Sikdar and others—Defendants—Respondents.

Appeal No 981 of 1925, Decided on 19th April 1928 from appellate decree of 1st Sub. Judge, Backarganj, D/- 27th January 1925.

(1) [1915] 42 Cal. 254 = 21 C. L. J. 187=27 I. C. 235=18 C. W. N. 1290.

(2) [1915] 18 C. W. N. 1234=27 I. C. 352.

(3) [1918] 22 C. W. N. 474=43 I. C. 779.

(4) [1913] 42 Cal. 172 = 20 C. L. J. 52 = 27 I. C. 61=18 C. W. N. 971 (F. B.).

**** Limitation Act, Art. 99—Payment of decree amount by one co-judgment-debtor and acceptance by Court—Suit for contribution—“Date of payment” is the date of acceptance of deposit of the money by the Court to the credit of the decree-holder.**

Where payment is made by a co-judgment-debtor in Court and the payment is appropriated by Court in full satisfaction of a decree, it is deemed to have accepted the payment on behalf of the decree-holder, it being looked upon as his agent or quasi agent; and, therefore, the limitation for a suit for contribution by such judgment-debtor against the other co-judgment-debtor begins to run from the date of acceptance of deposit in Court. [P 363 C 1]

The criterion must always be whether or not the deposit made in excess of what is due by the person making the deposit, did or did not remain under the control of the person making it : 25 Cal. 814 (P.C.) ; 3 C. L. R. 480 ; 4 Cal. 529; and 36 I.C. 332; Dist.: 3 U. B. R. 261, Rel. on. [P 365 C 1]

Jatindra Nath Sanyal—for Appellant.

Suresh Chandra Talukdar—for Respondents.

Suhrawardy, J.—The plaintiff and the defendant were cosharers in a certain taluk. The landlords of the taluk obtained a decree for rent and when the property was advertised for sale the plaintiff deposited the entire decretal amount in Court which was accepted by the Court and the landlords' decree was recorded as satisfied. The deposit was made by the plaintiff in Court on 4th February 1920, but the money was actually withdrawn by the decree-holders on 14th February 1920. The present suit for contribution by the plaintiff against his cosharer, the defendant, was instituted on 15th February 1923, the 14th February being a holiday. The question that arises in this case is whether the suit is in time. The Courts below have differed on this point, the lower appellate Court being of opinion that the period from which limitation should be reckoned is the date on which the decree-holder withdrew the amount, namely the 14th February 1920. In this view it held that the plaintiff's suit was not barred by limitation. The Munsiff, on the other hand, was of opinion that time ought to be calculated from 4th February 1920, the date on which the money was deposited by the plaintiff. In this view he held that the suit was barred by limitation and dismissed it. The question involved does not appear to have ever come directly up for consideration in any Court in India so far as the reported authorities go. The simple ques-

tion that we are called upon to decide is as to from what date in the circumstances of this case the period of limitation should be counted as prescribed by Art. 99, Lim. Act. Column 3 of that article says that the time should be computed from the "date of the payment in excess of the plaintiff's own share." There are a few other articles in the Limitation Act in which time runs from the date of payment, for example, Arts. 61, 81, 82 and 107. In all these articles the terminus a quo is laid down as the date of the payment. Column 1 of Art. 99 says that a suit for contribution by a party who has paid the whole or more than his share of the amount due under the joint decree, etc., etc. Neither does column 1 nor column 3 say clearly about payment to any particular person. The word "payment" in Column 3 should be read as conveying the same sense as the words "has paid" in column 1. The appellant argues that the payment is complete as soon as the amount is put into the Court to the credit of the decree-holder. The respondent, on the other hand, contends that there was no payment before the decree-holder drew out the amount from Court. Both of these extreme views may not be correct. But the facts of this case clearly support the contention of the appellant. The money was deposited on 4th February 1920 by means of a challan, the first column of which mentions the name of the plaintiff as the person on whose behalf the deposit was made. Column 2 mentions the name of the person to whose credit the amount was to be placed in the books of the Court, namely the decree-holder. Column 3 gives the number of the execution case and the names of the decree-holder and the judgment-debtor. Column 4 contains the particulars of receipt as the claim, with costs, due to the decree-holder. The following column mentions the amount deposited. On 4th of February the following order was passed by the Court in which the money was deposited :

Judgment-debtor is permitted to deposit the decretal amount as prayed.

This order was followed by another order of the same date :

Money deposited by judgment-debtor 10 and challan filed. Dismissed on full satisfaction.

Now on these facts the question that arises is whether the payment in Court or deposit in Court to the credit of the decree-holder and accepted by the Court was a payment within the meaning of Art. 99, col. 3. In my judgment the deposit or credit in the circumstances, and in view of the order passed by the Court, must be taken to be a payment within the meaning of that article. The money was deposited in Court to the credit of the decree-holder and it was accepted by the Court on behalf of the decree-holder and the decree was satisfied in full.

As I have said, the article does not mention the person to whom it should be made. The question should be looked at from the stand-point as to whether the payment into Court by the plaintiff was a payment within the meaning of the law or a mere revocable deposit. I think that as the payment was made by the plaintiff of the decretal amount, and as he lost all dominion over it, it must be taken to be payment by him within the article. There is the further fact in this case that the payment made by the plaintiff was appropriated by the Court in full satisfaction of the decree, that is, in payment of the decree-holder's due. The Court in this sense may be looked upon as an agent or quasi-agent of the decree holder. It took the money on behalf of the decree-holder, employed it for the purpose for which it was deposited and held it on behalf of the decree-holder. It accordingly, in my opinion, makes no difference when the decree holder withdraws the amount. It cannot be questioned that if the decree-holder were present on the day when the deposit was made he could have withdrawn the amount. To hold otherwise, namely, that the period of limitation should run from the date when the decree-holder withdraws the amount, would be to make the cause of action depend on the act of a third party who may indefinitely postpone it. In *Apurba Krishna Roy v. Chunder Money Debi* (1), it was held that there was no time-limit for a decree-holder to withdraw the amount deposited in Court to his credit. In that case, as in the case of *Hem Chunder Chaudhury v. Brojo Sundari Debi* (2), the question was whe-

ther any limitation affects the right of the judgment-creditor to withdraw a sum deposited by the judgment-debtor. The learned Judge remarked that the money so deposited could be taken by the creditor at any time after the deposit. In that particular case the money remained in Court for fifteen years. If effect is given to the contention of the respondent, that time should run from the date on which the money was withdrawn by the decree-holder it would seem that if the decree-holder does not draw the amount and allows it to remain in Court for ever, the plaintiff can have no right of contribution against his co-judgment-debtor. This question seems to me to be too absurd to maintain.

As I have stated there are no reported cases directly in point, but there are some cases in which, with reference to the particular facts of those cases, the word "payment," as appears in Art. 99, has been construed. In *Sakhamoni Chaudhurani v. Ishan Chunder Roy* (3) the facts were that a decree for eighty thousand rupees was obtained against the plaintiff. The plaintiff moved the High Court to stay its execution. It was ordered that such stay would be made if the plaintiff deposited a sum of fifty thousand rupees in the Court below and this was done. It was subsequently, on 3rd April 1885, withdrawn by the judgment-creditor. On these facts the Judicial Committee, without examining the point, accepted the view taken by the Court below that the cause of action arose on 1st April 1885. This case does not settle the point as it was not raised in it and it was not considered by their Lordships. On the other hand, on the facts of that case, it is clear that the money was not deposited to the credit of the decree-holder so that dominion over it had not passed from the judgment-debtor to the decree-holder who could withdraw it at any time he pleases. In *Radha Kristo Balo v. Rup Chunder Nandi* (4) on 1st March 1873 the plaintiffs in that case, who were judgment-debtors in a previous execution case, made an application to the Court stating that a certain sum was in deposit to their account in another Court and praying that the executing Court would send for so much of the amount as would be neces-

(1) [1900] 10 C. W. N. 854 (F. B.).

(2) [1882] 8 Cal. 89=10 C. L. R. 272.

(3) [1898] 25 Cal. 844=25 I. A. 95=2 C. W. N. 402=7 Sar. 294 (P. C.).

(4) 8 C. L. R. 480.

sary to satisfy the decree. The money was received by the executing Court on 1st April 1873 and paid over on that date to the decree-holder. It was held that time ran in that case from the 1st April 1873, when the money was received by the executing Court and paid over to the decree-holder, and, therefore, the suit, which was a suit for contribution instituted on 17th March 1876, was in time. This case does not help us in the examination of the present question. In *Fuckoruddin Mohamed Ahsan v. Mohim Chunder Chaudhury* (5) the plaintiff brought a suit for contribution stating that the cause of action arose on 7th June 1873, on which date his property was sold in satisfaction of a joint debt. The suit was instituted on 5th June 1876. The plaint was returned to the plaintiff for amendment by inserting the sums the plaintiff was entitled to get from each of the defendants. The plaint was re-filed on 17th July 1876. On the objection as to limitation the plaintiff contended that his cause of action did not arise as was stated in the previous plaint on the date of the auction sale of the property, but on the date on which the sale proceeds were paid away to the decree-holder. The learned Judges upheld the view and remarked :

Upon the facts stated in the plaint it is clear that the cause of action in the present case arose when the sale proceeds were drawn out of Court by the decree-holder.

The report does not say whether the sale proceeds were appropriated before they were withdrawn by the decree-holder in the way in which it has been done in this case. The point of law, as it has been placed before us, did not arise in that case in this form and was not considered.

In the case of *Annanda Mohan Roy Chaudhury v. Maniruddin Mahammad*, (6), which is not to be found in any of the authorized reports, the view expressed lends support to the opinion I have formed in this case. The decision was in appeal from Original Order No. 367 of 1913 by N. R. Chatterji and Sheepshanks, JJ., and it was held therein that, under Art. 61, Lim. Act, time should be calculated from the date on which the money paid is accepted by the Court and not from the date on which it is deposited in the Court. In that case deposit was made on 5th November 1908 by the

plaintiff with an application to the effect that the money might be paid over to the decree-holder. The Court did not pass any order upon that application on that date and directed the matter to stand over till the 14th November for orders. On that date the Court directed the amount to be received and held that the decree was fully satisfied. It was held that there was no payment of money until the Court accepted the money on 14th November and their Lordships supported their view by remarking that, so long as it was not accepted by the Court, it was open to the plaintiff to withdraw the amount. They recorded their opinion in these words :

We think that payment under Art. 61 means payment either to the person to whom it is to be made or into the Court on behalf of such person.

The facts of that case and the opinions expressed by the learned Judges apply to the circumstances of the present case. The question now before us arose before the Additional Judicial Commissioner of Upper Burma in *Yinke Supaya v. Maung Kiu* (7). There the surety had satisfied the decree obtained by the creditor and sued the principal for recovery of the amount under Art. 81. The question arose as to what should be taken as the date when the surety paid the creditor within the meaning of Art. 81, Lim. Act. The learned Judge held that limitation began to run from the date on which the surety paid the money into Court and not from the date on which the creditor took it out.

I may add that the words of the Limitation Acts of 1871 and 1877 were,

the date of the plaintiff's advance in excess of his own,

but I do not think that by substituting "payment" for the word "advance" the legislature intended any change of law.

On giving my earnest consideration to the question raised and argued at great length before us I have come to the conclusion that limitation in this case should be reckoned from the date on which the money was deposited by the plaintiff in Court and the Court appropriated it to the satisfaction of the decree. In this view the plaintiff's suit must be held to be barred by limitation.

The appeal is accordingly allowed, the decree of the lower appellate Court set aside and that of the Court of first

(5) [1879] 4 Cal. 529.

(6) [1916] 35 I. C. 392.

(7) [1920] 3 U. B. R. 261=60 I. C. 23.

instance restored with costs in all the Courts.

Cammiade, J.—I agree. The plaintiff, in order to obtain extension of the period of limitation allowed to him under Art. 99, Lim. Act seeks to take advantage of the fact that ten days elapsed between the date on which the money was put in by him and appropriated by the Court to the satisfaction of the decree and the date of the actual withdrawal of that money by the decree-holder. As my learned brother has pointed out, if the plaintiff's contentions were correct, it is to be feared that many persons would be precluded from suing persons jointly liable with them for sums paid by them in excess of the money due from them merely on account of the fact that the decree-holder had failed to withdraw the money from Court. It is conceivable that from many causes, either accidental or due to neglect or wilful omission on the part of the decree-holder, the money in deposit in Court and appropriated to the satisfaction of the decree may remain unpaid to the decree-holder for a number of years; and, if the contention of the plaintiff-respondent were correct as long as the money was not withdrawn by the decree-holder, the person who made the deposit would have no right to recover anything from his co-debtor. This would be an entirely absurd position. The criterion must always be whether or not the deposit made in excess of what is due by the person making the deposit did or did not remain under the control of the person making it. Obviously, when the Court has passed an order to appropriate the money deposited to the satisfaction of the decree, that money ceases to be under the control of the person making the deposit. After such an order has been made it would no longer be open to the depositor to apply for withdrawal of that money. The only person entitled to apply for its withdrawal would be the decree-holder or any other person entitled through him. In the present case such an order for appropriation was passed by the Court on 4th February, the date on which the deposit was made, and from that date limitation must run under Art. 99, Lim. Act I, therefore, agree that this appeal should be allowed.

A.L./R.K.]

Appeal allowed.

*** A. I. R. 1928 Calcutta 365**

MITTER, J.

Brajeshwary Dasi — Plaintiff—Appellant.

v.

Nityananda Das—Defendant—Respondent.

Appeal No. 890 of 1926, Decided on on 8th March 1928, from appellate decree of 4th Sub-Judge, Alipur D/- 28th November 1925.

** Easement—Light—Person selling house having windows overlooking his adjoining land—Vendor cannot obstruct light from coming to such windows by building on the adjoining land—Subsequent vendee of the land is also bound by the obligation.*

If a man sells a house which has windows overlooking adjoining land which he retains he cannot as a general rule, afterwards stop the light from coming to the windows of the house by building on the land for, when granting the house he is presumed to have granted also a right to light to the windows or to have covenanted not to obstruct them and he may not subsequently derogate from his own grant or violate his covenant. So also, if after selling the house, he sells the land to a third person, the latter may not obstruct the light from coming to the windows, for the vendor could only convey the land, subject to the same obligations to which it was subject in his own hands. The true principle underlying cases of this kind is that the vendee is entitled to have the enjoyment of the light and air of the ancient windows in the same manner as it was enjoyed during the unity of possession.

[P 366 C 2, P 367 C 1]

Girija Prosanna Roy Chaudhuri and Khirish Chandra Chakravarty—for Appellant

Judgment.—This is a plaintiff's appeal against the decision of the Subordinate Judge of 24 Parganas, dated 28th November 1925, which reversed the decision of the Munsif of Alipur, dated 1st July 1924. The plaintiff commenced the suit for the removal of a verandah and a wall which obstructed her windows. The case stated in the plaint is that premises No. 91, Kansaripara Road, Bhawanipur, which is at present numbered as 570 of the said road, belonged to the plaintiff's father, Rakhal Chandra Das. The plaintiff purchased a part of this premises from her father on 20th February 1906 and has been in possession of it since her purchase. There is a verandah on the north of the purchased land which she, the plaintiff, claims, passed to her by the conveyance of 20th February but the land underneath the verandah

remained with the vendor, her father. There was a stipulation in the deed of sale of 1906 that, if the plaintiff required, the verandah will be removed by the plaintiff's father in case the plaintiff required the same for the purpose of effecting repairs to the purchased land and building. There were also two windows on the disputed land which have been in existence, as the evidence shows, since the building was erected so far back as 50 years from now. The defendant, who is the son of Rakhol and the brother of the plaintiff, has raised a wall right across these windows and this has given rise to the cause of action for the removal of the wall. The defendant, who has now succeeded to Rakhal's estate after his death, also refused to remove the verandah although the plaintiff required the removal of the verandah for the purposes of effecting repairs to her building. Several defences were taken to the suit by the defendant. It was stated that, according to the terms of the deed of sale the defendant is not bound to remove the verandah and that the house does not want repairs. It was further stated that, the windows open on the private apartments of the defendants and the wall does not harm the plaintiff in any way.

These defences were negatived by the Munsif who granted a decree to the plaintiff and directed that the defendant do remove his verandah and wall within a certain date and, if he refused to remove the same, the plaintiff might remove the same at her own cost and then realize the costs from the defendant and that the plaintiff should be given sufficient access of air and light through the two windows which formed the subject-matter of the plaint. An appeal was taken against this decision of the Munsif to the Subordinate Judge 24 Parganas. The learned Subordinate Judge reversed the decision of the Munsif with reference to both the causes of action. He held with regard to the removal of the verandah that the best evidence has not been produced to show that the plaintiff required the removal of the verandah for the purpose of effecting repairs. The plaintiff examined her son, her son-in-law and another witness who all testified to the fact that the plaintiff's house was in a bad condition and required repairs. The learned Subordinate Judge seems somewhat hypercritical in his criticism

of the evidence of these witnesses who were most competent to speak to the fact as to whether the house required repairs or not. The learned Subordinate Judge proceeds to state that, in his opinion, there should be definite and best evidence regarding the need for repairs before the defendant can be called upon to remove the verandah in question, and such evidence has not been produced. I think, on a construction of the kobala, it was enough if the plaintiff came to Court and said that she required the removal of the building for the purpose of effecting repairs. The language of the deed of sale is as follows :

If in future you require to repair your buildings then I shall demolish and remove the verandah.

This language certainly suggests that the question as to whether repairs were needed or not would depend entirely on what the plaintiff thought. She now claims the removal of the verandah, because, in her opinion, repairs are required. She has examined her relatives who were most competent to speak to the need for repairs. In the face of this I do not think the Subordinate Judge was justified in dismissing the claim of the plaintiff for removal of the verandah on the ground that the best evidence has not been produced. There has been a defect of procedure in the trial of this part of the appeal which has affected the merits of the case which calls for interference of this Court in second appeal.

With regard to the other cause of action about the removal of the obstruction of the two ancient windows, the Subordinate Judge has also gone wrong. His view is that no right of easement could be acquired as the purchase of the plaintiff was within 20 years of suit and no right of easement could be acquired by the plaintiff as her vendor could not have acquired any such right over his own land. The true rule applicable in cases of this kind is stated in the well-known treatise of Goddard's Law of Easement, 7th edn., at p. 282, where the learned author states as follows :

If a sellmans a house which has windows overlooking adjoining land which he retains he cannot, as a general rule, afterwards stop the light from coming to the widows of the house by building on the land for, when granting the house, he is presumed to have granted also a right to light to the windows or to have covenanted not to obstruct them and he may not subsequently derogate from his own grant or

violate his covenant; so also if after, selling the house he sells the land to a third person, the latter may not obstruct the light from coming to the windows, for the vendor could only convey the land subject to the same obligations to which it was subject in his own hands.

The true principle underlying cases of this kind is that the plaintiff is entitled to have the enjoyment of the light and air of the ancient windows in the same manner as it was enjoyed during the unity of possession, that is, when his property as well as the property of her brother remained the property of their father. The principle which I have stated receives support from the decision in the case of *Coutts v. Gorham* which is cited at p. 129 of Gale on Easement, 10th edn., 1925. In that case the windows were made within 20 years, but before the lease granted by the owner in favour of the person named Coutts, and it was pointed out that, assuming that the windows were made within 20 years but before the lease made to Coutts, Gorham's present interest is derived from the same lessor at a subsequent period, and is, therefore, subject to the rights which Coutts already had against his lessor and, consequently, to that of his having the windows in question free from any obstruction.

I think, in the view with regard to the two causes of action which I have taken, the appeal must be allowed, the decision of the Subordinate Judge must be set aside and that of the Munsif restored with costs.

R.D.

Appeal allowed.

* A. I. R. 1928 Calcutta 367

RANKIN, C. J., AND C. C. GHOSE, J.

Rameswar Khiroriwalla—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 36 of 1928, Decided on 15th March 1928.

* *Criminal P. C., Ss. 491 and 561A*—*High Court should not interfere with an order of its own Judge.*

It is wrong that the High Court should under S. 491 re-try for itself a question which has already been determined by the same Court in its ordinary original criminal jurisdiction, or to pass an order overriding an order already made by the same High Court.

[P 368 C 2]

Langford James and Satindra Nath Mukerjee—for Petitioner.

B. L. Mitter, Khundkar and Mrityunjay Chatterjee—for the Crown.

Rankin, C. J.—In this case *Rameswar Khiroriwalla* has obtained a rule calling upon the Commissioner of Police and the Superintendent of the Presidency Jail to show cause why the petitioner should not be brought up before the Court under the provisions of S. 491, Criminal P. C.

The applicant was committed by the Chief Presidency Magistrate for trial by the High Court at Sessions in its ordinary original criminal jurisdiction upon charges under several sections of the Indian Penal Code. Each of the charges relates to an offence described as bailable in *Sch. 2, Criminal P. C.* On 24th January 1928, the applicant was released on bail by the order of Mr. Justice Page. Thereafter an application was made to Mr. Justice Buckland on behalf of the Crown for an order cancelling such bail upon the ground that, on 13th, 14th and 15th February 1928, the applicant had approached certain witnesses for the purpose of influencing their evidence at the trial. Mr. Justice Buckland, on 24th February 1928, made an order cancelling the bail, discharging the bail bond and committing the applicant to custody pending his trial.

The learned Judge in his judgment has carefully considered the meaning and effect of S. 496 and 561 A, Criminal P. C. He has come to the conclusion that the Court has power under the latter section to make such an order, assuming there to be no power otherwise. It is apparent from his judgment that this question was fully argued before him.

This rule came on for hearing before us on the 8th March, by which time the trial of the applicant had begun and was proceeding *de die in diem*. There can be no doubt, therefore, that the applicant is at present properly and lawfully detained in public custody while the trial proceeds. The only order which we have been asked on behalf of the applicant to make is an order that would direct him to be brought before this Bench after the High Court Sessions had adjourned for the day and which would provide for the applicant to be set at liberty (upon his giving sufficient security) during the adjournments of the Sessions Court.

The argument on behalf of the applicant is first that in view of S. 496, Criminal P. C., the learned Judge exercising the ordinary original criminal jurisdiction of the Court had no jurisdiction in the circumstances to direct the cancellation of the applicant's bail or to direct his re-arrest; secondly, accordingly, the applicant is a person illegally detained in public custody. If these points be made out, then, by the terms of S. 491, the High Court may, if it thinks fit, direct that the applicant be set at liberty or be dealt with according to law.

The High Court, which by S. 491 is invested with certain powers, is defined by S. 4 (j) to mean "the highest Court of criminal appeal or revision for any local area." This means for the present purpose the High Court of Judicature at Fort William in Bengal, which may act under Cl. 36 of its Letters Patent by any Judge or any Division Bench thereof, subject to any rules that may be made or directions that may be given by competent authority. In practice, until recently, the powers conferred by S. 491, which before 1923 were exercisable only over persons within the limits of the ordinary original civil jurisdiction of the Court, were exercised by the Judge taking Sessions, that is, by the Judge exercising the ordinary original criminal jurisdiction of the Court. Now that the powers are applicable to persons within the limits of the Court's appellate criminal jurisdiction, it is certainly more convenient that they should be exercised by the Division Bench appointed to deal with criminal cases. It is not, however, evident to me upon the face of the Criminal Procedure Code that the powers of the High Court under S. 491 might not, apart from any special rule made under the Letters Patent or any directions given by the Chief Justice, competently be discharged by a single Judge. This Bench is in no way a Court of appeal from the learned Judge exercising the ordinary original criminal jurisdiction, and grave inconvenience would arise if the same High Court should make an order for arrest and also an order for release upon divergent views upon a question of jurisdiction. If this be possible, so far as the statute is concerned, it would be possible for a single Judge to make an order overriding and nullifying

an order of a Division Bench. A Judge or a Bench which exercises powers under S. 491 has no claim to any particular precedence so as to require that the Sheriff should execute no order made by another Judge or Bench inconsistent therewith. It would introduce an incurable confusion into practice and theory if it were laid down that a considered judgment of the High Court upon a question of its jurisdiction could be challenged before the same High Court under S. 491. In my judgment the circumstance that certain orders of this Court in its ordinary original criminal jurisdiction are not appealable does not affect this matter. It appears to me that a case such as the present should be viewed on the principle that it would be a good return to a writ in the nature of habeas corpus to show that the applicant, during his trial at Sessions, was being detained under an order of this High Court which has not been set aside or varied. These considerations do not apply to orders made by Courts other than the High Court.

It is sufficient for purposes of the present case to say that it seems to me to be wrong that this Bench should think fit under S. 491 to re-try for itself the question which has already been determined by this Court in its ordinary original criminal jurisdiction, or to pass an order overriding an order already made by this High Court. In this view the rule will be discharged.

C. C. Ghose, J.—I agree.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 363

SUHRWARDY AND GRAHAM, JJ.

Abdul Alim Abed and another — Petitioners.

v.

Mt. Abir Jan Bibi and another — Opposite Party.

Civil Rule No. 73 of 1928, Decided on 13th February 1928, from order of Dist. Judge, 24-Parganas, D/- 6th Nov. 1927.

(a) *Mahomedan Law—Practice—Powers of District Judge as kazi can be invoked in connexion with matters of public and religious trust.*

The practice of invoking the power of a District Judge as a kazi in connexion with matters of public and religious trusts under the Mahomedan law has become general and it cannot

now be doubted that in a proper case the Judge should exercise the powers which he does possess. [P 369 C 2, P 370 C 1]

(b) *Civil P. C., S. 92*—*Expression “where the direction of the Court is deemed necessary for the administration of any such trust” explained.*

The words “where the direction of the Court is deemed necessary for the administration of any such trust” must be interpreted as meaning that where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust. The mere appointment of a mutwalli is not such a direction as is contemplated by the section : 33 Cal. 789, Dist.: 23 C. W. N. 115; 47 Cal. 592; and A. I. R. 1924 Cal. 473, Ref. to. [P 369 2, P 370 C 1]

(c) *Civil P. C., S. 92*—*Appointment of mutwalli—Court can appoint one even without a suit under S. 92.*

Where there is no mutwalli, the Court has power to appoint a mutwalli in respect of a wakf even without a suit under S. 92 : A. I. R. 1925 All. 759; 26 Mad. 450; and 33 Cal. 789; Dist.: A. I. R. 1924 Cal. 441, Foll. [P 370 C 2]

(d) *Mahomedan Law—Wakf—Duty of kazi in respect of Wakf is to appoint new trustee where he finds that there is no one to properly administer trust.*

Under the Mahomedan law the administration of a religious and public trust is vested in the kazi and it is the duty of the kazi, when he finds that there is no one to administer the trust, to see that it is properly administered and for that purpose it is within his competency, and it is proper, that he should appoint a trustee to manage the trust property. [P 370 C 2]

Nuruddin Ahmad and Charan Das Gupta—for Petitioner.

Nasim Ali—for Opposite Party.

Suhrawardy, J.—This rule is directed against an order of the District Judge of 24 Parganas dated 6th November 1927, by which he dismissed an application by the petitioners to appoint them as mutwallis of a wakf estate. The facts are that a wakf was created by the ancestor of petitioner 1. Under the deed of wakfnama, the opposite party would be the present mutwalli and after him the petitioner 1. The petitioner's case is that the opposite party parted with some of the wakf properties treating them as secular and thereupon he brought a suit against them in the local Subordinate Judge's Court and obtained a decree declaring the properties as wakf. On these facts he asked the Judge to appoint a mutwalli in the exercise of the powers of a kazi under the Mahomedan law. Opposite party 1, repudiates the wakf and her case is that the alleged wakf was only a paper transaction and that she never acted as mutwalli; on the

other hand she treated the properties as her own properties inherited from her ancestor. The learned Judge has held that, in the circumstances of the case, the petitioners' application could not be granted and the only remedy was to have recourse to a suit under S. 92, Civil P. C.

The practice of invoking the power of a District Judge as a kazi in connexion with matters of public and religious trusts under the Mahomedan law, has become general and it cannot now be doubted that, in a proper case, the Judge should exercise the powers which he does possess. Before us it has been contended by the petitioners, that opposite party 1 having repudiated the trust and denied having ever acted as mutwalli, the office of the mutwalli must be treated as vacant and the learned Judge should have exercised his powers as a kazi on an application made to him to appoint a mutwalli. It may be noted here that opposite party 2, who is also a co-mutwalli under the deed of wakf, has supported the petitioner and has expressed his consent to his appointment as a mutwalli. The real fight is between the petitioner and opposite party 1.

It is contended on behalf of the petitioner that in any case in which the power of a Judge is invoked for appointing a mutwalli it comes under S. 92, Civil P. C. I am unable to give effect to this broad contention. It is argued that the appointment of a mutwalli even of a wakf estate, in respect of which there is no mutwalli, comes under S. 92, Civil P. C., because that section makes a suit necessary

where direction of the Court is deemed necessary for the administration of wakf.

as has been observed in passing in some of the reported cases on this section and also under sub. Cl. (b) of Cl. (1) of the section for appointing a new trustee. Now there is no question as has been held in *Budreedas v. Chooni Lal* (1), that S. 92 applies to cases where there is an express or constructive trust created for public purposes of a charitable or religious nature and where there is a breach of trust—which is not the case here—on a direction of the Court is deemed necessary for the administration of such a trust; and thirdly, where the relief claimed is one or other of the reliefs mentioned in the section. If a matter comes

(1) [1905] 33 Cal. 789=10 C. W. N. 681.

within the provisions of this section it is clear that under Cl. (2) of the section, a suit under it is the only remedy open to a party. But in my opinion the words, where the direction of the Court is deemed necessary for the administration of any such trust, must be interpreted as meaning that where the Court has to give direction in the nature of framing a scheme or otherwise for the administration of the trust. The appointment of a mutwalli is not such a direction as is contemplated by the section. If the appointment of a trustee comes under the words "where the direction of the Court is necessary," the cases in which it has been held that the District Judge has the power to grant leases and mortgages of wakf properties on an application must be held to have been decided wrongly for, if the appointment of a trustee can be considered as a direction of the Court for the administration of the trust, granting permission for leases or mortgages, is a fortiori such a direction. The case of *Ashraf Ali v. Mahommad Nurojjoma* (2) is a case, where the scope of S. 92, Civil P. C., has been considered and the cases of *Fakrunnessa Begum v. Dist. Judge of 24 Parganas* (3) and *Habibur Rahaman v. Saidennesa Bibi* (4) are cases where it has been held that the District Judge is empowered to give permission to a trustee to grant leases of a trust property.

Now with regard to appointing a new trustee: it seems, considering the history of S. 92, Cls. (a) and (b), that by a new trustee is meant a trustee in place of an old trustee. Cl. (1), sub-Cl. (a) of the Act, of 1908 did not find place in the old S. 539. It was held by some of the High Courts, including this Court, that S. 539 contemplated removing a trustee and appointing a new one in his place. To give effect to this view the legislature has put the two clauses (a) and (b) in such juxtaposition as to lead one to suppose that appointing a new trustee is dependent on the removing of the old one, or, at any rate, where the appointment of a trustee is necessary in place of a trustee who has either been removed or has ceased to be a trustee. Our attention has been drawn to several cases, *Lachman Prosad v. Munia* (5), *Netiram*

Jogiah v. Venkata Charlu (6), which have been followed in several other Madras cases, where there are observation to the effect that where the Court is invited to appoint a mutwalli the matter comes under S. 92, Civil P. C. But on an examination of the facts of those cases it would appear that in those cases there were some persons who were claiming to be mutwallis and the applications were for removing them or removing them from the place they occupied and appointing the applicants as mutwallis. It has been held in *Badridas v. Chuni Lal* (1), that S. 92 applies as much to cases in which a trustee is sought to be removed as to cases in which a trustee de son tort is sought to be displaced. These cases are, therefore, no authority for the bare proposition that where there is no mutwalli in respect of a wakf, the Court has no power to appoint one except in a suit under S. 92. This view has been adopted in *Mohiuddin Chowdhury v. Aminuddin Chowdhury* (7). In that case the District Judge, on an application, has appointed a mutwalli in respect of a wakf of which there was no mutwalli then acting. The rival candidate applied to this Court to have that appointment set aside on the ground that the Judge could not pass the order he did except under S. 92, Civil P. C. The learned Judges held that he had such a power. The fact that in that case they also referred to the deed of endowment which stated that, in the event of no trustee being in existence at any time the Court will appoint, one does not seem to me to have affected the application of the law. I propose to follow this case and to hold that where there is no mutwalli the Court has power to appoint a mutwalli in respect of wakf. Under the Mahomedan law the administration of a religious and public trust is vested in the kazi and it seems to me that it is the duty of the kazi when he finds as in the present case that there is no one to administer the trust, to see that it is properly administered, and for that purpose it is within his competency and it is proper that he should appoint a trustee to manage the trust property.

Now, in the present case, the petitioner has come to Court with this allegation on his lips, that there is a valid trust and that the opposite party acted as a

(2) [1919] 23 C. W. N. 115=49 I. C. 355.

(3) [1920] 47 Cal. 592=56 I. C. 475=24 C. W. N. 899.

(4) A. I. R. 1924 Cal. 473=51 Cal. 331.

(5) A. I. R. 1925 All. 759=47 All. 867.

(6) [1903] 26 Mad. 450.

(7) A. I. R. 1924 Cal. 441.

mutwalli for a short time and thereafter he began to act in various ways in breach of the terms of the towliatnama and made all sorts of transfers against the provisions of the wakfnama and as the opposite party has thus abandoned his position as mutwalli of the wakf estate the appointment of a mutwalli was immediately necessary for the proper management, preservation and upkeep of the estate. It is true that opposite party 1 does not rely upon the trust and repudiated it, claiming the property as her secular property; but the way in which the Court has been approached in this case brings it within the provisions of S. 92, Civil P. C. I am not sure that in a proper application for the appointment of a trustee in the circumstances that have happened in this case, taking the position adopted by the opposite party into consideration, such appointment cannot be made on an application to the District Judge if a proper case is made out. But the allegations made make me think that the learned Judge is right in saying that it is a matter which comes only under S. 92, Civil P. C., and by Cl. (2) of the section, a suit or proceeding otherwise than under that section is barred. In this view this rule must be discharged with costs: two gold mohurs.

Graham, J.—I agree.

S.J.

Rule discharged.

* A. I. R. 1928 Calcutta 371

MUKERJI, J.

Rivers Steam Navigation Co. Ltd.
and another—Defendants—Petitioners.

v.

Bisweswar Kundu — Plaintiff — Opposite Party.

Civil Rule No. 609 of 1927, Decided on 22nd August 1927, from order of Sub-Judge, Khulna, D/- 3rd February 1927, in suit No. 156 of 1926.

(a) *Carriers Act*, S. 10 — Condition—Contract.

A contract with a carrier provided: "No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the Company within six months from the date of any default, loss or damage in respect of which such claim arises."

Held: that the condition was not unreasonable: 8 *Mad.* 107 and 27 *C. L. J.* 294, *Rel. on.*

[P 374 C 1]

** (b) Principal and Agent—Notice to agent of facts arising out of agency is notice to principal—But parties to contract can stipulate against this presumption.*

Notice of facts to an agent is constructive notice thereof to the principal himself where it arises from, or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal and if he has not, still, the principal having entrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal; otherwise the neglect of the agent whether designed or undesigned, might operate most injuriously to the rights and interests of such party. But it is quite open to the parties to a contract to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that the notice instead of being served on an agent would have to be served on the principal himself. This stipulation viewed in a proper light would mean that express notice is given of the limitation of the agent's authority, and if with such knowledge a party chooses to deal with the agent and not with the principal he does so at his own peril.

[P 374 C 2]

** (c) Principal and agent—General agency implying delegation to do all acts connected with a particular trade—Principal cannot set up secret and private instructions to the agent.*

In the case of a general agency which implies a delegation to do all acts connected with a particular trade, business or employment, the principles to be borne in mind are: "If a person is held out to third parties or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority; and thus to defeat his acts and transactions under the agency when the party dealing with him had, and could have, no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority. The maxim of natural justice here applies with its full force, that he, who without intentional fraud has enabled any person to do an act, which must be injurious to another innocent party, shall himself suffer the injury rather than the innocent party, who has confidence in him.

[P 375 C 1]

(d) Limitation Act, Arts. 30 and 31—Suits against carriers in respect of goods delivered for carriage are governed by Arts. 30 and 31—Onus of proving loss more than one year before suit lies on defendants.

It is now well settled that all suits against carriers in respect of goods delivered to them for carriage fall under Art. 30 or Art. 31, according as the claim is regarded as one based upon loss of or injury to the goods or non-delivery thereof. The onus of proving that the loss took place more than a year before suit and that, therefore, the suit was barred under

Art. 80, would lie on the defendants; *View of Chatterjee, J., in 44 Cal. 16, held not sound.*

[P 375 C 2]

(e) *Carriers Act (1865), S. 9—Negligence.*

Loss from an unknown cause is presumptive proof of negligence: 24 Cal. 786 and 26 Cal. 398 (P. C.), *Foll.*

[P 376 C 1]

Amulya Chandra Chatterji and Prokas Chandra Pakrasi—for Petitioners.

Jadu Nath Kanjilal and Hemendra Chandra Sen—for Opposite Party.

Judgment.—The Rivers Steam Navigation Co. Ltd. and the India General Navigation and Railway Co. Ltd. have obtained this Rule to show cause why the decree passed against them by the Small Cause Court Judge of Khulna should not be set aside.

Mulji Sicka and Co. dispatched six bags of mohini biri on 15th August 1925 from Jagannath Ghat to Khulna for carriage by the dispatch service of the two companies. The consignment was deliverable to Bisweswar Kundu who not having received the same instituted the suit claiming Rs. 380, which was made up of Rs. 314-8-0 as the price of goods, Rs. 31, as damages at 10 per cent., and Rs. 36, as interest, deducting a remission of Re. 1-8-0 from the total. The suit has been decreed in full with costs.

The grounds urged in support of the Rule are mainly four. To deal with these grounds it is necessary to set out a few facts, which are not disputed. Enquiries were made about the goods on behalf of the plaintiff and the plaintiff not having received delivery thereof wrote a letter to the agents of the companies at Barisal who sent the following reply:

Rivers Steam Navigation Co. Ltd.
(Incorporated in England)

India General Navigation and Ry. Co. Ltd.
(Incorporated in England)

Barisal . . . Agency
5th September 1925.

No. C. Mis. 29/25/15525.

Babu Bisweswar Kundu,

Merchant, Khulna Bazar, Khulna.

Dear Sir,

Khulna theft case.

J. Ghat to Khulna Ghat. Inv. No. 1935/35 of 15th August 1925. Your letter of 2nd September 1925.

In reference to your above, we inform you that the matter is under enquiry and the result will be intimated to you in due course.

Yours faithfully,
Pro. Macneill & Co.
Sd/- Mitchel,
Joint Agents.

It was alleged in the plaint that thereafter there was some correspondence, but we do not know what it was, and though some of it is on the record yet the same has not been proved. On the 1st April 1926, however, the plaintiff sent a pleader's letter to the said agents. It ran in these words:

From

Babu Nagendra Chandra Bhoumik,
Pleader, Khulna,

Dated, Khulna, 1st April 1926.

To

The Agents, I. G. & R. S. N. Co. Ltd.,
Barisal.

Sir,

Having been instructed by my client, Babu Bisweswar Kundu of Khulna Bazar, I hereby inform you that in spite of repeated demands you have not settled the claim of my said client in respect of the marginally* noted theft case.

*Khulna Godown I, therefore, give you
Theft Case. J. Ghat notice that, unless the
to Khulna Ghat Invoice claim is paid off within
No. 1935/35, a fortnight from the
dated 15th August date of receipt of this
1925. notice my client will be
compelled to sue you in

the civil Court for realization of the price of the said lost goods together with damages.

Yours faithfully,

Sd/- Nagendra Ch. Bhoumik,
Pleader,
Judge's Court, Khulna,
1st April 1926.

Various defences appear to have been taken on behalf of the defendant companies in their written statement, some of which were suggested in the cross-examination of the plaintiff's witnesses and were denied by them. These were not pursued any further and it is not profitable to refer to them here. It is necessary only to state that the story of theft, which was alleged as having led to the disappearance of the goods, has been definitely disbelieved by the trial Court. It should further be mentioned that the letter which the plaintiff wrote to the agents at Barisal in the first instance, and which appears to have been dated 2nd September 1925, has not been put in evidence by either party.

The first contention that has been urged in support of the Rule relates to the sufficiency and validity of the notice that is necessary to be given under S. 10, Carriers Act (3 of 1865). Much of the argument that has been advanced on this point is founded on the assumption that it was the pleader's letter of 1st April 1926 that was the notice in this case. The argument overlooks the letter of 2nd

September 1925 which, though not in evidence, is a document of which the existence is admitted and indeed cannot be denied, in view of the reply that was given to it. The circumstances under which it was written have been deposed to by the plaintiff's witness Taraknath Kundu. That witness said :

I went to the godown of the steamer companies and came away for two or three days as I was informed that the articles had not arrived. Then, on 2nd September 1925, Dwarkanath Sen, godown clerk, informed me that the goods were stolen On 2nd September 1925 we wrote letter to Barisal agent.

Section 10 of the Act provides that no suit shall be instituted against a common carrier for the loss of or injury to goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff. If the information that the godown clerk gave was definite enough it stands to reason to assume that the letter must have conveyed similar information. The letter, therefore, may well be treated as the requisite notice and it was given well within time. The defendants have produced the pleader's letter of the 1st April 1926 but not the letter of the 2nd September 1925. The presumption is that if produced it would have gone against them, that is to say, it would have appeared that it amounted to a notice of the loss of the goods. If, on the other hand, the information given by the godown clerk was indefinite, and if, therefore, there was no mention made of the loss in the letter of 2nd September 1925 the pleader's letter of 1st April 1926 was such a notice having made mention of "the said lost goods," "Khulna godown theft case" and "Jagannath Ghat to Kulna Ghat Invoice No. 1935 of 1925, dated 15th August 1925, though this letter was dated 1st April 1926, yet it must be regarded as within time as it was within the peculiar knowledge of the companies themselves as to when the loss took place, *Radhasyam Basak v. Secretary of State* (1), *Jugal Kishor v. G. I. P. Ry. Co.* (2), *G. I. P. Ry. v. Radhemal* (3), and they have failed to discharge the onus that

lay on them in respect of it, and also in view of the well-recognized principle of suppressed fraud, a principle which will be more fully referred to in dealing with the question of limitation.

Both the letters were addressed to the joint agents of the two Companies at Barisal, one of them is on the record and shows that it was so addressed, the other one must also have been similarly addressed as it was the joint agents of the "Barisal Agency" who acknowledged receipt of it. Reference has been made to condition No. 18 on the back of the forwarding note which runs in these words :

No claim of any kind whatsoever in respect of this contract shall be valid unless in writing and delivered at the office of the company in Calcutta within six months from the date of any default, loss or damage in respect of which such claim arises.

It is urged on the basis of this condition that the notices, such as they were, were not in compliance with this condition and accordingly the plaintiff's claim is not maintainable. To deal with this contention in order to clear up the ground, it should be pointed out that while S. 10 of the Act requires notice of the loss or injury to be given, condition No. 18 speaks of the notice of any claim under the contract.

It has, however, not been argued that the notice of the claim that has to be lodged under this condition is any different from the notice of the loss or injury contemplated by S. 10 of the Act. If the condition were relied on in that way it would obviously have to be held to be a term in the contract by which the defendants, who are common carriers and insurers of goods, have attempted to contract themselves out of their liability for negligence and imposed upon the insured a disability to recover beyond what the statute has provided for and has made an inroad upon the general law by engrafting on it a limitation that a legal liability which has arisen cannot be enforced in a Court without a demand being made on the party himself. What, however, has been argued is that the notice that was served in this case not having been delivered in "the office of the company in Calcutta, the condition has been violated and accordingly the claim is not maintainable. For companies which have such extensive business at numerous stations and on

(1) [1917] 44 Cal. 16=34 I. C. 130=23 C. L. J. 547.

(2) A. I. R. 1923 All. 22=45 All. 43.

(3) A. I. R. 1925 All. 656=47 All. 549.

riverine routes extending all over the provinces of Bengal, Behar and Assam, a condition like this, fairly interpreted, is not at all unreasonable, for, if it is complied with, the companies may at once be put on enquiry as to the loss or injury that has occurred. Moreover, there may be cases in which a servant or agent, service on whom of a notice meant for the companies would ordinarily be sufficient as service on the companies themselves, may be the very person responsible for the loss; in which case want of actual knowledge on the part of the companies would result in no proper investigation being held at all. That it is not an unreasonable condition was held in *British India Steam Navigation Co. Ltd. v. Hazi Mahommad Esack and Company* (4). The learned Judges who decided the case of the *River Steam Navigation Co. v. Hazari Mull* (5), also expressed the same view though the dictum laid down therein was obiter in view of what was actually decided.

The case of *India General Navigation and Ry. Co. v. Girdhari Lal Gobardhan Das* (6), in my opinion, has not actually decided this question. It is, unfortunately, however, that there is in existence nothing answering to the description of "the office of the company at Calcutta." The offices of the agents or managing agents of the two companies are located at two different places in Calcutta. But it is argued that by reason of condition No. 1, of the forwarding note, which is in the nature of an interpretation clause, the "Company" in this case should be read in the plural as meaning the two companies separately and, therefore, condition No. 18 should be read as meaning that two notices will have to be delivered, one at each of the two offices in Calcutta. Such a condition by itself is again not unreasonable, but if this is what was meant it should have been more clearly stated. Merely because the word "company" has to be read in the plural, by virtue of condition No. 1, there is no obligation to read the word "office" in the plural as well. There is nothing to prevent the two companies although they may have their registered offices at two different places from having one joint office in Calcutta for the

purpose of these notices, and there is nothing else to prevent the term being more definitely specified in the conditions.

The object of the condition is to do away with the presumption of knowledge from constructive notice arising out of the actual notice served on an agent. To that extent it is a reasonable condition, but beyond that it cannot reasonably go. It cannot be said that if the notice in writing is delivered to an agent and the agent in his turn delivers it to the office of the company in Calcutta it will not be a sufficient compliance of the condition. In *Story on Agency* para. 140, it is said :

Upon a similar ground notice of facts to an agent is constructive notice thereof to the principal himself where it arises from, or is at the time connected with the subject-matter of his agency for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal and if he has not, still the principal having entrusted the agent with the particular business the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or undesigned might operate most injuriously to the rights and interests of such party.

It is quite open to the parties to a contract to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that the notice instead of being served on an agent would have to be served on the principal himself. This stipulation viewed in a proper light would mean that express notice is given of the limitation of the agent's authority, and if with such knowledge a party chooses to deal with the agent and not with the principal he does so at his own peril. The question is : Do the circumstances of the present case suggest that the contracting parties were *ad idem* that this presumption will not arise ? In the first place it must be conceded that there was no express stipulation in the contract that this ordinary presumption founded on public policy will be put aside in regard to all transactions arising out of the contract, and that there is not a word in the conditions suggesting that the authorities of the companies such as they are in any way restricted in the matter of receiving notices of claim or loss. The companies admittedly have an agency at Barisal. It is named the

(4) [1881] 3 Mad. 107.

(5) [1918] 27 C. L. J. 294=41 I. C. 919,

(6) A. I. R. 1927 Cal 394=54 Cal. 430.

Barisal Agency as appears from the letter dated 5th September 1925, and the agents there style themselves as joint agents. It is not pretended that the agency is a special agency in the sense that there was delegation of authority to do a single act; it is a general agency which implies a delegation to do all acts connected with a particular trade, business or employment. In connexion with such agencies the principles to be borne in mind are well set out in Story on Agency para 127.

If a person is held out to third parties or to the public at large, by the principal, as having a general authority to act for and to bind him in a particular business or employment, it would be the height of injustice and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agent, limiting his authority; and thus to defeat his acts and transactions under the agency when the party dealing with him had, and could have, no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent, within the scope of his general authority; for he has held him out to the public as competent to do the acts and to bind him thereby. The maxim of natural justice here applies with its full force, that he, who without intentional fraud has enabled any person to do an act, which must be injurious to another innocent party, shall himself suffer the injury rather than the innocent party, who has confidence in him. The maxim is founded on the soundest ethics and is enforced to a large extent by Courts of equity.

As has been tersely put by an American Judge of great eminence:

The question in such cases is not so much what authority the agent had in point of fact, as it is what powers third parties had a right to suppose he possessed, judging from his acts and the acts of his principals.

Here the joint agents received the plaintiff's letter and in reply informed him that the matter was under enquiry and promised to intimate the result to him in due course. In sending the reply they purported to act as joint agents of the two companies in respect of the Barisal Agency. Applying the principles referred to above it irresistibly follows that the plaintiff must have understood that the notice to the Barisal agents was sufficient to discharge the burden that lay on him under S. 10, Carriers Act. Was he to assume that the notice which he had thus given would not be communicated to the principals at Calcutta? Knowledge acquired by the principals from their agents under such circumstances would not be knowledge acquired aliunde, but from the source of its emanation, namely, the

notice in writing. The defendants have nowhere said that they did not receive either of these two letters or that they did not receive them in time, and in the absence of any such express averments the ordinary presumption must be given effect to. There is no indication, that the companies ever restricted the powers of their agents in the matter of dealing with claims; and even if it be assumed that there were any such restriction the conduct of the agents in accepting the notices amounted to a representation by which the companies are bound.

The second ground on which the decision has been attacked is on the question of limitation. It is now well-settled that all suits against carriers in respect of goods delivered to them for carriage fall under Art. 30 or Art. 31, Lim. Act: *Chiranji Lal Ramlal v. B. N. Ry. Co. Ltd.* (7), *Hazi Azam v. Bombay and Persian Steam Navigation Co.* (8), *G. I. P. Ry. v. Ganpat Rai* (9), *Mutsaddi Lal v. B. B. & C. I. Ry. Co.* (10), *Venkatasubbarow v. Asiatic Steam Navigation Co.* (11). The action against the common carrier for non-delivery of goods is founded on contract because the relationship between the parties commences in contract, but it is an action in tort because the cause of action is the breach of duty of the carrier. The view of Chatterjee, J., in *Radha Shyam Basak v. Secretary of State* (1), that where there is a breach of the written contract Art. 115 applies and not Art. 31, can no longer be regarded as sound. If Art. 115 be held to apply, mere non-delivery was no proof of loss and the onus of proving as an affirmative fact that the non-delivery was due to loss or to some tortuous act of theirs, which would make the shorter period of limitation apply, lay on them: *Mohan Singh v. Henry Couder* (12), *British India Steam Navigation Co. v. Hazi Mohamed Eshak & Co.* (4), *Danmul v. British India Steam Navigation Co.* (13). But in this they have failed, upon the

(7) A.I.R. 1925 Cal. 559=52 Cal. 372.

(8) [1902] 26 Bom. 562=4 Bom. L. R. 447.

(9) [1911] 33 All. 544=10 I.C. 122=8 A. L. J. 543.

(10) [1920] 42 All. 390=58 I.C. 547=18 A.L.J. 377.

(11) [1916] 39 Mad. 1=29 M. L. J. 342=2 M.L.W. 805=30 I.C. 840=(1915) M.W.N. 644 (F.B.).

(12) [1883] 7 Bom. 478.

(13) [1886] 12 Cal. 477.

finding of the learned Judge. In my view, the article applicable is 30 or 31 accordingly as the claim is regarded as one based upon loss of or injury to the goods or of non-delivery thereof. Taking it either way the suit in my opinion was within time. Treated as a suit to which Art. 30 would apply, the onus of proving that the loss took place more than a year before suit and, therefore, that the suit was barred under Art. 30, would lie on the defendants: *Radha Shyam Basak v. Secretary of State* (1), *Jugal Kishore v. G. I. P. Ry. Co.* (2), *G. I. P. Ry. Co. v. Radhemal* (3). Moreover, a case of this nature would, in my opinion, attract the doctrine of concealed fraud. Of this doctrine, it is thus said in Pollock on Torts, 10th Edn. p. 220

The operation of the statute of limitation is further subject to the exception of concealed fraud derived from the doctrine and practice of the Court of Chancery which, whether it thought itself barred by the terms of the statute or only acted in analogy to it, considerably modified its literal application. 'Where a wrong doer fraudulently conceals his own wrong, the period of limitation runs from the time when the plaintiff discovers the truth or with reasonable diligence would discover it. Such is now the rule of the Supreme Court in every branch of it and in all causes. The same rule holds if the defendant has not actively concealed the fraud, but the plaintiff has been ignorant of it without any fault of his own.'

For this last statement the authority cited is *Oelkers v. Ellis* (14). Regarded as a suit to which Art. 31, would apply, there having been no time fixed for delivery and there having at no time been any refusal to deliver, but, on the other hand by the letter of 5th September 1925 the companies having informed the plaintiff that the matter was being enquired into, the plaint filed on 28th August 1926 was well within time: *Jugal Kishore v. G. I. P. Ry. Co.* (2). As pointed out in this last-mentioned case an inflexible rule, that time begins to run from the expiry of the ordinary period of transit, need not be recognized.

The third point urged on behalf of the defendants is on the question of their liability. Under the Carriers Act the loss or damage of goods delivered for carriage to a common carrier is prima facie evidence of negligence and the burden to disprove negligence lies on the carrier; and loss from an unknown cause is presumptive proof of negligence: *Chout-*

mull v. Rivers Steam Navigation Co. (15) affirmed on appeal by the Judicial Committee in *Rivers Steam Navigation Co. v. Choutmull* (16). The story of the theft having been entirely disbelieved, the defendants have not explained how the loss occurred. They have, therefore, failed to discharge the burden that lay on them. Some argument has been advanced before me to show that, the story of theft should have been believed. This, however, is a question of fact into which I would decline to enter in view of the very clear and strong finding of the Court below.

The fourth and last argument relates to the amount of the decree. So far as this argument is concerned, I do not find any materials on which a decree for damages may be passed. The allegation which forms the foundation of this part of the claim has not been proved and the learned Judge has not given any substantial reason for its sustenance. This part of the decree therefore, will have to be set aside.

The result then is that the rules should be discharged, subject to the modification that the decree for claim with costs will be reduced by Rs. 31 and will be for Rs. 418-8-9. For this small success the petitioners will be absolved from payment of the costs of the opposite party in this rule, it being ordered that each party will bear his or their own costs therein.

R.D.

Decree modified.

(15) [1897] 24 Cal. 786=1 C. W. N. 201.

(16) [1999] 26 Cal. 398=26 I.A. 1=3 C. W. N. 145 (P.C.).

A. I. R. 1928 Calcutta 376

MALLIK, J.

Rai Charan Pal and another—Defendants 1 and 3—Appellants.

v.

Jadu Nath Pal and others—Plaintiffs—Respondents.

Appeal No. 2196 of 1926, Decided on 20th April 1928, from appellate decree of Dist. Judge, Jessore, D/- 17th June 1926.

(a) *Landlord and Tenant*—Lease not produced—Tenant can establish his tenancy from possession and other circumstances.

Where a tenant cannot or does not produce his lease in writing, he can, nevertheless, establish his tenancy from possession and other circumstances: 24 C. L. J. 589, *Rel. on.*

[P 377 C 2]

(14) [1914] 2 K. B. 139=83 L.J.K.B. 658=110 L.T. 832.

(b) *Bengal Tenancy Act, S. 85—Lease in contravention of provisions of S. 85—Tenant in possession on the basis of the kabuliyat—Dispossession by subsequent lessees—Tenant is entitled to recover land.*

Although an under-raiyat's lease is in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of S. 85, yet, if the under-raiyat was in possession of the property on the basis of the kabuliyat, he has sufficient interest in the property to recover the land if dispossessed by the subsequent lessees from the raiyat: 24 C. L. J. 539; 29 C. L. J. 479; and 22 C. W. N. 61; *Foll:* 17 C. W. N. 468 and 17 C. W. N. 59, *Dist.* [P 377 C 2]

Hemendra Chandra Sen—for Appellants.

Gopendra Nath Das—for Respondents.

Judgment.—This appeal arises out of a suit for khas possession of some land on establishment of the plaintiff's title thereto. The allegations on which the plaintiff brought the suit were that he had obtained settlement of the land from two persons, Kanai and Dwijabar, by a patta in the year 1327 B. S. and that after he was in possession of the land for some time he was dispossessed by the defendants in the year 1330 B. S. The defence inter alia was that as Kanai and Dwijabar's interest in the land was that of a raiyat only the patta obtained by the plaintiff was void under the provisions of S. 85, Ben. Ten. Act, and that the defendants themselves had obtained a lease of the land from the widows of Kanai and Dwijabar in the year 1330 B. S. Both the lower Courts held in favour of the plaintiff and gave him a decree. The defendants have appealed to this Court.

It appears that the plaintiff as well as the defendants claimed the land in suit under registered leases in contravention of S. 85, Ben. Ten. Act, and the contention of the learned vakil for the appellants was that, that being so, the plaintiff could not succeed in ejectment against the defendants who were in the advantageous position of a defendant in possession. And in support of this contention he placed reliance on the cases of *Telam Pramanik v Adu Shaikh* (1) and *Jarip Khan v. Dorfa Bewa* (2). On behalf of the respondents reliance was placed on the decisions in *Gour Mondal v. Peari Maghi* (3), *Ganesh Mandal v. Thanda Namasundrani* (4) and *Nibaran*

Chandra Mirdha v. Ram Charan Mondal (5). The question for determination, therefore, is which of these two sets of rulings should be applicable to the facts in the present case. The learned vakil for the appellants urged that the present case would fall within the decision in *Garip Khan v. Dorfa Bewa* (2), inasmuch as the plaintiff based his case on the patta of the year 1327 B. S., which was inadmissible in evidence. I am unable to agree with the learned vakil in this view of the matter. The plaintiff did not base his case on the patta alone, but his case was—and this is also the finding of the learned District Judge—that he was in possession of the land as well. As has been pointed out by Fletcher, J. in *Ganesh Mondal v. Thanda Namasundrani* (4), where a tenant cannot or does not produce his lease in writing, he can never theless, establish his tenancy from possession and other circumstances. The present case, therefore, in my opinion, does not fall within the decision of the case reported in *Garip Khan v. Dorfa Bewa* (2), but falls within the decision of *Manik Borai v. Bani Charan Mandal* (6). In the case of *Gour Mondal v. Balaram Manji* (3), it has been held that although and under-raiyat's lease is in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of S. 85, Ben. Ten. Act, yet, if the under-raiyat was in possession of the property on the basis of the kabuliyat he has sufficient interest in the property to recover the land. On the authority, therefore, of the cases in *Ganesh Mandal v. Thanda Namasundrani* (4), *Nibaran Chandra v. Ram Charan Mondal* (5), *Gour Mondal v. Peary Majhi* (3), I hold that the plaintiff in the present case was entitled to a decree.

The present appeal, therefore, in my opinion, fails and must be dismissed with costs. There has been an application for leave to appeal under S. 15, Letters Patent. The application is allowed as I consider the case to be a fit one for such an appeal.

N.K.

Appeal dismissed.

(1) [1913] 17 C. W. N. 468=18 I. C. 791.

(2) [1912] 17 C. W. N. 59=15 I. C. 476=16 C. L. J. 145.

(3) [1918] 22 C. W. N. 61=43 I. C. 804.

(4) [1916] 24 C. L. J. 539=38 I. C. 489.

(5) [1919] 29 C. L. J. 479=51 I. C. 928.

(6) [1911] 13 C. L. J. 649=10 I. C. 469.

A. I. R. 1928 Calcutta 378

RANKIN, C. J., AND MITTER, J.

Chuni Lal Mandal—Defendant—Appellant.

v.

Hira Lal Mandal and another—Plaintiffs—Respondents.

Appeal No. 5 of 1927, Decided on 4th July 1927, from original order of Chotzner, J., D/- 22nd January 1927.

Civil P. C., Sec. 2, para. 1—Suit for partition—Reference to private arbitration on counsel's motion—Consent decree passed—Party objecting—Power of counsel limited—Decree must be set aside.

In a suit for partition, on the motion of the counsel of the parties, a particular person was appointed as a special referee to go into accounts and a consent decree was passed fixing the shares of the parties. Thereupon one of the parties moved the Court to set aside the decree on the ground that the counsel consented to arbitration contrary to his instructions. The Court found that the counsel had limited authority and proceeded with the case.

Held : that if a client objected to important matters of account being referred to private arbitration and to a private referee, and if that was done by mistake of his counsel, the Court was not wrong in taking steps to see that the suit should proceed in the ordinary way: *Neale v. Gordon Lennox*, (1902) 1 A.C. 465, *Foll.*

[P 380 C 2]

N. C. Chatterjee—for Appellant.*J. N. Majumdar and A. Dutt*—for Respondents.

The order appealed from was as follows:

Chotzner, J.—This is an application to vacate a decree made by this Court by consent of parties on 15th December 1926.

The parties to the litigation are related to each other as sons and mother, the plaintiff and defendant 1 being sons and defendant 2 being the mother.

After the case had been opened and one witness was being examined certain terms were put in by Mr. Roy who appeared for defendant 1 and these were accepted by Mr. Ghose for the plaintiff and by Mr. Mitter for defendant 2, though it does not appear that any of the learned counsel actually signed the proposed terms. Thereupon an order was made by consent embodying the terms recorded, giving the parties liberty to apply during the enquiry which was to be held by Mr. H. K. Mitter, Bar-at-Law. On the following day Mr. Mitter informed the Court that his client Nistarini Dassi was not prepared to accept the terms

embodied in the agreement. Notice was thereupon given to the other two learned counsel and the matter was heard upon affidavit.

Mr. Mitter informed the Court from his place at the Bar that, in consenting to the terms proposed, he was acting under a misapprehension as to the extent of the rights which his client had conferred upon him. He was not clear at the time when he consented that any restrictions had been put upon them and, therefore, he did not consider himself justified in maintaining the position he had taken in regard to the agreement.

Learned counsel, on the other side, have argued that learned counsel acting on behalf of their clients have complete authority to deal with all matters arising in the course of a trial and to dispose of them in their client's interest to the best of their knowledge and ability.

It is, I think, a well-established principle that learned counsel is vested with full authority to deal with all matters in his control relating to and affecting the interests of his client. Cases may arise and have arisen, as in the case of *Neal v. Gordon Lennox* (1), where learned counsel went beyond the powers that had been given to him and it was there pointed out that when learned counsel exceeded his authority the Court would not ratify it.

Now, there can be no question here that when he accepted the terms of settlement Mr. Mitter was acting under the impression that he had full powers to deal with all matters connected with the present litigation. He now states from his place at the Bar that that impression was mistaken and that his client had not vested him with an absolute but with only restricted authority, and he is supported herein by an affidavit filed by the lady herself and by another affidavit filed by her solicitor, and I have no hesitation in accepting his statement. I should personally have thought that no great injustice was being done to the lady if she had consented to the terms proposed but, as apparently, she feels it a grievance that the matters should be concluded upon the lines indicated, I am opinion that the settlement decree should be vacated.

(1) [1902] 1 A. C. 465=36 J. P. 757=87 L. T. 41=71 L. J. K. B. 939=41 W. R. 140.

I think, in the circumstances, it is only fair to the other two parties that the lady should pay the costs of the application and of the hearing.

The case will be restored and will be placed at the head of the list on 10th January 1927, subject to any part-heard case.

[On appeal the following judgment was delivered:]

Rankin, C. J.—In this case defendant Chuni Lal Mandal complains of an order made by Mr. Justice Chotzner whereby he set aside an order previously made by him, the effect of which was to declare certain shares of parties by consent in a partition suit, to appoint Mr. H. K. Mitter, Barrister-at-Law to partition a certain estate and to direct Mr. H. K. Mitter to take certain accounts and to make certain enquiries.

There were three parties to this suit : two brothers and their mother. The mother is said to be siding with the plaintiff Hira Lal and there appear to have been great many steps in the various disputes in which these parties unfortunately seem to have taken part one against the other. We are not at the moment concerned with anything which happened prior to the date the 15th December 1926, when this partition suit came on for hearing. It seems to be a suit in which both parties were liable to account as having various intrusions with the estate left by the father. Defendant Chuni Lal's case was that there was a large quantity of money and valuables in a certain iron safe in the house where Hira Lal and his mother lived and he was desirous of establishing that he was entitled to a certain share of these. In these circumstances, when the suit came on for hearing before Mr. Justice Chotzner, the first thing which happened was that the plaintiff was called on his own behalf as a witness and it was while the plaintiff's evidence was being taken that the incident happened with which we are now concerned.

That the issues which were settled by the learned Judge were fairly complicated there can be no doubt, and the question of the amount of money that was to go to the brothers and to the mother involved accounts and enquiries of a somewhat difficult character. Mr. A. K. Roy, who appeared for Chuni Lal, took the point that it was waste of time before

the learned Judge to go into evidence on the part of the plaintiff or anybody else as to the various details of the accounts as it was quite obvious that in this case there would have to be an order directing the taking of accounts, and accordingly he suggested that a Court officer should be appointed. Somebody else suggested that a particular named advocate, Mr. H. K. Mitter, should be appointed, the intention being that he would act as commissioner of partition and also as the person to whom the accounts and enquiries should be referred; in other words, he should be appointed as a special referee. In the end what happened was that Mr. J. N. Mitter, the learned counsel who appeared for the mother, accepted the suggestion that Mr. H. K. Mitter should be appointed and Mr. Mitter was appointed accordingly as appears from the consent decree passed by the Court.

That decree having been made, purporting to be a consent decree, the lady moved the learned Judge to set that aside. She made the case that she had given certain specific instructions to her attorney who had passed them on to her counsel. These instructions were directed to the question whether an arbitration or a reference to some person other than an officer of the Court should be agreed to. It may be mentioned that the parties had had previous experience of disputes being referred to arbitration and that it had been disastrous. Her case was that she had given express instructions that certain things were not to be referred in any way and she gave evidence to that effect herself. She filed an affidavit and her solicitor also filed an affidavit to the effect that he had specific instructions not to consent to any private arbitration or reference to any private individual of matters in dispute in the suit without getting tried by the Court certain questions, and further not to consent until another suit in which his client was the plaintiff was agreed to be tried along with the present suit, and all charges made against her by Chuni Lal Mandal in his written statement and by his counsel in her cross-examination were withdrawn.

Now, it is quite true, as Mr. Chatterji, in a very careful and able argument before us has pointed out, that at first sight a good deal of suspicion attaches to a

story of this sort. That suspicion is not lessened by the fact that the attorney's affidavit does not give any dates. But the matter does not stop there because the learned Judge, at the time when he considered the lady's application to set aside the previous decree, had before him Mr. Mitter, the learned counsel who had consented on behalf of the lady. Mr. Mitter informed the Court from his place at the Bar that in consenting to the terms proposed he was under a misapprehension as to the authority which had been conferred upon him by his client. He said that he was acting under the impression that he had full power to deal with all matters connected with the present litigation but that that impression was mistaken and he had only a restricted authority. In these circumstances, the learned Judge has acted upon the basis that this story of limited authority of the learned counsel is a true story. I am not prepared to reverse that finding.

The main argument of Mr. Chatterji before us has been upon the principle which is to be found in certain cases which he has cited, that if special restriction is put upon the general and apparent authority of a counsel to effect a settlement of matters in a suit, that restriction will not be binding on the other side unless it is communicated to him; in other words, every person is entitled to presume, till it is said to the contrary that learned counsel has a general authority. For that proposition certain cases have been cited to us. *Strass v. Francis* (2) reaffirmed in the case of *Welsh v. Roe* (3) and the Calcutta case of *Asharam Choutmal v. E. I. Ry. Co.* (3) decided by my learned brother Mr. Justice Page. On the other hand, we have to consider the case in the House of Lords, the well-known case of *Neale v. Gordon Lennox* (4).

The first thing we have to ask ourselves here is what was the nature of this order. In so far as it is complained of it is complained of because it is an order referring to a private individual—an advocate of this Court—certain matters of account which were involved in the

suit itself. It may be perfectly in the right of the learned Judge to refer matters of account to an officer of Court or to somebody else if he thinks it necessary; but in this particular case the reference was, by consent, to a particular named individual, and in these circumstances we have to consider whether the learned Judge was right in being satisfied that the reference in all these matters of account to this particular individual by consent was a reference which should stand after it had been discovered that the learned counsel who had consented to it had done so contrary to his client's instructions. I do not want to put this case on its facts too high, and I do not think that it can be put as high as the case of *Neale v. Gordon Lennox* from the point of view of the interest of the lady client. This is not a case in which the aspersions upon the lady's character were a very prominent feature of the suit. It is not a case in which it would be at all unreasonable for the lady to agree to the proposition put forward as, indeed, the learned Judge thinks.

But, on the other hand, if it is really true that the lady had objected to these important matters of account (from her point of view) being referred to private arbitration and to a private referee, and if that was done by mistake of her counsel, I am not prepared to hold that the learned Judge was wrong in taking steps to see that the suit should proceed in the ordinary way. If any order of reference can be made without the lady's consent it can still be made notwithstanding that this appeal is dismissed. I say nothing whatever upon that aspect of the case. I do not think that there was any lack of jurisdiction on the part of the learned Judge to make the order which he has made. I do not think that it is open in a case of this sort to the appellant Chuni Lal to say that he will hold the other parties to this bargain at all costs whether the Court thinks fit to do so or not. In my judgment the position is that the learned Judge has chosen the better course. He dealt with it as a case of the same essential type as *Neale v. Gordon Lennox* and it certainly is a case in which the order of reference which the Court has made involves that the Court's assistance is being asked in the sense in which

(2) [1866] 1 Q. B. 379=14 W. R. 634=14 Jur. N. S. 486=35 L. J. Q. B. 133=6 B. & S. 365=14 L. T. 326.

(3) [1918] 87 L. J. K. B. 520=34 T. L. R. 187=62 S. J. 269=118 L. T. 529.

(4) A. I. R. 1925 Cal. 696=52 Cal. 386.

Lord Halsbury referred to that matter in his speech in the House of Lords in the case of *Neale v. Gordon Lennox*.

On the whole, I am of opinion that this appeal should be dismissed with costs.

Mitter, J.—I agree.

N.K. *Appeal dismissed*

A. I. R. 1928 Calcutta 381

DUVAL, GRAHAM AND CAMMIADÉ, JJ.

Kambho Bera—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 319 of 1927, Decided on 21st September and 18th November 1927, from order of Chief Presy. Magistrate, Calcutta, D/- 21st April 1927.

(a) *Calcutta Suppression of Immoral Traffic Act* (13 B. C. of 1923), S. 6—*Offence*.

Per Graham, Cammiade and Duval, JJ.—Mere letting of rooms to prostitutes or collecting rents from them is not an offence.

(b) *Calcutta Suppression of Immoral Traffic Act* (13 B. C. of 1923), S. 6—(*Graham and Duval, JJ.*) : *Lessee subletting premises to prostitutes, collecting rent daily by sitting outside and actively associating with the business of the brothel—Conviction under S. 6 is proper (Cammiade, J., contra).*

The accused took on lease certain houses for the purpose of making a living out of them and sublet the houses to prostitutes and made a fine profit out of them. He was not content with simply collecting his rents once a week or once a month, but he attended there daily and had full control over them. He was also daily sitting outside the houses collecting his rents, at times interviewing visitors, and having men there to assist him.

Held : (Per Graham and Duval, JJ.)—That it was not a case of simply having let out the houses to some women who used them for immoral purposes, but was also a case where the lessee took the houses so as to make a profit out of prostitution and that his conviction under S. 6 was proper.

Per Cammiade, J.—Letting rooms to prostitutes and sitting at the gate of the premises to collect daily rent does not amount to the offence punishable under S. 6.

Probdh Chandra Chatterjee and Phasnindra Nath Mukerjee—for Appellant.

Pankridge—for the Crown.

Graham, J.—This is an appeal by one Kambhoo Bera, who has been convicted by Mr. J.D. Tyson, formerly Chief Presidency Magistrate of Calcutta, under S. 6 of the Calcutta Suppression of Immoral Traffic Act (Bengal Act 13 of 1923), and

sentenced to six months' rigorous imprisonment, and to pay a fine of Rs. 1,000, with an additional term of six months' rigorous imprisonment in the event of default to pay the fine. The case is stated to be the first of its kind and keenly contested before the Magistrate. The section in question reads as follows :

6 (1) Any male person, who knowingly lives, wholly or in part, on the earnings of prostitution, shall be punished with imprisonment, which may extend to three years, or with whipping, or with both of those punishments, and shall also be liable to a fine which may extend to one thousand rupees.

(2) Where a male person is proved : (i) to be living with, or to be habitually in the company of a prostitute, or (ii), to have exercised control, direction, or influence over the movements of a prostitute, in such a manner as to show that he is aiding abetting or compelling her prostitution with any other person, or generally, it shall be presumed, until the contrary is proved, that he is knowingly living on the earnings of prostitution.

The case, as originally set up before the Additional Presidency Magistrate, Mr. Biver, was with special reference to sub-S. (2) of the section and the charge was framed in these terms :

That you Kambhoo Bera, between the first day of August 1925 and the 29th day of July 1926, in the town of Calcutta being a male person knowingly lived wholly, or in part on the earnings of prostitution of several inmates of premises No. 37, Uma Das Lane, Calcutta, to wit, amongst others of Hari Bai, Paro, Chandra Debi, Saroj, Lakshmi and Sashi, by living with or being habitually in the company of the said prostitutes, or having exercised control, direction, or influence over the movements of the said prostitutes in such a manner as to show that you were aiding or compelling their prostitution with other persons generally, and thereby you, the said Kambhoo Bera, committed an offence punishable under S. 6, Cl. (1) Calcutta Suppression of Immoral Traffic Act and within my cognizance.

The learned Chief Presidency Magistrate observed that the charge had been inartistically drawn, that it undertook to prove more than the prosecution had been able to establish, and more than it was presumably ever intended to establish, since there was no case in respect of any of the women save and except, Saroj, and that, as matters stood, he was unable to hold it proved that Kambhoo lived with Saroj. He then went on to record the following findings:

I do not think it is at all proved that Kambhoo lives at 37, Uma Das Lane; the probability is that he lives at 64, Free School Street. . . . I am satisfied that he goes to Uma Das Lane and sits at the gates of the brothel at nights, and that he takes a hand in the proceedings there, and even accepts money, though

I do not think it is satisfactorily proved what money it is that he takes. There is evidence that his men bring visitors; this, coupled with his evident desire to get Chandra back when she ran away indicates an exercise of control in such a way as to suggest that he was aiding and even compelling to prostitution. The evidence on these points is, however, not conclusive, and I am not prepared to raise the presumption permitted by sub S. (2) of S. 6.

The learned Magistrate then goes on to comment upon the fact that the house in question and two others, so far from being let out by the accused at a loss, as contended by the defence, were let at exorbitant rents, and observes that the accused belongs to that class of men which relieves landlords of the troubles arising from the refusal of the civil Courts to grant decrees in enforcement of immoral contracts. He goes on to say:

We find Kambhoo giving his time and attention to this, going at night and sitting at the gate; and we find him taking pains to report when one of his tenants is missing; and we find further that she disappears mysteriously from the house of her benefactor and is traced again to the brothel of the man from whom she has just run away, and against whom she has just applied for police warning.

The question is, says the Magistrate, whether such a finding brings the accused within the purview of S. 6 of the Act, and his final conclusion is that it does, and he accordingly convicted and sentenced him as already stated.

The learned vakil for the appellant stated at the outset that he proposed to argue the appeal on the basis of the findings arrived at in the Court below, and his main contention was that, even if those findings be accepted, they are not sufficient to support a conviction under S. 6 of the Act, and that the mere acceptance of rent from persons known to the lessor to be living as prostitutes is not punishable under the section. He urged that the appellant was living not upon the earnings of prostitution, but upon his rent, and that, when some other fact intervenes, such as the right of a lessee to collect his rent, it cannot be said that he is living on the earnings of prostitution, and that the money taken must be shown to be in some way or other directly connected with the act of prostitution.

The argument is plausible, but, having regard to the particular findings which have been arrived at in this case, it cannot in my opinion avail the appellant. If the finding had been that the accused merely collected his rent daily from these

women, whom he knew to be prostitutes, I think it is doubtful if the section would apply. The finding here, however, is more than that. The learned Magistrate has found that the accused used to go at night and sit at the gate. What is the significance to be attached to that fact? It seems to me that the only possible conclusion is that the accused was doing something more than collecting his rent, and that he was actively associating himself with the business of the brothel. The further facts which have been found by the Magistrate in connexion with one of the women who disappeared from the house and was recovered point to the same conclusion. It would be quite unnecessary for the accused to go and sit at the gate at night if his only object in going there was to collect his rent.

In short the evidence, as the learned Magistrate has observed towards the end of his judgment, goes somewhat further than the bare case raised by the defence, and having regard to the findings on that evidence I am of opinion that it has been proved that the accused was in part at all events living on the earnings of prostitution and that he is liable to the penalty provided in S. 6 of the Act.

In my judgment the appeal should be dismissed and the conviction and sentence upheld.

Cammiade, J.—The appellant has been convicted by the Chief Presidency Magistrate of an offence under S. 6, Calcutta Suppression of Immoral Traffic Act, Act 13 B. C. of 1923, and has been sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000. In default of payment of the fine he has been sentenced to a further term of rigorous imprisonment for six months.

The appellant is admittedly the tenant of three sets of premises, Nos. 26B, 37 and 38, Uma Das Lane; and he admittedly sublets these premises to prostitutes. He is also the tenant of 64, Free School Street, which is occupied by male subtenants. In order to substantiate the charge against the petitioner, a variety of allegations were made at the trial, and practically all of these have been disbelieved by the learned Magistrate. These various allegations and the learned Magistrate's findings on them are as follows:

It was alleged that a prostitute by the name of Chandra had been brought to Calcutta by a man who carries on such traffic and had been sold to the appellant, who had forced her to practice prostitution against her will and had appropriated her earnings, and that the appellant had similarly taken the earnings of other prostitutes living in his houses and that he shared the earnings of others. It was further alleged that the remuneration to be paid to prostitutes was settled at the gate of the premises, where admittedly the appellant sits every evening, and that the remuneration is paid by the visitors into the appellant's hands. It was further alleged that the appellant lived at 37, Uma Das Lane, with the prostitutes.

The learned Magistrate has disbelieved all the above allegations. He has held that it has not been proved that the appellant lives at 37, Uma Das Lane and that the probability is that he lives at 64, Free School Street. He states that there is no evidence that Chandra was sold to the appellant, and that it has not been proved that the appellant lives with any of the prostitutes named in the charge. He further states that, though the appellant sits at the gate of the premises and receives money, it has not been satisfactorily proved what money it is that he takes.

The learned Magistrate further mentions that there is the evidence of one witness, witness 4, for the prosecution, to the effect that the appellant's men bring visitors to the prostitutes. His comment on this evidence and also on the evidence relating to a report made by the appellant to the police against Chandra is as follows:

The evidence on these points is, however, not conclusive; and I am not prepared to raise the presumption permitted by sub-S. 2 of S. 6.

The learned Magistrate sums up his findings in the following passages:

Briefly, then, the position is that Kambhoo is one of that class of men who relieve landlords of the troubles arising from the refusal of the civil Courts to grant decrees in enforcement of immoral contracts.

On the defence case, therefore, I think that Kambhoo is liable to punishment under S. 6; and the evidence, as I have shown, goes somewhat further than the bare case raised by the defence.

It is sufficient, it seems to me, for the prosecution to show that part of the income of the accused is to his knowledge derived from prostitution.

According to the learned Magistrate the facts he finds against the appellant are that he lets rooms to prostitutes and sits at the gate of the premises at nights to realize his rents, which are payable daily. As regards two of the allegations

made against the appellant, namely that men of his bring visitors to the prostitutes and that the woman, Chandra, was compelled to return to the appellant's house after she had run away from there, the learned Magistrate has said that the evidence is not conclusive. He does not say what it is not conclusive of; but, judging from the words that immediately follow, one must conclude that the learned Magistrate intended to state that the evidence was not fully satisfactory, because, he says:

I am not prepared to raise the presumption permitted by sub-S. (2) to S. 6.

In Cl. 2 to sub-S. 2 of S. 6 we find that

where a person is proved to have exercised control, direction or influence over the movements of a prostitute, in such a manner as to show that he is aiding, abetting or compelling her prostitution with any other person or generally, it shall be presumed, until the contrary is proved, that he is knowingly living on the earnings of prostitution.

The fact that the learned Magistrate holds that the evidence given before him does not raise this presumption clearly leads to the conclusion that the learned Magistrate did not believe the evidence. Had he believed the evidence, the presumption would clearly arise. Had the appellant compelled Chandra to return to his premises to carry on prostitution or were it true that the appellant had been proved to have brokers who brought visitors to the prostitutes living on his premises, his case would clearly fall within the terms of the rule laid down in sub-S. (2).

The question, therefore, now arising is whether the facts found, namely that the appellant lets rooms to prostitutes and sits at the gate of the premises to collect his daily rent, amount to the offence made punishable by S. 6 of the Act.

The section reads as follows :

Any male person who knowingly lives, wholly or in part, on the earnings of prostitution shall be punished with imprisonment, &c.

It will be noticed that the section applies exclusively to male persons; and this fact alone must make it clear that mere letting of rooms to prostitutes is not made an offence. Had the intention of the legislature been to make such letting of rooms punishable there is no reason why women should not be made punishable for doing the same thing.

The Act does not put the unfortunate women who live by prostitution outside the pale of the law and prohibit their living in rented houses or rooms. If we look at S. 3 of the Act, we find that the letting of houses and rooms to prostitutes is distinctly and expressly contemplated by the Act; and since that is so, earning of money by letting houses or rooms to prostitutes cannot by itself amount to living, wholly or in part, on the earnings of prostitution. If there were any substance in the contrary view every person who sold anything to a prostitute—a seer of rice or a packet of cigarettes—knowing that the woman was a prostitute would be living in part on the earnings of prostitution.

The only question remaining to be considered is whether or not the fact that the appellant sits at the gate of the premises at nights to collect his rent brings his case within the purview of the section. The learned Magistrate has found that the presumption laid down by sub-S. (2) does not arise. The first clause of this sub-section raises the presumption where a male person is proved to be living with, or to be habitually in the company of a prostitute. He has also found that the appellant collects nothing more than his rent, which is paid to him by the prostitutes after they have been visited. In these circumstances, however loathsome the appellant's calling may be, it is impossible to see how it can amount to an offence under the section.

I would, therefore, allow the appeal and set aside the conviction and sentence.

Duval, J.—In this case one Kambhoo Bera was put on his trial under S. 6, Calcutta Suppression of Immoral Traffic Act, before the Chief Presidency Magistrate and was convicted by him and sentenced to six months' rigorous imprisonment and a fine of one thousand rupees, in default, a further six months' rigorous imprisonment. The charge against him was that he was living wholly, or in part, on the earnings of prostitution of seven inmates of a certain premises No. 37, Umadas's Lane, Calcutta, and in support of that charge a large amount of evidence was adduced which may shortly be divided into three main heads: the evidence of prostitutes living in the house itself a large body of evidence of

local neighbours as to what was going on at the premises and the evidence of the landlords of three houses which were let out to the accused. The Chief Presidency Magistrate was unable to accept as good a large number of the statements made by the prostitutes and cast doubts on some of the other evidence as he considered that it might have been brought owing to ill feeling between the accused and some of the witnesses. But he did come to certain findings and in the hearing before me most of these findings are not contested. The admitted facts are that there are three houses in Umadas's Lane, Nos. 37, 38 and 26 (b), all of which are inhabited by prostitutes and apparently have been so inhabited for a long time, that the accused has taken leases of these three houses from their respective landlords and is personally collecting the rents daily from the unfortunates living therein. It is also in evidence that he pays rent to the landlord, Rs. 125 in respect of house No. 37. We have no evidence as to what rent he actually pays for the house No. 38 and as to house No. 26 (b) the evidence is that he only took it about a month before this prosecution was launched at a rental of Rs. 210. The landlord of premises No. 37 admits that he has let it out knowing it to be used by prostitutes so as not to have trouble of collecting rents himself and this appears to be the case in respect of the other two houses. Now as to this, the evidence also goes to show that he charges daily rent from these women and he goes regularly down this street though his residence is in another rented house a little way away and personally sees to the collection of rents. There is also evidence to show that his men are also engaged in seeing the people who visit these women and there is a further fact that he charges Re. 1.4.0 a day or so rent from each of the women, and on any calculation this must give him a large profit in respect of three houses.

We are concerned, however, only with house No. 37, in which six or seven women are said to live and even that house must bring in to him a considerable amount of profit per month. There is, therefore, evidence that he does make a fine profit by having taken lease of premises No. 37 and by collecting rent from the women living there. There is also evidence that he personally goes there and sees to the

collection of rent daily and his men also interview visitors. There is also some evidence that at times he interviews visitors himself and the evidence is that the women receive payments from the visitors and, after they are paid, hand the rents over to him. Now the question arises whether these facts, which I find from the evidence fully established, show that an offence under S. 6 of the Act has been committed. The mere payment of rent by a prostitute to a landlord would not in my opinion bring the case (as the Chief Presidency Magistrate appears to have thought) within the mischief of the section. A prostitute must find somewhere to live, whatever her occupation may be and; however she earns her money, and there are cases in England to show that the landlord cannot be convicted in respect of the keeping of a brothel which in England is illegal, because he only derives profit by taking a high rate of rent. I may refer specially to the case of *Reg V. Samuel Stan-nard* (1). But that case, on its own facts, is very different from the present case. In that case the landlord had no control over any inmates of the house though no doubt he let it out to people for immoral purposes, and, therefore, he had no right to decide as to who was to be admitted and who not into the house. Here the case is very different. Here the evidence goes to show that he took these three houses for the purpose of making a living out of them and the evidence shows that he makes a fine profit out of them. He also is not content with simply collecting his rents once a week or once a month, but he attends there daily and has full control over them. The oral evidence of the neighbours shows that he is also daily sitting outside the houses, collecting his rents, at times interviewing visitors, and having men there to assist him and, in my opinion, this is not a case of simply having let out the houses to some women who used them for immoral purposes, but is also a case where the lessee has taken the houses so as to make a profit out of prostitution and is making a profit by the interest and control that he is still exercising over the women and over the premises in question.

In this view I hold that the Chief Presidency Magistrate has rightly con-

victed the accused and, therefore, I uphold the sentence and conviction.

R.D.

Conviction upheld.

A. I. R. 1928 Calcutta 385

C. C. GHOSE AND BUCKLAND, JJ.

Nahar Lal Shah and another—Appellants.

v.

Baij Nath Shah and others — Respondents.

Appeal No. 4 of 1927, Decided on 14th November 1927, from original decree of Chotzner, J., D/- 16th November 1926.

(a) *Registration Act* (16 of 1908), S. 21—*Mortgage of several immovable properties—Inaccurate description of one property invalidates the whole deed.*

A house and certain land were mortgaged by the same deed. In respect of the land what was sought to be mortgaged was merely the tenants' permanent interest but the mortgagor had no tenants' interest in that land and, moreover, the description given of the said land was inaccurate in every particular.

Held: that the subject-matter of the mortgage had not been identified at all for the purposes of registration within the meaning of S. 21 and the document even if registered would not be valid. [P 386 C 2, P 387 C 1]

(b) *Word*—"Kayemi" does not connote zamindari interest in land by any person—It means "a permanent occupancy holding."

The word "kayemi" is never used in describing zamindari interest in land by any person. The word is always used in connexion with the description of tenants' rights in land and it "means a permanent occupancy holding."

[P 386 C 2]

Langford James, S. C. Basu and J. N. Mazumdar—for Appellants.

N. N. Sircar and P. N. Chatterjee—for Respondents.

C. C. Ghose, J.—This appeal must be dismissed and for the following reasons. The appeal arises out of an action brought by the plaintiff firm for a declaration that a certain Indenture of Conveyance executed in their favour, on 8th December 1921, by the first five defendants gives them an absolute right of ownership in the entirety of premises No. 187, Durmahatta Street, free from encumbrances, and for a further declaration that a certain mortgage executed on 25th June 1921, by the said defendants in favour of the firm of Nahar Lal Shah

Parnesswar Doyal Shah, who hereinafter called defendant 6. is null and void and for an order for cancellation thereof and for delivery of the said mortgage-deed and of vacant possession of a certain godown and stable in premises No. 187, Darmahatta Street, at present occupied by defendant 6. There is a further claim for mesne profits at the rate of Rs. 300 per month from the date of conveyance.

The first five defendants did not appear to contest the suit, but the suit was resisted by defendant 6 alone. Mr. Justice Chotzner, before whom the suit came on for trial, found, on the facts as disclosed in the evidence in this case, that the plaintiff was entitled to succeed and he accordingly made the declarations asked for. The plaintiff's case was that, if the one cotta of land as described in the mortgage-deed of 25th June 1921 was not in existence and could not be identified, the registration at Arrah of the deed which included the Calcutta property referred to above was invalid.

In the written statement which was filed the contentions put forward were: first, that the mortgage of 25th June 1921 was not null and void; and secondly, that the plaintiff could not question the validity of the registration of the mortgage inasmuch as the properties which were the subject of the mortgage were, as a matter of fact, in existence and they had been sufficiently described for the purpose of registration. The plaintiff firm's contention on the other hand was, as indicated above, that there could not have been any registration whatsoever of the document of 25th June 1921, inasmuch as the property, namely, one cotta of land in village Ekona in the district of Arrah, referred to in the document, did not exist, and, even if it did exist, the description thereof was insufficient within the meaning of S. 21, Registration Act.

On appeal before us, the only point that has been urged by Mr. Langford James on behalf of the appellant is that the learned Judge was wrong in coming to the conclusion that the property, namely, the said one cotta of land described as above, did not exist, and further that the plaintiff firm could not possibly challenge the validity of registration of the document on the ground of non-description or insufficient description of the said property.

Now, it appears to me, on the evidence

in this case, that what was sought to be mortgaged by the document of 25th June 1921 was: firstly, premises No. 187, Darmahatta Street, Calcutta, the boundaries whereof were set out in the document itself; and, in the second place, one cotta of land described in the document as follows:

In mouza Ekona, parganah Arrah, district Shahabad, Touzi No. 11292, Khewat No. 2, Thana No. 77, Khatā 132, Khasra No. 332, land one cotta kayemi, whereof the boundaries were set out as follows:

North, Hirdeya Rai; south, Chhakan Rai; east Padam Rai, west Deeki Rai.

Now, apart from the question of boundaries of this one cotta of land, there cannot be much doubt that what was sought to be mortgaged was a permanent occupancy right in one cotta of land within certain boundaries. That that was so is abundantly clear from the use of the word "kayemi." The word "kayemi" is never used, as far as I know in describing zamindari interest in land by any person. The word is always used in connexion with the description of tenants' rights in land and, as stated above, it means a permanent occupancy holding. Therefore, what was sought to be mortgaged was merely the tenants permanent interest in one cotta of land. It is further clear on the evidence in this case that the mortgagors had no tenants' interest in one cotta of land in mouza Ekona. This in itself would be sufficient to demonstrate the invalidity of the registration of the deed. Moreover, the description given of the said one cotta of land is inaccurate in every particular. The description of boundaries that is given in the document is really the description of the entire plot 332 consisting of no less than 21 cottas, and it is not and cannot be the description of any one cotta of land in the said plot. Therefore, apart from what can be deduced from the use of the word "kayemi," it is clear that the subject-matter of the mortgage has not been identified at all for the purposes of registration within the meaning of S. 21, Registration Act. What is the result then? The result is, as has been laid down in the section itself, and in a series of cases on that section, that there could not have been a valid registration of a document of this nature within the meaning of S. 21, Registration Act. If it has been registered, the fact of the

registration, in the circumstances of this case, confers no validity whatsoever. Therefore, it follows that no rights whatsoever had accrued to the mortgagors by reason of the execution of the mortgage of 25th June 1921 and the invalid registration thereof. It follows, therefore, that the plaintiff firm are entitled to ask for the declarations which they have prayed for in their plaint. It was argued, however, that there was no difficulty whatsoever by reason of the insufficient description of the one cotta of land in the document of 25th June 1921, because the transaction in substance was a mortgage of a 1/21 share in the land comprised in plot 332 and that whatever uncertainty there was in the description could be removed or cured by reason of partition proceedings being instituted by the mortgagee after he had obtained the mortgage decree on the mortgage. To that the answer is: first, that 1/21 share of interest in land comprised in plot 332 is not the subject-matter of the mortgage of 25th June 1921, and, therefore, no useful purpose can be served by founding an argument on facts which are not the facts in issue in this case. Secondly, the argument neglects altogether the considerations which flow from the use of the word "kayemi" to which reference has already been made. Therefore, the answer is twofold and they are as set out above; and these answers, it seems to me, are absolutely fatal to any contention that may be raised on behalf of the appellant. The result, therefore, is that there are no merits whatsoever in this appeal and it must be dismissed with costs.

Buckland, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 387

MUKERJI, J.

Murlidhar Ram Narayan—Accused—Petitioner.

v.

Corporation of Calcutta—Complainant—Opposite Party.

Criminal Revn. No. 1188 of 1927, Decided on 5th January 1928.

Calcutta Municipal Act, S. 385 (1) and S. 488 (1) and (2)—Conviction under S. 385 (1) read with S. 488 (1)—Continuing to work mill after conviction is not continuance of the offence—Second conviction is bad.

The accused set up a flour mill intending to

work it by electricity without the previous written permission of the Corporation and was convicted under S. 385, Cl. (1) read with S. 488, Cl. (1), and was sentenced to pay a fine on 30th March 1927. After the said conviction, he worked the mill from 1st April onwards. For this he was prosecuted for having committed an offence under S. 385, Cl. (1) read with S. 488, Cl. (2), and was sentenced to pay a daily fine of Rs. 10.

Held: that once the mill has begun to work with electricity, etc., the thing passes beyond the range of intention and it cannot be said to be a continuance of the same offence, but must be regarded as a new offence altogether and the conviction is bad in law and must be set aside. [P 388-C 1]

Kushi Prasun Chatterjee—for Petitioner.

Suresh Chandra Taluqdar and Gopendra Krishna Banerjee—for Opposite Party.

Judgment.—The question involved in this Rule is one of considerable nicety and of some importance. The petitioner set up a flour mill in a room at premises No. 139-1, Russa Road, intending to work it by electricity without the previous written permission of the Corporation and was convicted under S. 385, Cl. (1) read with S. 488, Cl. (1), Calcutta Municipal Act, and was sentenced to pay a fine of Rs. 10 on 30th March 1927. Since the said conviction he, to quote the words of the sanitary officer, "worked the mill from the 1st April onwards." That officer further deposed thus:

I inspected the mill in May and I found it working. After the last conviction the accused did not apply for permission under S. 385 nor has he got any. If the accused had applied, the permission would have been refused as the site and locality are unsuitable for the working of an electric mill.

For this he was prosecuted for having committed an offence under S. 385, Cl. (1) read with S. 488, Cl. (2) of the Act for a period of 30 days commencing from the 1st April 1927, and was sentenced to pay a daily fine of Rs. 10, i. e., to an aggregate fine of Rs. 300. He has then obtained the present Rule.

The question that arises for consideration is whether what was done by the petitioner amounted to a continuance of the offence mentioned in S. 385, Cl. (1) of the Act. The ingredients of an offence contemplated by that section are: first, the new establishment or material alteration, enlargement or extension of factory, workshop or workplace, and, second, an intention to employ steam, electricity, water or other mechanical

power therein. It is conceivable that the establishment should be in progress or that the alteration, enlargement or extension should be made after a conviction is once had, and, if any of these things is done, the second ingredient mentioned above being present, the act would amount to a continuance of the offence mentioned in the section. Once, however, the mill has begun to work with electricity, etc., the thing passes beyond the range of intention that forms the second ingredient of the section, and it cannot be said to be a continuance of the same offence, but must be regarded as a new offence altogether. It is not necessary to enquire whether the legislature has provided for such an offence, but evidently it has in S. 386, Cl. (1) of the Act. The argument upon which the learned Magistrate has relied a good deal, namely, the disparity between the daily fines provided for continuing offences relating to S. 385, Cl. (1) and those relating to S. 386, Cl. (1) cannot be of any assistance in construing the meaning of the said sections. It is not difficult to explain this disparity, and I do not feel pressed by the argument that to hold as above will be to make the petitioner liable to lesser penalty. I think the statute has made ample provisions for safeguarding the interests of all concerned and it is not necessary to strain the words of S. 385, sub-S. (1) to include within it cases which, on the face of the wording thereof, are outside its scope and which easily and clearly come within the next section.

In this view of the matter I am of opinion that the conviction of the petitioner is bad in law and must be set aside, and the fine, if paid, should be refunded. The Rule is accordingly made absolute.

It appears that there is considerable dispute as regards the date when the petitioner applied to the Corporation for permission to establish or to work the mill. In the interest of everybody, the matter should be cleared up and it is desirable that the permission should either be granted or definitely refused as speedily as possible, and, in the latter case, if that be the case, effective measures should be adopted so that the statutory authority of the Corporation may not be defied or flouted.

R.D.

Rule made absolute.

A. I. R. 1928 Calcutta 388

RANKIN, C. J., AND COSTELLO, J.

Khemadananda Kumar—Defendant—Petitioner.

v.

Rashamya Haldar—Plaintiff—Opposite Party.

Civil Rule No. 512 of 1927, Decided on 22nd June 1927, from order of Munsif 4th Court, Diamond Harbour (24 Parganas), D/- 16th March 1927, in Suit No 258 of 1926.

Bengal Tenancy Act, S. 105—Suit in ejectment—Defendant cannot get advantage of stay of proceedings under S. 111 by merely raising a question of status.

Section 111 does not mean that in any case in which the defendant chooses to raise a question as to status the landlord is prevented from taking action under the ordinary law in such matters. [P 388 C 2]

A suit in ejectment was brought against the defendant alleging that he was an under-raiyat and that notice had been given under S. 49. The defendant claimed to be an occupancy-raiyat, and having claimed to be an occupancy-raiyat he contended that by S. 111 the proceedings against him should in effect be stayed until three months after the final republication of the record-of-rights.

Held: S. 111 did not apply to the case: 3 C. L. J. 133; 3 C. L. J. 63n; and A. I. R. 1928 Cal. 1211; *Ref.* [P 389 C 1]

Satindra Nath Roy Choudhury—for Petitioner.

Panna Lal Chatterjee—for Opposite Party.

Rankin, C. J.—In this case a suit in ejectment was brought against the defendant alleging that he was an under-raiyat and that notice had been given under S. 49, Ben. Ten. Act. The defendant, by his written statement, claimed to be an occupancy-raiyat, and, having claimed to be an occupancy-raiyat, he contends that by S. 111, Ben. Ten. Act. the proceedings against him should in effect be stayed until three months after the final publication of the record-of-rights.

The Court below has refused this contention and said that the suit is one for recovery of khas possession and S. 111 does not apply to the case.

I am of opinion that the Court below is right in the view it has taken of S. 111. I do not think that it can be imputed to the section as to its meaning that in any case, in which the defendant chooses to raise a question as to status, the landlord

is prevented from taking action under the ordinary law in such matters.

We have been referred to a judgment in *Kanak Kanti Roy v. Srishtidar Mondal* (1). There are certain passages in that judgment which give colour to the contention of the present petitioner, but, upon a careful consideration of S. 111 and its real meaning, I am not of opinion that it can be laid down that in any case where the defendant offers to raise a question of status the plaintiffs are rendered powerless so far as the civil Court is concerned.

The rule is discharged with costs, the hearing-fee being assessed at one gold mohur.

Costello, J.—I agree. I only desire to add that in my opinion the point raised is amply covered by a decision of Mitra, J., in *Nasarulla Mia v. Amiruddi* (2). In that case the suit was one for rent and the defendant pleaded non-liability denying the relationship of landlord and tenant. He claimed the status of a jotedar or occupancy raiyat and put forward the record-of-rights and settlement rent-roll published on 20th October 1900 as a bar to the plaintiff's claim. The plaintiff's contention was that neither S. 105-H nor S. 111-A, Ben. Ten. Act, applied to the facts of that case. The learned Judge in his judgment said: "We think this contention is sound and the appeal must be allowed." There is also a similar decision in the same volume: see *Rajaram Singh v. Sheo Pershad Roy* (3) of the Calcutta Law Journal at p. 63 of the Notes portion at the end of the volume.

N.K.

Rule discharged.

(1) A. I. R. 1925 Cal. 1211.

(2) [1906] 3 C. L. J. 133 (134).

(3) [1906] 3 C. L. J. 63n.

A. I. R. 1928 Calcutta 389

MUKERJI, J.

Siti Fakir—Plaintiff—Petitioner.

v.

Chand Bewa and others—Opposite Parties.

Civil Rule No. 1068 of 1927, Decided on 9th January 1928, from order of 2nd Munsif, Bogra, D/- 30th April 1927, in S. C. C. Suit No. 680 of 1926.

(a) *Contract Act, S. 69—Words "interested in the payment of money" explained.*

The words "interested in the payment of money" in S. 69 include an apprehension of

any kind of loss or inconvenience or, at any rate, any detriment capable of being assessed in money, while the same is not enough under the common law to found a claim for reimbursement. [P 391 C 1]

S sold seven wans of land to one K who gave in usufructuary mortgage three-and-half wans of land to one J. Out of these three and half wans of land, two wans of land were purchased by P from one C to whose share the land came as a donee from S. Later, mortgagee J instituted a suit against P and others for getting possession of two wans of land. In the suit P, as defendant, set up a title paramount and averred that his purchase was before mortgage and it was not affected by the same. The mortgage decree that was obtained by the said mortgagee was put into execution, and in the application for execution P appeared as judgment-debtor and land was included in the schedule of properties as one of the mortgaged properties. The property was advertised for sale. Upon this, P paid up the entire decretal amount in order to redeem his share. Thereafter, P instituted a suit for recovery of that sum.

Held: that, considering the circumstance in which deposit was made, plaintiff was entitled to be reimbursed under S. 69; 28 All. 563; 33 Mad. 232; and 19 C. L. J. 72; Ref. [P 391 C 1]

(b) *Contract Act, S. 70—Applicability of—Elements discussed.*

The words of S. 70, Contract Act, are very wide, and, applied with discretion, they enable the Court to do substantial justice in a case where it would be difficult to impute to the person concerned relation actually created by a contract. For the application of that section three elements are necessary, viz., first, that the act should be lawfully done for another; second, that it should not be the doer's intention to do it gratuitously; and third, that the other party should enjoy the benefit of it: A. I. R. 1925 Cal. 1097 and 38 Cal. 1, Ref.

A deposit made with the approval of the Court is a deposit lawfully made: 38 Cal. 1, *Foll.*

[P 391 C 2]

Radha Binode Pal and Jitendra Mohan Banerji—for Petitioner.

Hiralal Chakravarti for *Manmatha Nath Roy*—for Opposite Parties.

Judgment.—This rule is directed against the decree of the Munsif, First Court, Bogra, by which the learned Munsif, acting as a Judge of a Court of Small Causes, has dismissed the petitioner's suit. The suit was for recovery of a sum of Rs. 133 odd from the defendants upon certain allegations, which, as far as can be made out from the arguments, are not at present disputed. The facts, shortly stated, are these:

One Samat sold seven wans of land to one Khoshi Bibi in 1315. In 1325 Koshi Bibi gave in usufructuary mortgage three-and-half wans out of the said seven wans of land to one Jamatulla and others. Among these three-and-half wans of land

was a plot, which, according to the petitioner, had been purchased by him in the year 1322 from one Chand Bibi. The petitioner's case was that Samat had made an oral gift of 16 wans of land to Chand Bibi and three others and that, after the death of Samat which took place in 1318 B. S., there was a partition of the said 16 wans of land amongst the said donees, and that this particular plot fell to the share of Chand Bibi. After the mortgage aforesaid, the mortgagees, Jamatulla and others, instituted a suit against the petitioner and others, alleging that they had obtained possession under the usufructuary mortgage in respect of only one-and-half wans of land and that they could not get possession of the remaining two wans and for that reason they instituted the suit for a declaration of their usufructuary mortgage right to the said two wans of land and praying for khas possession thereof and in the alternative for a decree for sale of the mortgaged properties. In that suit the petitioner, as defendant, set up a title paramount and averred that his purchase was before the mortgage and it was not affected by the same. That litigation ended in a decree passed by the Subordinate Judge on appeal, who upheld the decree for sale made by the trial Court, but held that the petitioner would not be bound by the sale of the said two wans of land which in the said decree was described as plot 3 of the plaint of that suit.

The mortgage decree that was obtained by the said mortgagees was put into execution and in the application for execution that was filed the petitioner's name appeared as the first judgment-debtor and plot 3 was also included in the schedule of properties, the said plot being mentioned as one of the mortgaged properties and the decree was sought to be executed in respect of that property as well. An order was made for the sale of the mortgaged properties as applied for on behalf of the mortgagees, and this particular plot was advertised for sale. Upon that the petitioner paid up the entire decretal amount by putting in the sum in Court under an order passed by the executing Court which stated that the amount deposited as aforesaid should be received and that the execution case should be dismissed on full satisfaction and the decree-holder permitted to with-

draw the money. Thereafter the petitioner instituted the present suit for recovery of the said sum of Rs. 133 odd from the defendants. The learned Munsif has dismissed the suit holding that the plaintiff had no right to be reimbursed either under the provisions of S. 69 or of S. 70, Contract Act. The learned Munsif has observed in his judgment that as the plaintiff's purchase had been made long before the date of the mortgage, and as the mortgage suit was dismissed so far as it was against the petitioner, and it being ordered in the judgment of the appellate Court in that suit that his interests in the land were not to be affected by the sale, the plaintiff had no right to make the deposit under S. 69, Contract Act. He, moreover, held that the payment which the plaintiff made cannot be said to have been made "lawfully" within the meaning of the word as used in S. 70, Contract Act. He held that the deposit made as aforesaid by the plaintiff was a mere voluntary payment and, therefore, he was not entitled to be reimbursed. In this view of the matter the learned Munsif, as I have already said, dismissed the suit.

The arguments that have been addressed to me on behalf of the petitioner in this rule have been to the effect that, in the view which the learned Munsif has taken both as regards the provisions of S. 69 and of S. 70, Contract Act, the learned Munsif has been in error. So far as S. 69, Contract Act, is concerned it is to be noted that, notwithstanding the declaration which the petitioner had obtained in his favour in the mortgage suit and which was to the effect that his interest in plot 3 of the plaint in the suit would not be affected by the sale, the mortgagees decree-holders purported to proceed against the petitioner also, making no reservation whatsoever in respect of his interest in plot 3 with regard to which there was a declaration of exemption as I have already stated. It has been urged on behalf of the opposite party that, although this was the state of things, the fact that there was a declaration in favour of the petitioner by a competent Court which had finally determined that the interest of the petitioner in plot 3 would not be affected by the sale, was sufficient to take away any interest which the petitioner might otherwise have in the payment of the month

and that the apprehension, if any, which he entertained by reason of the property being advertised for sale, was without foundation, and that he had no justification whatsoever such as would give him the right to be reimbursed under the provisions of S. 69, Contract Act. To accept this argument of the opposite party would be to put the petitioner in a worse position than he otherwise would be in, merely because he had succeeded in obtaining beforehand a declaration protecting his rights, and I am clearly of opinion that, in the circumstances of the case, the petitioner, by reason of the apprehension which he entertained of the sale which was going to take place in respect of the plot which belonged to him, had an interest in the payment of the money which the other judgment-debtors in that case were bound by law to pay. The mere fact that there was a declaration in his favour is not sufficient to take away that interest. The decisions under S. 69, Contract Act, have made it perfectly plain that the words "interested in the payment of money," as used in that section, include an apprehension of any kind of loss or inconvenience or, at any rate, any detriment capable of being assessed in money while the same is not enough under the common law to found a claim for reimbursement. Reference in this connexion may be made to the decisions of Stanley, C. J., of the Allahabad High Court, in the case of *Tulsha Kunwar v. Jogeshwar Prasad* (1), of the Madras High Court in the case of *Subramania Iyer v. Venkappa Reddi* (2) and of this Court in the case of *Pankhabati Chaudhurani v. Nonihal Singh* (3). I am, therefore, of opinion that the case comes directly within the purview of S. 69, Contract Act, and in the circumstances in which the deposit is alleged to have been made by the plaintiff he is entitled to be reimbursed under the provisions of that section.

It is not necessary, in view of what I have just said, to deal with the question as to whether S. 70 would or would not apply to this case. But, even if I am wrong in the view that I have taken with regard to S. 69, I think that the case

comes also within the purview of S. 70, Contract Act. It is true that the interest of the petitioner in plot 3 of the suit, to which reference has already been made, was protected by the decree; but the existence of an interest is not always, though it is generally, a test which establishes the lawful character of a payment. In these circumstances it stands to reason to hold that such interest as the petitioner had in the sale was a sufficient interest which would make the deposit that he made a lawful payment within the meaning of S. 70. It has been held in a large number of decisions to which it is not necessary to refer on the present occasion, inasmuch as they have been discussed in a recent decision of this Court in the case of *Nagendra Nath v. Jugal Kishore Roy* (4), that the words of S. 70, Contract Act, are very wide and, applied with discretion, they enable the Court to do substantial justice in a case where it would be difficult to impute to the person concerned relation actually created by a contract. It has been pointed out in that case that for the application of that section three elements are necessary, viz.: first, that the act should be lawfully done for another; second, that it should not be the doer's intention to do it gratuitously, and third, that the other party should enjoy the benefit of it. So far as the second and third elements are concerned, there can be no question that they are present in the present case. As regards the first of these elements: it is sufficient to refer to the case of *Suchand Ghoshal v. Balaram Mardana* (5), a case which, in my opinion, makes the nearest approach to the present one in which Sir Lawrence Jenkins, C. J., observed that if a deposit were made with the approval of the Court it should be held that it was a deposit made lawfully. I am, therefore, of opinion that this rule should be made absolute, that the decree against which it is directed should be set aside and the case should be sent back to the Court of the learned Munsif, so that the other issues which arise in the suit may now be dealt with and disposed of in accordance with law. Costs of this rule, one gold mohur, will abide the result of the suit.

N.K.

Rule made absolute.

(4) A. I. R. 1925 Cal. 1097.

(5) [1911] 38 Cal. 1=12 C. L. J. 566=6 I. C. 810=14 C. W. N. 945.

(1) [1906] 28 All. 563=(1906) A. W. N. 114=3 A. L. J. 372.

(2) [1910] 33 Mad. 232=4 I. C. 1083=19 M. L. J. 750.

(3) [1913] 19 C. W. N. 778=21 I. C. 207=19 C. L. J. 72.

A. I. R. 1928 Calcutta 392

B. B. GHOSH AND ROY, JJ.

Dinanath Kundu and others—Defendants—Appellants.

v.

Janaki Nath Roy and others—Plaintiffs—Respondents.

Appeals Nos. 135 of 1925, and 41 of 1926, Decided on 23rd June 1927, from original decrees of Sub-Judge, Faridpur, D/- 28th May 1925.

(a) *Landlord and Tenant — Lease whether permanent—Surrounding circumstances and entire terms of lease must be looked into—Tenant taking leases for different terms—Last lease in different form and purporting to give a high premium and high rate of rent—Lease was held to be permanent lease.*

Unless the words clearly indicate permanency of lease, the surrounding circumstances and the entire terms of the lease must be looked into in order to ascertain the nature of the grant. [P 394 C 1]

The property originally belonged to a zamindar from whom the predecessor-in-interest of the defendants first took a lease of the property in 1876 for a term of three years. On the expiry of the term of that lease, other leases were taken for different terms from time to time by the same lessees from the landlord. The lease just before the one in question was taken in 1895. This was for a term of five years, which was to terminate at the end of the Bengali year 1307, corresponding to the middle of April 1901. Before the expiry of the term of that lease, the present defendants took the lease in dispute by executing a kabuliyat, dated 21st September 1900. The most important provisions in it being : "I had been till now in possession of the haut, etc., by taking a temporary miadi, ijara settlement of the same and realizing rents. I prayed to you for having granted a bemiadi settlement of the haut, etc..... and you, on receiving a salami of Rs. 3,500 from me and fixing the annual rent at Rs. 800, granted my prayer and made me a bemiadi settlement of the haut..... I appear before you and agreeing to pay a rent of Rs. 800 per annum, I execute this deed of bemiadi, kabuliyat." The plaintiffs in the suit acquired the interest which originally belonged to the landlord by virtue of a purchase at a sale in execution of a mortgage decree on 28th April 1921.

Held : that it can hardly be reasonable to suppose that the tenant paid Rs. 3,500 as salami and consented to increase the rent to Rs. 800 in order to take a lease which might be terminated the next month or the next year at the will of the landlord. Taking all these facts into consideration the only reasonable conclusion was that the lease was a permanent one, instead of giving the lessee a more precarious right than what he had under the temporary lease which preceded it. [P 394 C 2]

(b) *Words "sarsari" and "bemiadi."*

A "sarasari" lease no doubt connotes the

idea of a temporary settlement. But coupled with the expression "bemiadi" it can only mean a permanent lease but variable as to rent. [P 395 C 2]

(c) *Landlord and Tenant — Tenancy commences from the date mentioned in the document of tenancy unless shown otherwise.*

Unless it could be definitely shown that the tenancy was to commence at a particular date different from the date of the document by which it was created, it must be held ordinarily that the year of the tenancy commences from the date of the document. [P 396 C 1]

(d) *Transfer of Property Act, S. 107 — In Bengal a lease evidenced only by a kabuliyat creates lease as much as by a patta executed by landlord and accepted by tenants.*

It has all along been the practice, in Bengal at any rate, to create large leasehold interest^s of a permanent nature by accepting a kabuliyat from the tenant, or, in other words, a kabuliyat executed by the tenant and accepted by the landlord is as much a lease as a patta executed by the landlord and accepted by the tenant.

[P 396 C 2]

Dwarkanath Chakravarti, Nirmal Chandra Chakravarti, Bansori Lal Sarkar and Ajendra Nath Dutt—for Appellants.

S. C. Basak, Jotindra Mohan Bose, Nagendra Chandra Chaudhuri, Birendra Chandra Das and Bepin Chandra Bose—for Respondents.

B. B. Ghosh, J.—These two appeals by the defendants arise out of two actions in ejectment which were decreed by the Subordinate Judge. The plaintiffs brought the suits on the ground that the defendants were in possession of the leaseholds in temporary right under two leases evidenced by two kabuliyats, dated 21st September 1900 and 4th August 1903, respectively. The suit, out of which appeal No. 135 of 1925 arises, relates to the kabuliyat of the 21st September 1900. The parties to the two suits are the same. The questions on which the decision of the two appeals depends are also the same. There were two suits, only because there were two separate leaseholds under two separate leases. Notices were served, dated 20th Bhadra 1329 B. S., corresponding to 6th September 1922, and it was alleged that the notices were to terminate the lease at the end of the Bengali year on 30th Chaitra 1329 corresponding to some date in the middle of April 1923. The suits were brought on 20th September 1923. The Subordinate Judge decreed both the suits and various grounds were discussed in his judgment. In these appeals the appellants raise only two points for con-

sideration and those two points are, in my opinion, the only two effective points in the appeals. The first and the most important point is as to the construction of the leases and the second question is as to the legality and sufficiency of the notices served on which, it is alleged by the plaintiffs, the leases were terminated. The leasehold properties—and I need mention only one property and the observations would apply to the other also—consist of a haut, bandar and bazar situated on the bank of a streamlet. The property originally belonged to a zamindar named Bepin Behari Roy. The predecessor-in-interest of the defendants first took a lease of the property on 7th April 1876 for a term of three years at a rent of Rs. 375 per annum. On the expiry of the term of that lease, other leases were taken for different terms from time to time by the same lessees from the landlord which it is unnecessary to mention in detail. The lease just before the one in question was dated 2nd August 1895. This was for a term of six years, which was to terminate at the end of the Bengali year 1307, corresponding to the middle of April 1901. Before the expiry of the term of that lease, the present defendants represented by one of them, Dina Nath Kundu, took the lease in dispute from Bepin Behari Roy, by executing a kabuliyat, in his favour, dated 21st September 1900. The kabuliyat with respect to the other leasehold property was executed by the same defendant in favour of the son and the administrator to the estate of Bepin Behari Roy, who had died in the meantime on 4th August 1903. This lease was executed with regard to some excess land lying contiguous to the land which was the subject-matter of the previous lease of 1900.

The whole question in dispute is whether by these leases the lessees obtained a permanent, heritable right to the leasehold properties subject to certain restrictions as to the use of the properties and with the liability of the rent being variable under certain conditions or not. The plaintiffs in the suits acquired the interest which originally belonged to Bepin Behari Roy by virtue of a purchase at a sale in execution of a mortgage-decree on 25th April 1921. The contention on behalf of the plaintiff is that the defendants hold under a tem-

porary lease or, at the utmost, under a lease 'from year to year which was terminable by six months' notice to quit and, such a notice having been served upon them, they have no right to remain on the land. The plaintiffs are, therefore, entitled to khas possession by ejecting the defendants. We have thus to see which of the contentions should prevail. The contention of the plaintiffs found favour with the Subordinate Judge. The most important provisions in the lease are these :

I had been till now in possession of the haut, etc., by taking a temporary miadi ijara settlement of the same and realizing rents. I prayed to you for having granted a bemiadi settlement of the haut, etc. . . . and you, on receiving a salami of Rs. 3,500 from me and fixing the annual rent at Rs. 800, granted my prayer and made with me a bemiadi settlement of the haut. . . . I appear before you and, agreeing to pay a rent of Rs. 800 per annum, I execute this deed of bemiadi kabuliyat.

3. If due to my default or neglect of duty the conditions of the haut . . . deteriorate or are likely to deteriorate instead of being improved, you shall forthwith be able to take khas possession by ejecting me from the haut, etc., and no objection on the part of myself and my heirs shall be entertained.

Paragraph 4, provides that the tenant shall pay all necessary expenses for the improvement of the property.

Paragraph 5 runs thus :

If in future the present condition of the haut, bazar, bandar and ghat be improved, I shall pay without objection the increased rent that may be assessed by you over and above the jama fixed. I shall not be entitled to raise any plea or objection thereto . . . nor shall I be able to make an istafa (surrender) thereof.

Without your permission I shall not be competent to dig any tank or build any permanent masonry structure within the lands of this haut, bazar and bandar or to allow any shopkeeper to do so. I shall not be competent to grant any bemiadi settlement of any land of the haut. . . .

Paragraph 9 restricts the power of transfer, etc.

Paragraph 13 ends in this way :

In default, you shall be competent to bring a suit according to law and realize compensation and to take khas possession of the haut, etc., if you so desire, and no objection thereto on the part of myself or my heirs will be entertained. I and my heirs remain bound by the terms of this kabuliyat.

The learned Subordinate Judge held that this only created a temporary lease. It is argued on behalf of the appellants that the word "bemiadi" is synonymous to "permanent". In support of the contention, they have referred

us to a publication by the Government named "A Guide and Glossary to Survey and Settlement Records in "Bengal." There, a "permanent tenure" is translated as bemiadi muthusthuth and the contention on behalf of the appellants is that this is the correct translation of the term "bemiadi".

The next contention of the appellants is that in the record-of-rights the interest of the appellants was recorded as a permanent tenure. The then landlord, Upendra Nath Roy, raised an objection to the record. The objection was to the expression "tenure" and not to the permanency of the right. This appears to be so from the order of the Settlement Officer who decided the objection. The landlord urged that no interest in the land had been created and, therefore, it was only a sayar jama and the Bengal Tenancy Act had no application to this sort of jama. The learned advocate for the respondents very rightly contends, in my opinion, that no inference can be drawn from this, as the landlord took exception to the authority of the Settlement Officer to make any record whatsoever of this property. The appellants next rely upon the case of *Forbes v. Hanuman Bhagat* (1), where the learned Judges held that the lease which made a bemiadi settlement was, upon its proper construction, intended to be permanent and not from year to year. On the other hand, the learned advocate for the respondents relies upon another case of the Patna High Court, *Parshan Kuer v. Tulsi Kuer* (2), in support of the contrary contention where the learned Judges held that a bemiadi lease, although the grant included the minerals and was hereditary according to its terms, created only a lease from year to year. The real question seems to me to be to construe the lease according to the expressions used in it taking it along with the surrounding circumstances. It has been held in a series of cases that, unless the words clearly indicate permanency of lease, the surrounding circumstances and the entire terms of the lease must be looked into in order to ascertain the nature of the grant; and I propose to do so in the present case in order to discover what the meaning of the expression bemiadi was in this

lease. Beginning from the very beginning, I may refer to the meaning of the word "miadi" as it appears in Wilson's Glossary. According to that authority "miadi" means "limited, terminable, conditional." The prefix "bey" implies "absence"; literally, the word "bemiadi" must, therefore, mean "unlimited, not terminable, unconditional." Now, contrast this lease where the word "bemiadi" has been used with the expression "miadi" as applied to the previous lease which was then running. The previous lease was a lease for a term. The tenant says that instead of a miadi lease, i. e., lease for a term, he was desirous to take a bemiadi lease, i. e., a lease which was not terminable. Add to this fact, that the tenant had been taking terminable leases for certain fixed periods from the year 1876 and the period of the last of such leases was running at the time of the lease in question. It can hardly be reasonable to suppose that the tenant paid Rs. 3,500 as salami and consented to increase the rent to Rs. 800 at that time in order to take a lease which might be terminated the next month or the next year at the will of the landlord. The next question is this : so long as the lease was for a term, the rent fixed was not at all liable to be increased, as would appear from Ex. D (5), the previous lease for the land, dated 2nd August 1895. In the present lease, the landlord has been given the power of unlimited increase of rent on certain grounds. Then again, contrast the right to create subleases. In para. 9, of Ex. D (5) it is stipulated by the tenant:

I shall not be competent to settle any tenant under me for any period in excess of the prescribed term of my ijara;

that is to say, the tenant was entitled to create a sub-tenancy to the extent of six years. Under the lease in question, the corresponding provision is, as I have already stated, "I shall not be competent to grant any bemiadi settlement of any land of haut, etc." Here, again, the word "bemiadi" appears. Now, in my judgment, it cannot be conceived that the tenant was restricted from giving even a temporary sublease. What was provided there was, in my opinion, that the tenant would not be entitled to create a permanent sublease; and that gives, in my judgment, a key to the meaning of the word as understood by the parties. It

(1) A. I. R. 1924 Pat. 88=2 Pat. 452.

(2) [1917] 2 Pat. L. J. 180=39 I. C. 658=1918 P. H. C. C. 11.

may then be asked: Why are these restrictions prescribed against the right to dig tanks, build permanent masonry structures, houses, etc.? If the landlord finds that a tenant at will is behaving in such a manner as to jeopardize his interest so as to deteriorate the value of the property, it is open to him simply to serve a notice to quit if the lease was terminable at his will. But if the lease was not terminable, then these provisions would be of importance. The land was let out for the purpose of a *haut*, bazar, etc. Digging of tanks would be incompatible with the purpose of a *haut* or bazar and necessarily the income derived from the *haut* or bazar would be diminished and thereby the landlord's interest would be affected as he would not be, under the circumstances, entitled to assess, a higher rent. There was no such restriction in the previous lease for a term: see Ex. D (5), dated 2nd August 1895. The obvious reason is that no tenant would go to the expense of spending money in digging tanks or raising permanent masonry structures on a leasehold property let out only for a short term. Much less would a tenant do so if the lease was not even for a term but liable to be terminated at the will of the landlord.

These restrictions, therefore, indicate to my mind that the lease was such a one that the tenant might find it advantageous to himself to spend money for those purposes, and hence the restrictions were imposed. This leads me to the conclusion that the lease was intended to be a permanent one. Next, there is an indication that this lease would be heritable. From the passages in paras. 3 and 13 of the lease, which I have already cited, it appears that the heirs were also to be bound by the stipulations contained in the *kabuliyat*. Taking all these facts into consideration, it seems to me the only reasonable conclusion is that the lease was a permanent one, instead of giving the lessee a more precarious right than what he had under the temporary lease which preceded it. This was also the opinion of both the trial and the appellate Courts in the judgments in suit No. 2 of 1913, which, although not binding on the plaintiffs in this case, is entitled to consideration as what was understood by the Judges to be the effect of the lease. I have omitted to mention that some argument was based on the expres-

sion "*sarasari bemiadi kubuliat*" in the last line of the *kabuliyat* of 4th August 1903. The Subordinate Judge has held that "*sarasari*" means a summary and temporary settlement. It really means "variable." A "*sarasari*" lease no doubt connotes the idea of a temporary settlement. But coupled with the expression "*bemiadi*," it can only mean, in my view, a permanent lease but variable as to rent. If only a temporary lease was intended to be given, it would have been sufficient to call it a "*sarasari*" lease. In this connexion, I may refer to the definition of a "*permanent tenure*" in the Bengal Tenancy Act, only as an illustration, to show how these leases are understood. In that Act, a "*permanent tenure*" means "a tenure which is heritable and which is not held for a limited time." In my view these leases are not terminable on service of notice to quit. This puts an end to the principal contention which has been raised as to the right of ejectment in these cases.

But I think I should make my observations with regard to the sufficiency and legality of notices served by the landlord upon the defendants. No question arises before us as to the proper service of the notice. It is, however, contended that the notice is bad on the grounds stated below. The notice runs as follows :

You are hereby informed that the *bemiadi* settlement (then describes the property and the lease) will expire on 30th Chaitra 1329 B.S., and the said *bemiadi* settlement shall not remain in force after 30th Chaitra, 1329 B.S. After 30th Chaitra, 1329 B.S. that is to say, from 1st Baisakh, 1330 B.S., you shall give up *khas* possession

The contentions are these: (1) This notice does not in its terms terminate the tenancy, but only mentions the fact that the lease will expire on a certain date. The intention is to show that the term of the lease will end of its own effect on that date. If that is not the fact this notice is bad in law. (2) The tenancy commenced on 5th *Aswin* from the date of the *kabuliyat* and, therefore, any notice served under S. 106, T. P. Act must terminate with the end of the year of the tenancy. The end of the tenancy would be the 4th of *Aswin* of any Bengali year. As the notice was to terminate on 30th Chaitra, 1329 B. S., it is insufficient. In support of the last contention, the appellants cite the case of *Kishori Mohun*.

Roy v. Nund Kumar Ghosal (3), and particularly the following observations of Banerjee, J., at page 724 :

I think it must be at least held that the tenancy was one reserving a yearly rent, and the year of the tenancy commenced on the 14th day of Pous 1294.

The respondents, on the other hand, contend that, although the kabuliyat is dated 5th Aswin 1307 B. S., the rent was payable according to the Bengali year as would appear from the schedule of the kistibandi at the end of the document. Further, it is urged that rents were realized as shown by the rent receipts according to the Bengali year. Therefore, the year of the tenancy should be considered as the ordinary Bengali year. In support of this contention, the learned advocate for the respondents cites the case of *Ismail Khan v. Jaigun Bibi* (4). In this case, Banerjee and Stevens, JJ., at p. 577, make the following observations with regard to the argument that

as the tenancy was created by a kabuliyat, Ex. 3, dated 19th Chait. 1257 B. S., and the notice was served on 23rd Ashw in 1303 B. S. and expired on the last day of Chait of that year, it did not expire with the end of the year of the tenancy and was, therefore, a bad notice. We do not consider this argument valid. For though the tenancy was, as appears on the face of Ex. 3, created by that document, and the document is dated 19th of Chait, rent has all along been paid, as is clear from the rent receipts filed . . . according to the ordinary Bengali year, so that a year of the tenancy would be the ordinary Bengali year.

In this state of divergence of opinion pronounced by the same learned Judge, I do not feel called upon to express any definite opinion on the question in these cases. My inclination is that unless it could be definitely shown that the tenancy was to commence at a particular date different from the date of the document by which it was created, it must be held ordinarily that the year of the tenancy commences from the date of the document. In that view, in this particular case it may be held that the tenancy commenced from the 5th Aswin 1307 B. S.

There is one other point which I need mention and which was raised by the learned advocate for the respondents here for the first time. What he urged was this: that the lease in question being evidenced only by a kabuliyat, which was said to have been accepted by the lessor,

under the terms of S. 107, T. P. Act, such a kabuliyat cannot be held to create any lease which was beyond the term of one year. This question, as I have said, was not raised in the Court below either in the issues or during the course of the argument. We have not got here the opinion of the learned Judge below on the question, nor can it be definitely said that no patta was executed. If this point had been raised by the plaintiffs, the defendants might have met that objection by other pleas. The question, however, so far as this Court is concerned, is concluded by the authority of the case of *Raimoni Dasi v. Mathura Mohan Dey* (5). I may also mention that it has all along been the practice, in this province at any rate, to create large leasehold interests of a permanent nature by accepting a kabuliyat from the tenant, or, in other words, a kabuliyat executed by the tenant and accepted by the landlord is as much a lease as a patta executed by the landlord and accepted by the tenant. Indentures are unknown in the mofussil in this country. From the view that I have taken on the first point the only conclusion that I can arrive at is that these appeals must be allowed and the suits dismissed with costs in both the Courts.

Roy, J.—I agree.

S. J.

Appeals allowed.

(5) [1912] 39 Cal. 1016=15 C. L. J. 665=14 I. C. 540=16 C. W. N. 606.

A. I. R. 1928 Calcutta 396

SUHRAWARDY AND GRAHAM, JJ.

Mahendra Nath Biswas—Plaintiff—Appellant.

v.

Charu Chandra Bose and another—Defendants—Respondents.

Appeal No. 1856 of 1925, Decided on 7th December 1927, from appellate decree of Addl. Dist. Judge, 24-Perganas, D/-27th April 1925.

Cosharer — Adverse possession — Possession between tenants-in-common—A person cannot be a tenant-in-common with one whom he never recognized as such.

The principle of possession between co-owners is that every co-owner is a tenant-in-common and that possession of a tenant-in-common is not adverse to his co-tenant. But a person cannot be a tenant-in-common with a person whom he never recognized as a co-

(3) [1897] 24 Cal 720.

(4) [1900] 27 Cal. 570=4 C. W. N. 210.

tenant and probably had no knowledge of his existence : 16 C. W. N. 849, *Rel. on.*

[P 397 C 2]

Hemendra Nath Sen and Gopendra Nath Das—for Appellant.

Rupendra Kumar Mitra and Ajendra Nath Dutta—for Respondents.

Judgment.—This appeal may be disposed of on the short ground that the plaintiff's suit as framed is not maintainable under S. 42, Specific Relief Act. The plaintiff claims the land in the suit as a cosharer with the defendants. The defendants deny that they were ever the plaintiff's cosharers and say that the properties belonged to them by transfer from the rightful owner. The plaintiff brought the present suit for declaration of his title to the properties in suit and for confirmation of possession. The trial Court found all the issues relating to title and possession against the plaintiff and dismissed the suit. The learned Additional District Judge has not gone into the question of title, but, on his finding on the question of limitation, he is of opinion that the suit is not maintainable. He has found that the plaintiff was never in possession, either actual or constructive, of the properties in suit and, therefore, the present suit, which is brought under S. 42, Specific Relief Act, is not maintainable. The learned advocate who appears for the appellant argues that the view taken by the learned Judge on the question of limitation is wrong and that, as he is a cosharer, the possession of the defendants should be presumed to be his possession; in other words he was in possession of the properties in suit through the defendants. Various objections can be taken to this contention : (1) The plaintiff in his plaint admits that the defendants were claiming the entire moveable and immovable properties on the strength of a will and probate. It is said that this conduct of the defendants has only clouded his title, but the facts cannot be concealed that the defendants were in possession in their own right to the exclusion of all others including the plaintiff. If the defendants were possessing the properties on the strength of a will they were certainly possessing them as against the plaintiff if he had any title to them. (2) The learned Additional District Judge's finding on the question of limitation does not appear to be erroneous in law. The will under which the

defendants are in possession is dated 1892. The present suit was brought in 1924. For so many years the defendants were in possession in their own right derived under the will. Every case between co-owners with regard to the question of adverse possession must be decided on the particular facts of that case. Admitting that the plaintiff was ever a co-owner his exclusion from this property for such a length of time under a title inconsistent with the title set up by the plaintiff is enough to entitle the Court to deduce from it that there was an ouster of the plaintiff from the properties. *Ayennessa Bibi v. Sheikh Isuf* (1). (3) The principle of possession between co-owners is that every co-owner is a tenant-in-common and that possession of a tenant-in-common is not adverse to his co-tenant. But a person cannot be a tenant-in-common with a person whom he never recognized as a co-tenant and probably had no knowledge of his existence. Since 1892 the defendants have been in possession of the property in their exclusive right. They never regarded the plaintiff as a cosharer and it is possible, on the case they have proved before the trial Court, that they were not aware even that he was their cosharer.

The plaintiff was out of possession at the time of the institution of the suit. That being so, the case comes within the purview of the proviso to S. 42, Specific Relief Act, and is not maintainable in its present form. It may be noted that the plaintiff describes the suit in the plaint as one for declaration of title and has affixed necessary Court-fees for such a suit. The appeal accordingly fails and is dismissed with costs.

N.K.

Appeal dismissed.

(1) [1912] 16 C. W. N. 849=14 I. C. 722.

A. I. R. 1928 Calcutta 397

DUVAL, J.

Keshub Chandra Choudhury and another—Decree-holders—Petitioners.

v.

Joyfulnessa Bibi and others—Opposite Parties.

Civil Rules Nos. 664 and 665 of 1927. Decided on 10th November 1927, from order of 2nd Munsiff, Nilphamari (Rangpur). D/- 23rd February 1927, in Misc. Cases Nos. 1 and 2 of 1927.

(a) *Civil P. C., O. 9, R. 13—Order setting aside ex-parte decree cannot be assailed in appeal against the decree finally passed.*

An order setting aside an ex-parte decree cannot be assailed in an appeal which might be brought against the decree finally made after the ex-parte decree has been set aside: 22 Cal. 931, *Foll.* [P 398 C 2]

(b) *Civil P. C., O. 1, R. 1—Ex-parte rent decree can be set aside as against some of the defendants only—Civil P. C., O. 9 R. 13.*

A rent decree can be obtained against some of the holders of a holding without every holder being impleaded and so an ex-parte rent decree can be set aside as against some defendants and remain a perfectly good decree against the others: A. I. R. 1925 Cal. 1056, (F. B.) and 6 C. L. J. 226, *Ref.* [P 398 C 2]

Radha Binode Pal—for Petitioners.

Fazlul Huq and Jahnabi Charan Das Gupta—for Opposite Parties.

Judgment.—These two Rules were obtained in respect of two orders in two rent suits setting aside in their entirety two ex-parte decrees. It appears that in these suits there were in all fourteen defendants, five of whom were females. Decrees were passed ex parte and subsequently there were sales, but the finding of fact is that the summons had not been legally served on the five female defendants who also had been kept out of the knowledge of the decrees for a considerable period after the decrees were passed. The learned Munsiff, therefore, set aside in toto the two ex-parte decrees on the application of the five ladies. Against this order these Rules were obtained.

A preliminary point is taken that, as a matter of fact, this is not a matter for the use by this Court of S. 115, Civil P. C., because when the suits are re-tried, the order setting aside the ex-parte decree will be then liable to be attacked in appeal, and in support of that proposition, the learned advocate for the opposite parties has referred me to certain decisions of other High Courts. I am, however, bound by the decisions of this Court, and the decisions of this Court are against the contention that an order setting aside an ex parte decree could be assailed in an appeal which might be brought against the final decree made after the ex-parte decree has been set aside. I would only refer to the case of *Chintamani Dassi v. Raghoonath Sahoo* (1). This disposes of the preliminary point.

Two grounds are taken before me on

behalf of the petitioners. The first is that the whole decree should not have been set aside, but only the decree as affecting these five ladies; and, secondly, that the learned Munsif wrongly put the onus on the petitioners in respect of the plea of limitation. As to the second point: I do not think, there is much substance in it. It appears clear from the findings of the learned Munsif that the ladies were kept out of the knowledge of the decree and the proceedings against them also in execution only till within a few days of the present applications being made. As to the first point: the argument for the petitioners appears to me to have considerable weight. It is now settled that a rent decree can be obtained against some of the holders of a holding without every single holder being impleaded. I would refer to the recent Full Bench case of *Kailash Chandra Mitra v. Brojendra K. Chakravarti* (2). Therefore, it would not have been illegal to have granted decrees in respect of these rents against the nine male defendants only. It is also not disputed that an ex-parte decree can be set aside as against some defendants and remain a perfectly good decree against the others: see the case of *Jadubansa Narain v. Hari Charan* (3). It follows, therefore, that, even if the five lady applicants had never been made parties, there would have been perfectly good decrees for rent against the other nine defendants. It is urged, therefore, that the order of the learned Munsif in these two matters should be varied and the decrees set aside only in respect of the five ladies and not as against the male defendants. The learned advocate for the ladies has argued that there is no reason why this Court should invoke its jurisdiction under S. 115, even though the learned Munsif has not acted strictly in accordance with law in setting aside the decrees in toto. I am inclined, however, in the interest of limiting litigation, as I have the power, as the learned Munsif has acted illegally, to set aside his order setting aside the decrees as against the nine male defendants, as I consider it would be in the interest of justice that I should do so.

I, therefore, make the rules absolute to this extent: that the orders setting aside these decrees shall operate as against the

(2) A. I. R. 1925 Cal. 1056 (F. B.).

(3) [1907] 6 C. L. J. 226.

(1) [1895] 22 Cal. 981.

five applicant ladies only and the decrees stand against the other defendants. As each party has been partially successful. I make no order as to costs.

N.K. *Rule made partly absolute.*

A. I. R. 1928 Calcutta 399 (1)

v. PAGE AND DUVAL, JJ.

Bhabesh Chandra Banerjee and others
—Defendants 1, 2 and 4—Appellants.

v.

Shyama Sundari Debi and others—
Plaintiffs—Respondents.

Appeal Nos. 382 and 956 to 960 of 1925, Decided on 4th January 1928, from appellate decree of the Sub-Judge, Asansol, D/- 13th November 1924.

Bengal Tenancy Act, S. 105—Rent entered in the record-of-rights—Application to enhance rent—No application to correct the entry under S. 105—Rate of rent is not concluded against the landlord by such an application if tenants agree to pay higher rent.

Revenue Court has no jurisdiction to correct an entry in the record-of-rights in an application made under S. 105 merely to enhance the rent unless there is an application to correct such entry under S. 106, and the rate of rent is not concluded against the landlord by reason of his having made an application under S. 105 when the tenants have agreed to pay a higher rent. [P 399 C 2]

Hiralal Chakravorthy for Bankim Chandra Mukherji and Sailendra Nath Bannerjee—for Appellants.

Shamdas Bhattacherya and Jyotish Ch. Sirkar—for Respondents.

Page, J.—The suits out of which these appeals arise were brought to recover arrears of rent. The issue which fell for determination was whether the rent payable was at the rate alleged by the tenants or at the rate alleged by the plaintiff. The difference between the two rates is equivalent to a sum which at some remote period was collected as an abwab. Since 1865 the tenants have paid, and have received rent receipts, upon the footing that the rent payable was at the full rate claimed by the landlord; and there is a finding of fact by the lower appellate Court (having regard to the evidence adduced on the one side and on the other) that there was a valid agreement proved between the landlord and the tenants that they would pay the sum which was made up of rent proper and abwabs as consolidated rent. That is a finding of fact which we are not

prepared to disturb in second appeal. The learned vakil on behalf of the appellant, however, has urged that the rate of rent is concluded in favour of the tenants by reason of the fact that an application was made by the landlord under S. 105, Ben. Ten. Act, for an enhancement of rent. Now the record-of-rights sets out the rent as being the rent proper and not what I may call the consolidated rent now claimed by the landlord; and if an application had been made under S. 106, Ben. Ten. Act, to correct that entry, in my opinion, it would not now be open to the parties to that application to reargue the rate at which the rent was payable in the present suit. But the application under S. 105, was for enhancement of rent, and upon such an application the revenue officer would not have had jurisdiction to correct the entry in the record-of-rights. It follows, therefore, that, as this is an application to enhance the rent under S. 105, and not an application to correct the entry in the record-of-rights under S. 106, it is not within the ambit of S. 105, and the rate of rent is not concluded against the landlord by reason of his having made an application under S. 105. In the circumstances obtaining in this case, therefore, the issue as to the amount of rent payable is one which the parties were entitled to canvass in this suit, and the finding being one of fact and adverse to the appellant, the appeals fail and must be dismissed with costs: one set in each appeal.

Duval, J.—I agree

N.K.

Appeals dismissed.

* * A. I. R. 1928 Calcutta 399 (2)

SUHRAWARDY AND GRAHAM, JJ.

Mt. Machuni Bibi—Applicant.

v.

Jardine Menzies & Co. — Opposite Parties.

Reference No. 4 of 1927, Decided on 17th January 1928.

*** Workmen's Compensation Act, S. 12—Work undertaken by A as part of his business—Part of work entrusted to B—B sub-contracting for the work with C—One of C's workmen killed by accident—The principal for the purposes of S. 12 is A, and he can be indemnified by B—Compensation cannot be obtained under the Act for any further sub-contracting of the contract.*

Where A undertakes work which is ordinarily part of his trade or business, but, for his business, he contracts with B for the execution of

part of this work, and *B* similarly contracts with *C* for the whole or part of the work he himself has contracted for, and one of *C*'s workmen is killed by accident, the principal for the purpose of S. 12 is *A*, and he is entitled to be indemnified by *B*, and as regards the question, whether *B* is entitled in turn to be indemnified by *C*, the Act does not provide for such a contingency. The "contractor" referred to in sub-S. (2), S. 12 is the contractor who contracts directly with the principal as defined in S. 12 (1). If there is any further sub-letting of the contract, indemnification cannot be obtained under the Act and must be sought by recourse to the civil Courts. [P 400 C 2]

Harendra K. Sarbadhikary, Subodh Chandra Dutt and Hari Prasanna Mukherjee—for Applicant.

Judgment.—This is a reference by the Commissioner for Workmen's Compensation, Bengal, under S. 27, Workmen's Compensation Act (8 of 1923), and arises out of certain proceedings which are now pending before the Commissioner under the Act.

The facts appear to be shortly as follows: Messrs. Jardine Menzies & Co. Architects and Building Contractors, undertook to do the ironwork in connexion with the erection of a garage in Central Avenue, and for that purpose entered into a contract with one Amulya Charan Aich. On 12th December last, while a khalasi named Golab Khan, now deceased, the husband of the petitioner in this case, was at work on the premises and was engaged in hoisting a beam an iron column post fell upon him, resulting in fatal injuries. The widow of the deceased thereupon applied before the Commissioner for an order on Messrs. Jardine Menzies & Co. to deposit the sum of Rs. 900, as compensation for the death of her husband.

Messrs. Jardine Menzies & Co. filed a written statement denying their liability and submitting that, if they were found to be liable to pay compensation to the applicant they were entitled under S. 12 to be indemnified by Babu Amulya Charan Aich with whom they alleged they contracted for the performance of the work on which the deceased was said to have been engaged. Babu Amulya Charan Aich was accordingly served with notice as provided by the rules under the Act, and duly appeared by pleader and filed a written statement in which he stated that Messrs. Jardine Menzies & Co engaged one N. Bhattachariya as contractor for the iron work, who again engaged him (Amulya Charan Aich), who in turn

engaged Ishak Mia and Maniruddi jointly as contractors to do the ironwork. The proceedings, as already stated, are pending before the Commissioner, and, in the meanwhile, he has submitted this reference, inviting our decision upon a question of law which he has formulated as follows bearing upon the application of S. 12 of the Act:

A undertakes work which is ordinarily part of his trade or business. For the purpose of his trade or business he contracts with *B* for the execution of part of this work. *B* similarly contracts with *C* for the whole or part of the work he himself has contracted for. One of *C*'s workmen is killed by accident.

1. Who, for the purpose of S. 12 is the principal?

2. If *A* is the principal, and is found liable to pay compensation, by whom is he entitled to be indemnified? If by *B* then is *B* in his turn entitled to be indemnified by *C*.

We have considered the relevant sections of the Act and our decision on the two points referred is as follows:

1. The principal for the purpose of S. 12 is *A*; in other words, in this case, Messrs. Jardine Menzies & Co.

2. Messrs. Jardine Menzies & Co. being the principal, are entitled to be indemnified by the contractor to whom they entrusted the work. That this is so is clear from the terms of S. 12 (1) of the Act. Whether, however, Messrs. Jardine Menzies & Co. entered into the contract with Amulya Charan Aich, as alleged by them, or with N. Bhattachariya, as claimed by Amulya Charan Aich, is, of course, a question of fact for the determination of the Commissioner.

As regards the further question, whether *B* is entitled in turn to be indemnified by *C*, the Act does not appear to provide for such a contingency. The contractor referred to in sub-S. (2) of S. 12, is the contractor who contracts directly with the principal as defined in S. 12 (1). If there is any further subletting of the contract, indemnification cannot be obtained under the Act and must be sought by recourse to the civil Court. It may be, as observed by the learned Commissioner, that to hold *C* liable to indemnify *A* would be the construction most workable in practice, and that it would avoid litigation. We cannot, however, read into the Act something that is not to be found there. Let the papers be returned to the Commissioner with our opinion.

N.K.

Reference answered.

A. I. R. 1928 Calcutta 401

RANKIN, C. J., AND C. C. GHOSE, J.

Dwijapada Haldar and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 633 of 1927, Decided on 21st February 1928, from order of Addl. Sess. Judge, 24-Perganahs, D/-5th August 1927.

Criminal P. C., S. 268—Trial by jury—One of the jurymen not knowing English—Charge translated to him in vernacular by Public Prosecutor and the defence mukhtear allowed to object if he was not satisfied—Verdict of jury unanimous—Accused is not prejudiced.

Where one of the jurymen in a case had not an adequate knowledge of English and when the peshkar commenced to translate the Judge's charge in the vernacular, it was found to be unsatisfactory because of his lack of sufficient knowledge of English, whereupon it was arranged that the Public Prosecutor being the best man available as regards translating capacity would translate the charge to the jury, the mukhtear for the defence being told that if he wanted to object to any translation he was at liberty to object then and there and the verdict of the jury was unanimous:

Held: that there was no reason to think that this particular jurymen was not given the benefit of the correct translation of the Judge's charge and it was a fair trial and the accused was in no way prejudiced. [P 402 C 1]

Mritunjoy Chatterjee and Monindra Nath Banerjee (2)—for Appellants.

Khundkar—for the Crown.

Suresh Chunder Taluqdar and Mohendra Kumar Ghose—for Complainant.

Rankin, C. J.—In this case the two accused persons were put on their trial on a charge of having raped a girl called Tustumoni on 28th May last in the afternoon. The girl appeared to be of the age of 16 or 17. It is said that neither her father-in-law nor her mother-in-law was in the house.

The defence was that the girl was the kept woman of one of the witnesses, Hari Narayan and that the whole story was false, and it was alleged that it arose out of enmity with Hari Narayan.

There were many questions of fact for the jury upon which, it seems to me, that the jury might have come to conclusions one way or the other and would have had some reason in either case. We are now concerned with the question whether the case was put properly to the jury and it is of no avail at this stage for us to consider the questions of fact about which there was evidence both ways.

We have been taken through the charge of the learned Judge and I must say that it seems to me an admirable charge. It deals with the relevant facts. It omits hardly anything of the smallest importance, and in my opinion, it puts everything clearly and fairly. It is true that in one part of the charge, with reference to the question whether the girl was the kept woman of Hari Narayan, the learned Judge says:

You will also remember that that was a matter which was never put to Tustumoni.

It appears that that was put to Tustumoni and that, no doubt, is a mistake on the part of the learned Judge. I can see no other expression in this charge that is open to serious criticism. The learned Judge was endeavouring to describe the character of the country in which this hut or house was, pointing out to the jury that the incident did not take place in a village but in an abadi. It is true that there is some evidence that there were certain houses not very far away. I do not think that that in any way shows that what the learned Judge said was in any way misleading to the jury.

It was pointed out that the mother-in-law was not called. An explanation was given that she was deranged in her mind and the learned Judge told the jury that if they thought fit they could draw the inference that the mother-in-law was being kept back by the prosecution. The learned Judge might have gone on to say that if the jury thought that she was being kept back by the prosecution they might draw the further inference that if she had been called she would have given evidence contrary to the prosecution case. It does seem to me that we may attribute sufficient intelligence to the jury in understanding what is meant by "being kept back by the prosecution."

Again, as regards the medical evidence I can see no serious criticism to be made upon what the learned Judge has told the jury. He does not tell them that they are not to think about it all. What he does tell is that, although the doctor has said that there were injuries on the girl that might have been caused in the way she says, still the doctor very fairly says that if anybody was minded to set up a false case of rape it would be quite possible to produce similar injuries for that purpose; and, therefore, the learned Judge says that one cannot decide this

case by the doctor's evidence, that the doctor's evidence is inconclusive and that before one convicts a prisoner one must do so on the strength of other evidence in the case. That I think is a very fair way of putting it to the jury and that particular passage again seems to me to be quite correct.

The result, in my judgment, is that with the exception of this slip where he says:

You will also remember that that was a matter which was never put to Tustumoni, there is nothing that can be found fault with in this charge and I am of opinion that that is not a matter of any great importance. It only concerns with whether or not it was put to the girl. It was put to the girl and the girl denied it.

The only other matter is that it has been brought to our attention that one of the jurymen in this case had not an adequate knowledge of English and that apparently when the peshkar commenced to translate the Judge's charge in the vernacular it was found to be unsatisfactory because of his lack of sufficient knowledge of English. Thereupon it seems that it was arranged that the Public Prosecutor being the best man available as regards translating capacity would translate the charge to the jury, the mukhtear for the defence being told that if he wanted to object to any translation he was to be at liberty to object then and there. It strikes me that that is perhaps unfortunate but not an unfair way of getting the translation made as long as it was understood that the mukhtear was free to object whenever he thought fit to object. It is said that the mukhtear on one or two occasions, at all events, did object. That being so, the juror was given the benefit of the fact that one man put it one way and the other man put it the other way and I do not think that there was any possible prejudice to the prisoner in a matter of this sort. After all it appears that all the other members of the jury knew English sufficiently and that this particular member of the jury appears to have agreed with all the others. There was a finding of the jury that was unanimous. Of course there is a great temptation in criminal cases to use any loophole which suggests possibility of a prejudice that can be exaggerated afterwards. Speaking for myself I rather object

to putting it upon mukhtears or other people that they should consent to do something which is not in itself proper without their consent. It is very much to be wished that peshkars or the Judges themselves should explain the charge to the jurymen who do not know English, but in this case I am quite satisfied that there are no reasons to think that this particular jurymen was not given the benefit of the correct translation of the Judge's charge. In all these circumstances I think this appeal must fail. It is accordingly dismissed.

C. C. Ghose, J.—I agree.

S.J.

Appeal dismissed.

A. I. R. 1928 Calcutta 402

SUHWARWADY AND GRAHAM, JJ.

K. C. Bannerjee, Official Receiver—Petitioner, *In re*.

Civil Rule No. 1481 of 1927, Decided on 20th December 1927, against order of Court of President of Calcutta Improvement Tribunal, D/- 23rd August 1927.

(a) *Land Acquisition Act, S. 32—Compensation money acquired by an incompetent person is part of his real property.*

The compensation money representing the estate of an incompetent person such as idol partakes of the nature of real property and does not lose its character as such because it has been transformed in shape. [P 404 C 2]

(b) *Land Acquisition Act, S. 32—Acquisition Court holds the compensation money subject to the orders of civil Court*

Under S. 32 the acquisition Court is not absolutely vested with the compensation money. It is apparent that possession of the receiver is the possession of the Court and the money if made over to the receiver will remain in custodia legis. The law does not vest the acquisition Court with such power as to retain the money in its possession in spite of the direction of a competent civil Court. [P 402 C 2]

(c) *Civil P. C., O. 41, R. 1—Receiver is the officer and representative of the Court—Limitation on his powers explained—Receiver.*

Graham, J.—A receiver by his appointment does not become the representative of the party, but is an officer and representative of the Court which appoints him. Indeed he is frequently spoken of as "the hand of Court" and is merely in possession of the property on behalf of the party who may be ultimately declared to be entitled thereto. One or other of the parties must eventually be declared to be entitled to the securities in question or at all events to retain possession of them. A receiver appointed by the Court is merely a temporary custodian of the properties on behalf of the Court, and holds them for the benefit of the

party successful in the litigation. He cannot deal with the properties in any way without the consent and approval of the Court, so that no apprehension need arise that the interest of either of the contesting parties is likely to suffer in any way by reason of his temporarily retaining possession of the properties.

[P 405 C 1]

Bipin Chandra Mallik and Kusi Prasun Chatterjee—for Petitioner.

Suhrawardy, J.—This application in revision is by the Official Receiver of this Court against an order of the President of the Calcutta Improvement Tribunal by which the learned President refused to make over certain Government promissory notes held in his Court to the petitioner. In the circumstances of the case there is no opposite party and we had to hear this matter *ex parte*. We have given our earnest consideration to the facts of this case and to the observation made by the learned President in his judgment. The facts are that a portion of the premises No. 28, Giri Babu's Lane, in Calcutta belonging to the debutter estate of certain idols was acquired under the Land Acquisition Act and the compensation thereof was deposited with the Calcutta Improvement Tribunal under S. 31 of the Act. Thereafter some of the shebais of the said idols instituted a suit in the original side of this Court against certain persons for a certain declaration which will be more particularly mentioned later. In that suit an application was made by the plaintiffs for the appointment of a receiver and the Court appointed the Official Receiver as Receiver in the suit with all the powers with which a receiver can be vested under O. 40, R. 1, Civil P. C. The receiver thereafter applied to the President of the Tribunal that the Government securities representing the compensation money awarded in respect of a portion of the debutter property acquired might be made over to him. The learned President on certain considerations has refused to make over the securities to the petitioner. Before proceeding further it is necessary to observe that the order appointing the petitioner as receiver ran in the following words:

And it is further ordered that the said receiver be also at liberty to withdraw the securities representing the compensation money in respect of premises No. 28, Giri Babu's Lane, and deposited with the Tribunal of the Improvement Trust, Calcutta, and the interest accrued due and to accrue due thereon.

Since the learned President has declined to part with the securities in spite of the order of this Court, the matter has assumed an importance which demands very careful consideration by us. The main grounds on which the learned President has refused to make over the securities to the petitioner may be summed up thus: (1) The receiver is only a trustee for the parties to the suit, and no party to the suit is a person competent to alienate the land within the meaning of S. 31, Land Acquisition Act 1 of 1894 or a person entitled to act under S. 3, prov. (iv) of the Act; (2) That the suit in the High Court is a suit between parties claiming to be shebais to which the idols are not parties either in name or in substance; and, therefore, the properties which belong to idols should not be made over to the receiver appointed in such a suit; (3) The order of the High Court appointing the petitioner to be the receiver cannot deprive the Improvement Tribunal of the statutory right which it has under the Act of retaining the money, under O. 40, R. 1 (2) and the order of appointment of the receiver cannot operate so as to remove from its possession or custody the property as no party to the suit has a present right so to remove.

As regards the first ground it is clear on the authorities that the view expressed by the learned President is not tenable in the circumstances of the present case. As has been held in the case of *Harihar Mukherjee v. Harendra Nath Mukherjee* (1), a receiver appointed by the Court is not ordinarily the representative or agent of either party in the administration of the trust. But his appointment is for the benefit of all parties and he holds the properties for the benefit of those ultimately found to be the rightful owners; and reliance has been placed on the decision in *Jagat Tarini Dassi v. Nata Gopal Chaka* (2), where it is laid down that the receiver is the representative of the Court and may be deemed to be right arm of the Court in exercising jurisdiction invoked in such cases for administering the property because the Court can only administer through a receiver. The learned Judges further observed that no doubt, in

(1) [1910] 37 Cal. 754=6 I. C. 416=12 C.L. 252.

(2) [1907] 34 Cal. 305=5 C. L. J. 270.

some cases the expression is used that the receiver may be considered as a representative of the parties to the suit but this only in the sense that as against an adverse claimant his title does not stand higher than that of the parties to the litigation; and upon this notion of the character of the receiver is founded the provision in O. 40, R. 1 (2), Civil P.C. In *Harihar Mukherjee's* case (1) the question was whether the receiver appointed by the Court could take possession of the property without a succession certificate. It was held that a receiver, when he seeks to take possession of the subject-matter of the litigation under an order the Court is not a person who claims to be entitled to the effects of a deceased person under the Succession Certificate Act, 1889, and he is in no sense a representative of the deceased person but, is merely entrusted by the Court with certain power over the estate for temporary purposes. The decision in *Radha Binode Mandal v. Gopal Jiu Thakur* (3) rests on the fact that there the suit was for declaration of plaintiffs' title as shebait in which the idol was not interested.

This brings us to a consideration of the nature of the suit in the High Court which is connected with the second ground on which the learned President's judgment is founded. The suit in the High Court as appears from a perusal of the plaint is no doubt for a declaration that the plaintiffs and some of the defendants are shebait of the idol. But there are also two prayers in the plaint which are relevant for our present purposes. The prayer (o) is to this effect :

If necessary the said debutter estate be administered by and under the direction of this honourable Court,
and, (p)

if necessary a scheme be framed for the proper performance of the worship of the Thakur.

It is conceivable that in view of these prayers this Court appointed the receiver and authorized him to take possession of all the debutter properties including the promissory notes in the hands of the improvement tribunal. In the suit the plaintiffs further prayed that certain unauthorized alienations of the idols' properties might be set aside. Considering the entire scope of the suit it is difficult to hold that the idols were not interested

in the suit. As has been observed by their Lordships of the Judicial Committee in *Jagadindra Nath Roy v. Hemanta Kumari Devi* (4), that although an idol may be regarded as a juridical person capable of holding properties, it is only true in an ideal sense; but the fact remains that the possession and management of the dedicated properties belong to shebait; in other words though the idol is the owner of a property but being incompetent to manage it, the right of management and possession is vested in the shebait. The suit is for the benefit of the idols though a portion of it relates to matters personal to the plaintiffs. We are told that all the other properties belonging to the idols have been taken possession of by the receiver. There appears to be no reason why the promissory notes which are in the possession of the Tribunal should not be taken possession of by the receiver as a part of the debutter estate. As has been held in *Mrinalini Dasi v. Abinash Chander Dutt* (5) the compensation money representing the estate of an incompetent person partakes of the nature of real property and does not lose its character as such because it has been transformed in shape. The money in the hands of the Tribunal therefore, is a portion of the debutter property which would have come into the possession of the receiver under the direction of the Court if it were not acquired under the Land Acquisition Act : see also *Kamini Devi v. Promotho Nath Mukerjee* (6).

As to the third ground under S. 32, Land Acquisition Act, the acquisition Court is not absolutely vested with the compensation money. It is apparent that possession of the receiver is the possession of the Court and the money if made over to the receiver will remain in custodia legis. The law does not vest the acquisition Court with such power as to retain the money in its possession in spite of the direction of a competent civil Court. Taking all these facts into consideration I am of opinion that the order of the learned President of the Improvement Trust should be set aside and that he be requested to comply with the order

(4) [1905] 32 Cal. 129=31 I.A. 203=8 C.W.N. 809=8 Sar. 698 (P.C.).

(5) [1910] 11 C.L.J. 533=6 I.C. 508=14 C.W.N. 1024.

(6) [1912] 89 Cal. 33=10 I.C. 491=13 C.L.J. 597.

(3) A. I. R. 1927 P. C. 126=54 Cal. 770=54 I. A. 288 (P. C.).

of this Court by making over the money to the petitioner. This rule is made absolute.

Graham, J.—I agree and desire to add only a few words. The rule was issued at the instance of the Official Receiver to show cause why an order of the President of the Calcutta Improvement Trust Tribunal rejecting the application of the Official Receiver to withdraw certain securities deposited with the Tribunal under S. 31 of the Act should not be set aside and an order made directing the delivery of the said securities to the petitioner.

The learned President of the Improvement Trust Tribunal, in refusing the application, proceeded mainly upon the ground that he was precluded by the terms of the statute (Land Acquisition Act 1 of 1894) from acceding to the application, and he has referred in support of the view taken by him to certain provisions of the Act. He has held that the receiver stands in the shoes of the parties and represents them, and that that being so he cannot have any greater power than is possessed by the party whom he represents. The learned President has perhaps not considered sufficiently the fact that a receiver by his appointment does not become the representative of the party, but is an officer and representative of the Court which appoints him. Indeed he is frequently spoken of as "the hand of Court" and is merely in possession of the property on behalf of the party who may be ultimately declared to be entitled thereto. One or other of the parties must eventually be declared to be entitled to the securities in question, or at all events to retain possession of them. A receiver appointed by the Court is merely a temporary custodian of the property on behalf of the Court and holds them for the benefit of the party successful in the litigation. He cannot deal with the properties in any way without the consent and approval of the Court, so that no apprehension need arise that the interest of either of the contesting parties is likely to suffer in any way by reason of his temporarily retaining possession of the properties. For these reasons and also in view of the order made on the original side of this Court by Mr. Justice Pearson I agree with my learned brother that the order which has been made by the President of the Improve-

ment Trust Tribunal cannot be sustained and that this rule should be made absolute.

N K.

*Rule made absolute.

A. I. R. 1928 Calcutta 405

MUKERJI, J.

Bani Kanta Mondal and others—Defendants—Petitioners,
v.

Hemanta Kumar Ghose and others—Plaintiffs—Opposite Parties.

Civil Rule No. 952 of 1927, Decided on 29th November 1927, against decree of Sub Judge, Khulna, in S. C. C. Suit No. 28 of 1927, D/- 22nd April 1927.

Provincial Small Causes Act (9 of 1887), Sch. 2, Art. 35 (ii)—Suit for damages for taking away paddy—No offence under Ch. 17, Penal Code, disclosed—Suit is cognizable by Small Cause Court.

A suit for mesne profits against a trespasser is cognizable by Small Cause Court and Cl. (2) of S. 35 has not effected any change in the law.

Plaintiff had obtained as against the defendants delivery of possession of a certain land through the Court. Thereafter litigation went on between the plaintiff and the defendants, and taking advantage of the said litigation the defendants did not give up possession, and continuing in such possession took away the paddy that was standing on the land and appropriated the same to their own use. The plaintiff sued for damages for use and occupation.

Held: that the suit was cognizable by Small Cause Court as damages that had been claimed were not for any act which amounted to any criminal offence within the meaning of Chap. 17, I. P. C.: 28 C. L. J. 120, Dist.

[P 406 C 2]

S. C. Bose and Saroj Kumar Chatterjee—for Petitioners.

Sarat Chandra Roy Choudhuri and Santi Kumar Roy Choudhuri—for Opposite Parties.

Judgment.—I am of opinion that to accede to the contention urged on behalf of the petitioners in this Rule would be to hold that all suits for recovery of mesne profits against trespassers are outside the cognizance of the Court of Small Causes. Sch. 2, Art. 31, Provincial Small Cause Courts Act, was construed by this Court prior to the introduction of Cl. (ii) of Art. 35 in the case of *Kunjo Behary Singh v. Madhub Chandra Ghose* (1), and a Full Bench of this Court held that suits were cognizable by Courts of Small Causes. To find out whether the intro-

(1) [1896] 23 Cal. 884 (F.B.).

duction of Cl. (ii) to Art. 35 in the said schedule has effected any change in the law it may not be out of place to refer to what was said^a in that case by Trevelyan, J. He observed that suits for damages in the nature of mesne profits were cognizable by a Court of Small Causes even under Act 11 of 1865. It would require very strong reasons to suppose that the introduction of Cl. (ii) was made in Art. 35 with the object of unsettling the practice that has obtained in this country ever since the foundation of Courts of Small Causes, and indeed to those who are familiar with the history of this clause it is well known why and to meet what class of cases this clause was introduced.

Turning now to the allegations contained in the plaint upon which the plaintiff's cause of action is founded what is stated in paras. 6 and 7 thereof is this that the plaintiff had obtained as against the defendants delivery of possession through the Court on the 17th November 1924, that thereafter litigation went on between the plaintiff and the defendants, and that taking advantage of the said litigation the defendants did not give up possession and continuing in such possession took away the paddy that was standing on the land on the said 17th November 1924, and that thereafter they illegally grew paddy on the land in the year 1332 and appropriated the same to their own use and for that the plaintiff sued "for damages for use and occupation." These allegations standing by themselves would hardly make out a case either under S. 379, I. P. C. or under S. 447 thereof. Other elements have got to be proved in order to establish a case of criminal trespass or of theft as against the defendants. It might well be that the defendants acted under a bona fide claim of right, that although the Court had delivered possession of the land to the plaintiff they were not willing to part with their possession in view of such rights as they thought they had in the lands, and that after acting in that belief they did not give up possession but continued to be in occupation of the lands and to grow crops thereon and to take such crops as had actually been grown by them and belonged to them. I do not see how it can be said that the acts committed by the defendants necessarily amounted to theft or criminal trespass.

My attention has been drawn to a decision of this Court in the case of *Abinash Chandra Sarkar v. Atul Krishna Bose* (2), in support of the position which the petitioners have taken up, namely, that the allegations in the plaint, if established, do constitute a criminal offence. It will be seen however, that there is a broad distinction between that case and the present one. The difference lies in this that in that case the complainant having obtained a decree for possession against a certain person had obtained actual possession of the land in respect of which the decree had been passed—actual possession in the sense in which the expression is understood in criminal law. I am of opinion that the damages that have been claimed in the present suit are not for any act which would amount to any criminal offence within the meaning of Chap. 17, I. P. C. We need not in the present case look at the exceptions contained in Chap. 4, I. P. C., for the determination of this question at all. I accordingly hold that the Small Cause Court had jurisdiction to deal with this suit.

The Rule is, in my opinion, fit to be discharged and I order accordingly. The opposite party will be entitled to costs. Hearing fee two gold mohurs.

N.K.

Rule discharged.

(2) [1918] 28 C. L. J. 120=48 I. C. 678=23 C. W. N. 395.

A. I. R. 1928 Calcutta 406

MALLICK, J.

Khagendra Prasanna Sen—Appellant.

v.

Sasi Mohan Tarkasastri and others—Respondents.

Appeal No. 2186 of 1925, Decided on. 23rd January 1928, from appellate decree of Addl. Sub-Judge, Noakhali, D/- 20th June 1925.

(a) *Bengal Tenancy Act, S. 52—Reduction in the area of holding—No stipulation in the patta that tenant would not be entitled to any reduction of rent—Tenant is entitled to the proportionate reduction of jama.*

Section 52 gives a statutory right to the tenant to have his jama reduced when there is a reduction in the area of the holding in creating a permanent tenure. An agreement with a tenant to deprive him of the provisions of S. 52 is valid; but that agreement must be stated in clearness. When there is no stipulation in the patta that the tenant would not be entitled

to any reduction of rent even if there would be a reduction in the area of the holding then the tenant would be entitled to the proportionate reduction of the jama: *A. I. R. 1924 Cal. 880, Ref.* [P 407 C 1]

(b) *Bengal Cess Act, S. 41—Valuation roll is a factor in determining the amount of cess.*

The rate as laid down in the Cess Act is not the only factor in determining the amount of cess. There is another factor in determining it and that factor is the valuation roll.

[P 407 C 2]

Jyotis Chandra Guha—for Appellant.

Judgment.—This appeal arises out of a suit for recovery of arrears of rent. The defence inter alia was that the defendant was entitled to a reduction of the jama as admittedly a portion of the holding had been acquired by Government and that the cess which the plaintiff had claimed was excessive the plaintiffs having claimed cess at the rate of 2½ annas in the rupee whereas according to the defence it should have been only six pies in the rupee. This defence found favour with the first Court and the trial Judge gave a part-decree to the plaintiffs in accordance with the case for the defence. In appeal, the lower appellate Court set aside the judgment and decree of the Court of first instance and gave a full decree to the plaintiffs. The defendant has come up to this Court in second appeal.

The first point that arises for consideration is whether the defendant was entitled to a proportionate reduction of the jama. The learned Subordinate Judge could not allow any reduction of the jama principally on two grounds. One of these grounds was that there had been nothing in the patta under which the land was held to show that the defendant would be entitled to a reduction of the jama in case there would be a reduction in the area of the holding. I do not see how that ground can be sustained. S. 52, Ben. Ten. Act, gave a statutory right to the defendant to have his jama reduced when there was a reduction in the area of the holding. Then as regards the absence of any stipulation in the patta on the question of reduction of rent: it is true that in creating a permanent tenure (as the tenure in the present case is) an agreement with a tenant to deprive him of the provisions of S. 52 is valid; but that agreement must be stated in clearness: *Umesh Chandra v. Mati Lal* (1). In the

(1) *A. I. R. 1924 Cal. 880.*

present case, as I have stated before, there was no stipulation in the patta that the defendant would not be entitled to any reduction of rent even if there would be a reduction in the area of the holding.

The second ground on which the learned Subordinate Judge refused to allow a proportionate reduction of rent to the defendant was that as the land had originally been let out on two pattas in which there were two different rates of rent given no reduction of rent was possible under the ordinary rule of three. But it appears that the defendant in an additional written statement gave full details of the two holdings as created by the two pattas and also of the subsequent amalgamation of them with an average rate of Rs. 3-1-6 per kani. The plaintiffs in no part of their case challenged these allegations as they are to be found in the schedule attached to this additional written statement. In these circumstances and remembering also that the point of the present average rate was never raised in the Court of first instance I am of opinion that the learned Subordinate Judge was not justified in raising that point and in making it one of his grounds for refusing the defendant a proportionate reduction. The two grounds on which the lower appellate Court refused to allow any proportionate reduction in the rent are both, in my opinion, unsustainable and I am of opinion that the defendant was in the circumstances of the case entitled to a reduction of the jama as claimed by him.

There was another point urged before me and that was about the amount of cess allowed to the plaintiffs. The plaintiffs were allowed by the lower appellate Court an amount of cess as it is to be found in the settlement khatian. The learned vakil for the appellant contended that this was not proper inasmuch as the Cess Act does not allow any rate higher than six pies in the rupee. But the rate as laid down in the Cess Act is not the only factor in determining the amount of cess. There is another factor in determining it and that factor is the valuation roll. The rate of cess at Rs. 3-6-4 per year, as it is to be found in the settlement khatian, must be presumed to be correct and as observed by the learned Subordinate Judge there was

nothing in the present case which rebutted that presumption. The rate at which the lower appellate Court has allowed cess to the plaintiffs must, therefore, stand.

The result, therefore, is that the appeal is allowed in part. The plaintiffs will get a decree for rent at the rate admitted by the defendant. But they will get cess at the rate as it is to be found in the settlement khatian after making a proportionate reduction in the sum as in the case of the rent. I make no order as to costs in this appeal as no one put in any appearance on behalf of the respondent at the time of the hearing. The costs in the lower Courts will be in proportion to the success and failure of the parties.

N.K. *Appeal allowed in part*

A. I. R. 1928 Calcutta 408 (1)

DUVAL, J.

Nilmani Mondal—Defendant 3 — Appellant.

v.

Chekan Mondal and others—Defendants 1 and 2—Respondents.

Appeal No. 182 of 1925, Decided on 5th January 1928, from appellate decree of Sub-J. Khulna, D/- 27th April 1925.

Civil P. C., O. 41, R. 31—A judgment of the appellate Court should decide the points of fact—It should not be merely one of affirmance.

Where the judgment of first appellate Court simply affirmed the judgment of the lower Court just saying that there was a previous decree and so there can be a decree now

Held: that the judgment was not a sufficient judgment. It ought to decide the points of fact. [P 408 C 2]

Saraj Kumar Chatterjee—for Appellant.

Mukunda Behary Mallik—for Respondents.

Judgment.—In this case, the plaintiffs brought a suit in respect of one and a half bighas of homestead land, their case being that the tenancy was created by acceptance of a kabuliyat from the predecessors of the defendants. Of the three defendants, defendant 1 denied that he had any interest, defendant 2 did not appear and defendant 3 contested saying that the land was not held under the plaintiff at all but held under one Hari Mondal at a different rental, from whom he had a potta which he produced. The

first Court decreed the suit. He went into the evidence and found that the relationship of landlord and tenant in respect of this land existed between the parties and the rent was due. He considered the fact that there had been a previous decree for rent in which a kabuliyat was mentioned, though the kabuliyat on which the plaintiff based the inception of the tenancy was not produced in the present suit. He also considered other points and then gave his decision. The learned Subordinate Judge however, in delivering a judgment of affirmance, has dealt with nothing at all except that he says that there was a previous rent-decree. On the other hand, he says the potta of the defendants does not show that it relates to this land but he also says

We do not know whether the kabuliyat lands, whatever they may be, are the same as plaintiff lands but that is no matter and the identity of the same may be left open.

I cannot hold that this is a sufficient judgment by a final Court of fact for the disposal of this matter. The defendant has a right to have a judgment deciding the points of fact and not merely a judgment in affirmance come to by just saying that there was a previous decree and so there can be a decree now. In the result, I must set aside the judgment of the Subordinate judge and send back the case for re-hearing of the appeal according to law. Costs in this Court will abide the result.

N.K.

Case remanded.

A. I. R. 1928 Calcutta 408 (2)

PAGE AND GRAHAM, JJ.

Man Mohan Pandey—Plaintiff—Appellant.

v.

Hari Nath Chaudhury and others—Defendants—Respondents.

Appeals Nos. 1581 to 1588 of 1925, Decided on 5th August 1927, from appellate decrees of Spl. Judge, Jessore, D/- 25th March 1925.

Evidence Act, S. 32 (2)—Rent suit by landlord—Account books from the landlord's sherista tendered in evidence and admitted under S. 32 (2)—The fact that they were made in the absence of and without the assent of the tenants and were uncorroborated is not sufficient ground to consider them as of no value.

In a suit by a landlord under S. 105, Ben. Ten. Act, for settlement of fair and equitable rent, the tenants produced dakhilas to prove

that certain holdings had been held at a uniform rate of rent for more than 20 years. In order to rebut a presumption in favour of the tenants the landlords tendered in evidence certain account books from their sherista. The lower Court admitted them under S. 32 (2), but refused to attach any value to the entries in these account book because these books were prepared in the landlord's sherista, in the absence of tenants, and they were uncorroborated.

Held: that the fact that merely because those books were prepared in the landlord's office in the absence of the tenants and they were uncorroborated was not a sufficient ground for refusing to attach any value to the entries in those books as evidence: 28 Bom. 294; 16 C. L. J. 24; 16 C. L. J. 328; and 47 Cal. 266, *Ref.*

[P 409 C 2]

Sarat Chandra Ray Choudhury, Ananda Charan Karkoon, Subodh Chandra Lahiri and Bijali Bhusan Sanyal—for Appellant.

Tarakeswar Pal Choudhury and Jiten-dra Mohan Banerjee—for Respondents.

Page, J.—This is an appeal from a decision of the learned Special Judge of Jessore reversing a decision of the Assistant Settlement Officer of Jessore. The appeal arises out of an application by a landlord under S. 105, Ben. Ten. Act, for settlement of fair and equitable rent. A large number of holdings were under consideration, but this appeal relates only to eight of them. The record-of-rights is in favour of the landlord, and in the record-of-rights is an entry to the effect that the holdings under dispute are those of settled raiyats, and, therefore, prima facie the rent was liable to enhancement under certain circumstances. The tenants who are now respondents pray in aid S. 50, sub-S. (2), Ben. Ten. Act, and produced dakhilas which proved to the satisfaction of both Courts that these eight holdings had been held at a uniform rate of rent for more than 20 years. In order to rebut the presumption which under such circumstances will arise in favour of the tenants the landlords, who are now appellants, tendered in evidence certain account books from their sherista, namely jama wasil baki jamabandi, sheha and karcha papers. These papers relate to the year 1872 and onwards, and both the lower Courts have considered these account-books upon the footing that they were admissible in evidence under S. 32, sub-S. (2), Evidence Act, 1872. The entries in these books, therefore, were admissible, in evidence without corroboration: see

Rampyarabai v. Balaji Shridhar (1); *Dukha Mandal v. W. N. Grant* (2); *Aktowli v. Tarak Nath Ghose* (3); *Umed Ali v. Khaje Habibulla* (4). The entries in these account-books were also admissible in evidence notwithstanding that they were made in the absence of and without the assent of the tenants. But the weight to be attached to the entries in these account-books was a matter to be determined by the tribunal whose duty it was to take them into consideration, and in second appeal, if it is clear that the lower appellate Court, under a proper appreciation of the law material to the matter in hand, had come to a finding of fact upon the issue as to whether the entries in these account books outweighed the evidence of the dakhilas produced by the tenants or not, this Court would not interfere with the finding at which the lower appellate Court arrived.

In the present case, however, it is apparent from the judgment of the learned Special Judge that he has not considered the relative weight to be attached to the entries in these account-books and the rent receipts produced by the tenants upon the merits of the documents at all. In my opinion, the learned Special Judge approached the consideration of this matter from the wrong standpoint, for, as I understand his judgment, the ground upon which he refused to attach any value to the entries in these account books, whatever they might have been and however genuine they were, was that these books were prepared in the landlord's sherista and

it is not fair to charge the tenants with liability on the strength of papers prepared in the zamindar's office in the absence of the tenant,

and that no value is to be attached to such paper in the absence of legal corroboration by other sufficient evidence. Now, as we have said, merely because papers such as those in question are not corroborated or merely because they were prepared in the landlord's office in the absence of the tenants, is not a sufficient ground for refusing to attach any value to the entries in those books as evidence.

(1) [1904] 28 Bom. 294=6 Bom. L. R. 50.

(2) [1912] 16 C. L. J. 24=16 I. C. 467.

(3) [1912] 16 C. L. J. 328=17 I. C. 266=17 C. W. N. 774.

(4) [1919] 47 Cal. 266=56 I. C. 38=31 C. L. J. 68.

In this case, in my opinion, in considering the facts the learned Special Judge misdirected himself as to the law, and the case must be remanded to the lower appellate Court in order that the appeal should be determined according to law. It is not to be understood that because this case is remanded for re-hearing this Court has expressed or formed any opinion whatever as to whether the entries in these documents taken together with the other evidence in this case are sufficient to establish that the tenants of this holding are liable to have the rate of rent, that they are now paying, readjusted. It may be that after considering these documents and the other evidence the learned Special Judge will come to the conclusion that the entry in the record-of-rights is correct. On the other hand, he may take an opposite view. But inasmuch as the entries in these account books have been held by both the lower Courts to be admissible under S. 32, sub-S. (2), Evidence Act, the learned Special Judge is not entitled to summarily dismiss them from consideration together with the other evidence in deciding the issues which fall to be determined upon the appeal. The result is that the decree of the lower appellate Court is set aside, and the case is sent back to that Court to be dealt with in accordance with law. Costs of and incidental to this appeal abide the result. We assess the hearing-fee in this appeal at two gold mohurs.

This judgment will also govern the other seven analogous appeals.

Graham, J.—I agree.

N.K.

Case sent back.

A. I. R. 1928 Calcutta 410

MUKERJI, J.

Indra Mohan Roy—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1044 of 1927, Decided on 20th December 1927, from order of Sess. Judge, Dacca, D/- 25th August 1927.

(a) *Motor Vehicles Act (8 of 1914), S. 6—Motor driven without owner's knowledge by an unlicensed driver—Owner is not liable—Nor is he liable even if his licensed driver had permitted the unlicensed driver to drive.*

Where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts

if an act is expressly prohibited, but not otherwise; and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express or implied. [P 411 C 2]

Where a motor bus is driven by a person who has no license without the knowledge of the owner, the owner cannot be convicted. Nor can he be convicted on the ground that his licensed driver had given the unlicensed driver permission to drive: *A. I. R. 1924 Cal. 985, Rel. on: 38 Cal. 415 and 45 Cal. 430, Dist.*

[P 412 C 1]

(b) *Tort—Master's liability—A servant has no implied authority to engage a stranger to do work on behalf of his master so as to render the master liable for the stranger's act—Master and servant.*

A servant has no implied authority to engage a stranger to do work on behalf of his master, so as to render the master liable for the stranger's acts or defaults except perhaps in a case of necessity, which term comprises only well-known exceptional cases: (*Case law discussed*).

[P 412 C 1]

Mahendra Kumar Ghose and Suresh Chandra Taluqdar—for Petitioner.

Judgment.—The petitioner is the owner of a motor-bus which was on a certain day driven by a person who had no license to drive. The petitioner has thereupon been convicted under S. 16, Motor Vehicles Act (8 of 1914) and sentenced to pay a fine of Rs. 15 and an order has been made under S. 18 of the Act cancelling his license for a period of six months. This rule is directed against the said conviction, sentence and order.

The petitioner's defence was that seven or eight days before the date of the occurrence he had left for home leaving the bus in charge of his licensed driver and that he was not liable if any unlicensed person drove the bus during his absence and without his knowledge. There was a further defence that the licensed driver was on the bus but it has been disbelieved. The licensed driver Krishna was examined as a Court witness. He said that on the day in question, he went away to take his meals asking one Shyam Lal Das to act as driver but as a matter of fact one Nalini who had no license has driven it. He said further that the petitioner had gone home some days before the date of the occurrence. He also said that Nalini was the manager of the bus and used to accompany him on the bus. There is a further statement in the cross-examination of this witness by the defence which runs in these words:

The bus was in charge of Nalini and not of myself.

It is not clear whether by this the witness meant to deny the allegation of the petitioner that he had left for home leaving the bus in charge of the witness; but as the Magistrate has not stated anything about this matter in his judgment I think it is fair to proceed on the supposition that this allegation of the petitioner has not been disproved. In that view the question that arises is whether the petitioner is punishable for the fact that the bus was driven, though without his knowledge and without his consent express or implied, by a person who is not a licensed driver.

The conviction of the petitioner is founded on the liability of the owner arising under S 6 of the Act. The relevant portion of the section runs thus:

No owner shall allow any person who is not (so) licensed to drive it.

The Magistrate has purported to follow the decisions in the cases of *Thornton v. Emperor* (1) and *Baidya Nath Bose v. Emperor* (2) to which he has referred in his judgment, and on the authority of those decisions has held that the petitioner should have seen that the bus was not driven by any man other than a licensed driver. He has further remarked that even upon the decision in the case of *Viraj Lall v. Emperor* (3) the petitioner is liable as the driving of the car by any man other than a licensed driver is expressly prohibited by the Act, because on the principle of that decision the petitioner as master of Krishna is liable for the criminal act of Krishna in allowing Nalini to drive the bus.

Now the penal clause upon which the conviction in *Thornton v. Emperor* (1) was founded was R 4 of the rules framed under the Bengal Motor and Cycle Act 3 of 1903 which was worded thus:

No person shall drive or have charge of or cause or permit to be used any motor-car, motor cycle or trailer which does not in all respects conform to these rules or which is so driven or used as to contravene any of these rules.

The rule contravened in that case was R. 20 which purported to forbid the reckless or negligent driving of a motor car. It was held that once the permission express or implied to use a car was given the owner remains responsible for any misuse of the car while that permis-

sion lasts and that a general injunction to the chauffeur never to drive the car beyond the regulation speed is not sufficient to get rid of the owner's responsibility. These Rr. 4 and 20 were for all practical purposes same as Rr. 3 and 19 framed under the Act of 1914 under which arose the case of *Baidya Nath Bose v. Emperor* (3). In that case it was said that the language of R. 3 could not be said to be very happy and that the construction of the rule was not free from doubt but the decision in *Thornton's case* (1) was binding. The view taken in *Thornton's case* (1) has been dissented from in the case of *Viraj Lall v. Emperor* (3) which was a case under R. 3 and R. 16 framed under the Act of 1914. It has been said in that case that where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts if an act is expressly prohibited but not otherwise; and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express or implied.

These decisions may be helpful in interpreting R. 4 or R. 3 referred to above and to which they relate, in which the words are:

No person shall cause or permit to be used any motor vehicle etc., words which make it necessary to determine whether the word "person" is meant to include an absentee owner. The decisions properly viewed merely purport to lay down rules of interpretation to be followed in such and similar cases. In my judgment they are of little assistance in construing the words of S. 6 of the Act to which I have already referred and which define the liability of the owner who is made liable for allowing a person not to drive the vehicle.

The real question is whether in the circumstances that have happened in the present case the petitioner can be said to have allowed Nalini to drive the bus. It is a question of fact whether he did so or not, and to answer this question it will have to be considered: firstly whether he did so himself; and secondly whether if Krishna did so, Krishna's act may be imputed to him under any general principle of law relating to master and servant.

As regards the first of these two questions: it cannot be said that there is any evidence either direct or circumstantial.

(1) [1911] 38 Cal. 415=13 C. L. J. 335=9 I.C. 480=15 C. W. N. 390.

(2) [1917] 45 Cal. 430=26 C. L. J. 37=42 I. C. 601=22 C. W. N. 72.

(3) A. I. R. 1924 Cal. 985=51 Cal. 948.

from which any consent express or implied can be held to have been established or to be capable of being deduced. As far as can be made out it has not been established even that the petitioner had any knowledge that such a contingency was likely to happen.

As regards the second question: there is abundant authority for the proposition that a servant has no implied authority to engage a stranger to do work on behalf of his master, so as to render the master liable for the stranger's acts or defaults except perhaps in a case of necessity, which term comprises only some well-known exceptional cases: *Gwilliam v. Twist* (4) and *Haris v. Fiat Motors Ltd.* (5), (both of which were cases in which the driver left the control of the car allowing it to be driven by a stranger). Similarly where a driver contrary to instructions allowed a third person to drive who knocked down a passer-by it was held that the owner was not liable as the driver had acted outside the scope of his authority: *Coogan v. Dublin Motor Co.* (6). But the owner's liability may arise if the driver retains control of the car and allows a stranger to drive negligently: *Ricketts v. Thos. Tilling Ltd.* (7) and *Richard v. Shard* (8). If these general principles are applied to the present case, the petitioner can hardly be said to be responsible for the act of Krishna for Krishna, even if he had allowed Nalini to drive the bus, had clearly acted outside the scope of his authority in doing so.

On no conceivable principle then, in my judgment, can the petitioner be said to have allowed Nalini to drive the bus and consequently his conviction and sentence and the order of cancellation of his license against which the rule is directed must be set aside and the fine if paid should be refunded. The rule is made absolute.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 412

B. B. GHOSH AND CAMMIADÉ, JJ.

Ananda Bandhu Das and others—Defendants—Appellants.

v.

Ambica Charan Bhattacharjee and another—Plaintiff and Co-plaintiff—Respondents.

Appeal No. 227, of 1925, Decided on 8th December 1927, from original decree of Offg., Sub-Judge, 2nd Court, Chittagong, D/- 15th September 1925.

Administration — Wife appointed as administratrix and granted permission to make permanent leases for necessary purposes—Permanent lease granted by her, but for purposes not necessary for administration, will be deemed to be by her as holder of a widow's estate and if not for necessity reversioners can set aside—Hindu law—Alienation.

An executor or administrator does not appear to have, according to the law, an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a bona fide purchaser may be protected in certain cases where a transfer is not for that purpose. [P 415 C 2]

A will provided. "In case it becomes necessary to grant any permanent leases to tenants the executors shall be competent to grant them under the signature of my wife and at the end of each year they shall submit and explain an account of the income and expenditure to her." The wife made certain permanent leases to have money which was required for purposes quite different from what it was the duty of the wife to perform as an administratrix.

Held: that the lady was not competent to grant the leases as the administratrix

[P 416 C 1]

Held, further, that the leases which were granted by the lady were granted by her in the exercise of her right as the owner of a widow's estate as heir of the testator and, as such, not being supported by legal necessity, the reversioners were entitled to recover possession after the death of the widow: *English cases Referred*.

[P 416 C 1]

Sarat Chandra Basak, Chandra Sekhar Sen and Nikunja Behari Roy—for Appellants.

Jogesh Chandra Roy, Narendra Kumar Dass, Nripendra Chandra Das and Jagannath Majumdar—for Respondents.

B. B. Ghosh, J.—This is an appeal by some of the defendants, that is, defendants 7, 10, 16 and the representatives of the original defendant 14, against the judgment and decree of the Subordinate Judge, 2nd Court, Chittagong, dated 15th September 1925. The suit was originally brought by plaintiff 1 only by making plaintiff 2 a pro forma defendant who was subsequently transferred on his own

(4) [1895] 2 Q. B. 84=64 L. J. Q. B. 474=59 J. P. 484=43 W. R. 566=72 L. T. 579.

(5) [1907] 23 T. L. R. 504.

(6) [1914] 49 I. L. T. 24.

(7) [1915] 1 K. B. 644=84 L. J. K. B. 342=112 L. T. 137=31 T. L. R. 17.

(8) [1914] 31 T. L. R. 24.

application to the category of plaintiffs. These two plaintiffs claimed the property in suit as the reversionary heirs of one Bhabani Das Bhattacharja who died in October or November 1874 leaving a widow Bama Sundari surviving him. Bhabani had previously executed a will dated 28th July 1874, by which he had appointed several executors. The executors renounced their executorship and the widow applied for letters of administration with the copy of the will annexed which was granted to her on 8th February 1875. It appears that on 6th May 1879 the widow Bama Sundari executed two permanent leases in favour of one Gour Hari Das (Choudhury), the predecessor-in-interest of defendants 7 to 15, and the properties covered by these two leases are the only subject-matter of dispute in this appeal. The Subordinate Judge has made a decree for possession in favour of the plaintiffs making the defendants liable for mesne profits. From that decree these defendants have appealed to this Court.

The history after the grant of the letters of administration is that the agnates of Bhabani Das oppressed his widow in various ways so that she was obliged to leave the family dwelling-house of her husband and had to go to live in her father's residence. In September 1899 she applied to the District Judge for permission to sell certain properties. This permission was refused and in that order the District Judge made certain observations about the revocation of the letters granted to her. In November 1899 two of the executors applied for letters of administration with the will annexed of Bhabani Das and plaintiff 1 also made a similar application. In the meantime, on 28th September 1899, Bama Sundari sold her right to all the properties to the predecessor-in-interest of defendants 1 to 6. The learned District Judge granted letters of administration to one of the executors named Kibal Krishna Bhattacharji. On appeal the High Court set aside that order and the result was that the original grant to Bama Sundari was not interfered with. In September 1906 Bama Sundari brought the properties covered by the two pattas of 1879 to sale after having obtained a decree for rent. It will be noticed that this was after she had parted with all her interest in the

properties left by her husband. The disputed properties were purchased by the predecessor-in-interest of defendants 16 to 19, who has been found to be a benamidar of the original lessee Gour Hari. Bama Sundari died on 10th January 1921, and this suit was brought by the plaintiffs to recover possession of the properties left by their maternal uncle Bhabani Das, of which the properties subject to the aforesaid leases are now the subject-matter of this appeal. The ground urged by them is that there was no legal necessity for permanent leases. The Subordinate Judge in his judgment discusses various points and has come to the conclusion that the leases were not granted for legal necessity. He has further held that the widow had only limited powers of alienation as administratrix and had not the power before the passing of the Probate and Administration Act, 1881 to grant permanent leases without the sanction of the District Judge. He has also held that the transaction entered into by the widow in granting permanent leases was not a bona fide one. He appears to have been of opinion that the salami which was said to have been paid to the lady before the Sub-Registrar was not actually received by her, but that there was only a show of payment. In that view he has decreed the suit.

The first contention on behalf of the appellants is that the Subordinate Judge has misread the law as regards the powers of an administrator governed by the Hindu Wills Act before the passing of the Probate and Administration Act as stated in Phillips and Trevelyan's book on Hindu Wills 2nd edn, p. 225, by omitting a "not" in the quotation made by him. This is true. Their argument is that before the passing of the Probate and Administration Act an administrator acting under the Hindu Wills Act had the same authority as an executor under S. 269, Succession Act, which was made applicable to Hindus by S. 2, Hindu Wills Act. S. 269, Succession Act, 1865, runs thus :

An executor or administrator has power to dispose of the property of the deceased, either wholly or in part in such manner as he may think fit.

I am of opinion that the Subordinate Judge was wrong in his view of the law as regards the powers of an administrator under the Hindu Wills Act before

the passing of the Probate and Administration Act, 1881. Whether the leases are binding on the plaintiffs or not will depend on other considerations and the matter will be dealt with later on.

The next point urged is that in any view of the case under the terms of the will, it should be held that the widow forfeited her right to succeed to the property by the sale of all her properties inherited from her husband on 28th September 1899 and that the plaintiffs were entitled to come in as heirs under the Hindu law on that date; and the suit, having been brought in January 1924, was barred by limitation. With regard to this point we are of opinion that the appellants' argument cannot be sustained. Even assuming that the sale would work a forfeiture of the right of the widow, which we are not prepared to hold, there is no subsequent disposition of the property under the will and the result would be an intestacy. The widow was the heir under the Hindu law and she would be entitled to hold the property as the heir of the testator Bhabani Das under any circumstance when there was no gift over under the will; and so long as Bama Sundari was alive, the plaintiffs would have no title to the property left by Bhabani.

The first point is a more substantial one and requires careful consideration. It is contested on behalf of the respondents that Bama Sundari did not give the permanent leases of the property in question in the course of the administration of her husband's estate, and, therefore, the power conferred upon an administrator under S. 269, Succession Act, 1865, does not come into play. Letters of administration were granted to her in 1875. The finding of the Subordinate Judge is that there were no debts to be paid by the administrator. It was not necessary for the administrator to alienate the property for the purpose of administration, nor does it appear that the administration had not already come to an end at the time when the permanent leases were given. The leases, therefore, granted by the lady were not granted by her as administratrix, but should be taken as granted by her as a Hindu widow, and not being supported by legal necessity are not binding on the plaintiffs. It is further argued that on the finding of the Subordinate Judge, that

the leases were not bona fide, they are not binding on the plaintiffs under any circumstance.

The lease Ex. B (16) shows the reason why it was given. The other lease, we are told, was in the same terms. There the lady describes herself as the widow of Bhabani. It is stated that the istem-rari mokarrari kaemi daemi patta was given for the purpose of her husband's Gaya sradh, for the expenses of her residence at Benares and other necessary expenses. These are matters which cannot be held to be for the purpose of the proper administration of the estate of her deceased husband, and she does not describe herself in granting the leases as administratrix nor does it anywhere appear that the lessee was aware that she was given letters of administration of her husband's estate.

I apprehend that the powers given to an executor under S. 269, Succession Act 1865 were for the purpose of conversion of the testator's estate into money for the payment of debts to the creditors and for the facility of division of the legacies. The powers granted under that Act were the same for all cases of administration, whether the testator died after leaving a will or died intestate. Where it is clear that no debt has to be paid and no legacies have to be divided, it would be difficult to say that an administrator has an unlimited power of sale for his own purposes. No authority in point has been cited at the Bar with regard to any restriction on the exercise of the power of an executor or administrator under S. 269, Succession Act, but as that section was taken from the English law, I think it is permissible to refer to English authorities in order to explain the nature of the power, which I shall presently do.

It was contended by Mr. Chandra Sekhar Sen in reply that the fact that the lady did not describe herself as administrator did not affect the right of the lessee and he relied on the case of *Preonath Karar v. Suraja Coomar Goswami* (1), where the Court held that the fact that the vendors did not describe themselves as administrators but described themselves as heirs did not affect the case because either as administrators or as heirs they were entitled to sell, though as heirs

(1) [1892] 19 Cal. 26.

they could not sell anything more than their own shares. This would be applicable only to the case of bona fide purchasers who had no knowledge that the money was to be applied otherwise than for the payment of the Testator's debts. see *Corser v. Cartwright* (2), referred to in the above case. In *Solomon v. Attenborough* (3) one of two executors without the knowledge of his co-executors, pawned articles of plate belonging to the testator's estate with certain pawnbrokers, who had no notice that he was not the absolute owner thereof, and he misapplied the money advanced upon them for his own purposes. At the date of the pledge all the testator's legacies and debts so far as they were known had been paid, but the residuary estate had not been completely realized and distributed. On the death of the pledgor the transaction was discovered and an action was brought by his co-executor and a new trustee against the pawnbrokers to recover the plate. The Court of appeal held, reversing the trial Court, that inasmuch as the pledgor had not purported to act as executor, and the defendants had no notice that he was executor, the latter had no title to the plate and must deliver it up to the plaintiffs. The House of Lords affirmed the decision on appeal on the ground that the proper inference from the facts was that the executors at the time held the plate not as executors but as trustees and, therefore, the deceased executor had no power to pledge the plate: *Attenborough v. Solomon* (4). In *Ricketts v. Lewis* (5) it was held that an administrator has no power to mortgage leaseholds of an intestate under leases not containing repairing covenants in order to raise money for repairing the property. And such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised. Fry J., (as he then was) observed :

What authority had the administratrix to raise money for the purpose of repairing the property? It may be that she was liable to repair by virtue of covenants in the lease, but having regard to the length of the terms

and the time when they were granted that does not appear probable, and the onus of proving that there was such a liability is on the mortgagee, and he has not discharged it. It comes then, shortly, to this: that at the date of the mortgage Mrs. Lewis did not require the money for any purpose which it was her duty to perform as administratrix, and that she did require it for the purposes of her own beneficial enjoyment.

Applying the principles laid down in these cases there cannot be any doubt, in my judgment, that the leases in dispute cannot be sustained. There was no debt to pay off the testator; the lessor did not purport to grant the leases as administratrix; she did so rather as the widow of Bhabani Das; the lessee does not appear to have any knowledge that letters of administration had been granted to the lessor; there was clear notice in the lease to the lessee that the money was required for purposes quite different from what it was the duty of the lessor to perform as an administratrix; all these circumstances establish that the leases are not binding on the estate left by Bhabani Das, even assuming that the lessee did actually pay the premium to the lady as stated in the leases. An executor or administrator does not appear to have according to the law an absolute power to dispose of the property of the deceased if it is not necessary for the purpose of administration of the estate, but a bona fide purchaser may be protected in certain cases where a transfer is not for that purpose.

There can be no doubt that she could make alienations for necessity as a Hindu widow. But the Subordinate Judge has found that there was no necessity for such alienation and no attempt has been made to show that that finding is correct. It is further argued on behalf of the respondents that the will itself does not give a free power of alienation by way of leases even to the executors. Para. (8) of the will says :

In case it becomes necessary to grant any permanent leases to tenants, the executors shall be competent to grant them under the signature of my wife, and at the end of each year, they shall submit and explain an account of the income and expenditure to her.

It is urged that it cannot be reasonably said that when the executors had renounced, the widow, would according to the will itself, get an unfettered power of making alienation by way of permanent leases by taking letters of administration with the will annexed.

(2) [1876] 7 H. L. 731=45 L. J. Ch. 605.

(3) [1912] 1 Ch. 451=81 L. J. Ch. 242=28 T. L. R. 225=106 L. T. 87=56 S. J. 270.

(4) [1913] A. C. 76=82 L. J. Ch. 178=57 S. J. 76=107 L. T. 838=29 T. L. R. 79.

(5) [1882] 20 Ch. D. 745=90 W. R. 609=51 L. J. Ch. 837=46 L. T. 968.

I am not quite sure that if it was necessary for the purpose of administration the widow could not grant a permanent lease by reason of these provisions. But on the grounds already stated we are of opinion that the leases which were granted by the lady were granted by her in the exercise of her right as the owner of a widow's estate as heir of Bhabani, and, as such, not being supported by legal necessity, the reversioners are entitled to recover possession after the death of the widow.

On these grounds the appeal must be dismissed with costs.

Cammiade, J.—I agree.

N.K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 416 (1)

PAGE AND DUVAL, JJ.

Hefajuddin Talukdar—Plaintiff—Appellant.

v.

Nabi Nasya and *others*—Defendants—Respondents.

Appeal No. 1346 of 1925, Decided on 4th January 1928, from appellate decree of Addl. Dist. Judge, Rangpur, D/- 17th February 1925.

Civil P. C., O. 13, R. 2—Admissibility.

It is a matter of discretion with the Court to admit certain documents at the rehearing obtained on a review though they were not tendered in evidence in the first appeal. [P 416 C 1]

Surendra Nath Das Gupta—for Appellant.

Nirode Bandhu Roy—for Respondent.

Biraj Mohan Majumdar—for Dy. Registrar.

Duval, J.—In this appeal, the main point which was argued on behalf of the appellant was that certain documents which were not tendered in evidence at the first trial, after a review of that trial had been obtained, were admitted in evidence in the second trial. It appears that the reviewing Court by its order did not exclude the trial Court from considering these documents at the re-hearing and by its order granting the review ordered that the case should be re-heard. Admittedly, these documents were relevant and admissible. Whether they ought to have been admitted or not at the discretion of the Court at the re-hearing was a matter for the Court to decide and I am not prepared to hold that these proceedings would

be vitiated, because these documents at the discretion of the trial Court were used as evidence at the re-hearing. Moreover, the learned Judge in the lower appellate Court, apart altogether from those documents, relied upon certain dakhilas which were at any rate some evidence in support of the very issue upon which the disputed documents were used as evidence. It cannot be said that the finding of the lower appellate Court was arrived at without evidence being before it upon which it reasonably could arrive at the decision to which it came. That point, therefore, fails. The second point taken on behalf of the appellant is that as the review was granted upon one ground although the application for review was based upon another ground the subsequent proceedings were all vitiated. It is enough to say that in the circumstances of this case we should not be disposed to consider such a point, unless it was taken in the lower appellate Court. No objection, however, to the validity of the review proceedings was taken in the lower appellate Court and, in the circumstances, we do not propose to consider it on second appeal. The result is that this appeal fails and must be dismissed with costs.

Page, J.—I agree.

N.K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 416 (2)

CHOTZNER AND GREGORY, JJ.

Bhadreswar Sardar—Accused—Applt.

v.

Emperor—Opposite Party.

Criminal Appeal No. 693 of 1927, Decided on 1st February 1928.

(a) *Evidence Act, S. 30—Statement, for using it against the co-accused, must be a confession in respect of an offence with which all are charged.*

A statement made by an accused person, before it can be taken into consideration against a fellow prisoner, as is provided for in S. 30, must amount to a confession on the part of the maker with respect to the offence with which all are charged : 2 All. 444, Rel. on.

(b) *Criminal P. C., S. 297—Charge to jury—Judge wrongly dealing with a certain statement as a confession amounts to serious misdirection.*

Where a Judge while charging the jury dealt with a certain statement as a confession, while in reality it was not,

Held : that this was a serious misdirection.

Mrityunjay Chattopadhyay and *Manindra Nath Banerji II*—for Appellant.

N. K. *Khundkar* and *Anil Chandra Roy Chaudhury*—for the Crown

Judgment.—The appellant Bhadreswar Sardar, along with certain other persons who have not appealed to this Court, was tried in the Court of the learned Sessions Judge of Nadia with the aid of a jury for an offence under S. 395 I. P. C., and the learned Judge, agreeing with the unanimous verdict of guilty of the jury, has convicted and sentenced him to undergo five years rigorous imprisonment. The learned vakil who has appeared in support of the appeal has relied upon certain misdirections which he says the learned Judge has committed in that he admitted in evidence a certain statement made by one of the accused, Purna, before a Magistrate and wrongly described it as a confession. This statement was subsequently retracted. Now, the learned Judge, first of all, put S. 30, Evi. Act before the jury and then he went on to say:

The principle underlying the section is that, when a person makes a confession implicating himself and others to the same extent, the fact of self-implication affords some guarantee for the truth of the incrimination of the others. But the truth of this guarantee is weakened, as in the present case, when the confessing accused makes the others take a much more prominent part in the dacoity than he took himself and says that he was forced by the others to take them to Hazari's house and it is still further weakened, as here, when the accused has retracted his confession. Although capable of being taken into consideration, retracted confessions of this nature are to be scrutinized with the greatest care. It has not been made on oath, it has not been tested by cross examination and its truth has been denied by its maker. If the retracted confession were the only evidence on the record, its evidentiary value as against the other two accused Bhadreswar and Mohendra would be extremely meagre. You will take this confession into consideration, gentlemen, only after you have carefully weighed and scrutinized the whole of the prosecution evidence.

The learned vakil has contended that the statement made by Purna is not a confession, in as much as it is not incriminatory but self-exculpatory. We have no doubt, on reading the statement, that that is precisely what it is. It has been pointed out in many cases that a statement made by an accused person before it can be taken into consideration against a fellow prisoner, as is provided for in S. 30, Evidence Act, must amount to a confession on the part of the maker with respect to the offence with which all are charged. It must be a confession or, as it was put by Mr. Justice Straigh in *Empress of India v. Ganraj* (1) :

the test, S. 30, Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered. In fact, to use a popular and well-understood phrase, the confessing prisoner must tar himself and the person or persons he implicates with one and the same brush.

If that test is applied to the present case, what do we find? Purna says that he went to the spot—the scene of the dacoity—under pressure; that, in fact, he was actually under fear of imminent death, that he took no part in the dacoity; that he stood outside the house and at the end went away. Mr. Khundkar who has appeared for the Crown has contended that, though it may not, strictly speaking, be a confession, it is nevertheless an admission. But, if it be regarded as an admission, there can be no doubt that the learned Judge did not put that aspect of the case to the jury; and even then, though it might be considered against the person who made it, it could by no possibility be considered as against the other accused persons. When we find that the learned Judge in this case all through dealt with this statement as a confession, we cannot but hold that this was a serious misdirection. In point of fact, a statement only becomes admissible in evidence at all if it is an incriminating statement which involves the maker as it does those persons whom he incriminates. It is no doubt true that the learned Judge took particular pains to explain what little value a statement of this kind, especially when retracted, has. But, on the other hand, it is possible that the mere fact that this statement had been placed before the jury when it was not admissible at all might have led them to a conclusion at which, in the absence of that statement, they would not have arrived. We think, therefore, that this appeal must be allowed and that the proper order to make in the case is to set aside the conviction and sentence and to direct that all the accused persons except Bhaku Sardar who has been acquitted by the jury be retried on the substantive charge.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 418

MUKERJI, J.

Nibaran Chandra Sikdar—Plaintiff—Appellant.

v.

Abdul Hakim and others—Defendants—Respondents.

Appeal No. 1537 of 1925, Decided on 21st December 1927, from appellate decree of Addl. Sub-Judge, Chittagong, D/- 7th March 1925.

Civil P. C., S. 2 (2)—Decree on review is a new decree—Appeal lies from such decree—*Civil P. C., S. 114, O. 47, R. 4.*

The effect of allowing an application for review is to vacate the decree originally passed. The decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one and therefore no appeal can lie from the decree originally passed: 28 *All.* 240; 34 *All.* 282; 44 *Cal.* 1011; and 140 *P. R.* 1919; *Rel. on.* [F 419 C 1]

Krishna Kamal Moitra and Rabindra Nath Choudhury—for Appellants.

Narendra Kumar Das—for Respondents.

Judgment.—The suit which has given rise to this appeal was instituted by the plaintiff for declaration of title and recovery of khas possession of certain lands.

The lands comprised of two plots, the southern portion of Cadastral Survey Plot No. 3315 and the whole of Cadastral Survey Plot No. 3316. The plaintiff's case was that the lands originally belonged to his father in ryoti right and comprised a holding held under one Nobo Chandra Saha, that the said Nobo Chandra Saha sold up the holding at a rent sale, and that one Ramesh Chandra Rakshit purchased it at the said sale and let it out to the plaintiff in dar-ryoti interest on 23rd April 1920, that the defendants dispossessed him in August 1920, upon which he instituted a suit under S. 9, Specific Relief Act, but was unsuccessful therein and hence the suit. The case of defendant 1 was that Cadastral Survey Plot No. 3315 was held by his father in dar-ryoti right under one Sarada Charan Sikdar who in 1917 also mortgaged his ryoti interest to the said defendants' father. The case of defendant 3 was that Cadastral Survey Plot No. 3316 belonged to certain persons, that under a partition and a transfer subsequently made it came to be owned in ryoti right by defendant 3, and that he settled it in dar-ryoti to defendant 1.

The Munsif decreed the suit, but the Subordinate Judge on appeal has dismissed it.

The Subordinate Judge has found that the documents showed that one Nobo Chandra Saha having obtained a decree for arrears of rent against the plaintiff's father Ratanmani put the holding up to sale and Ramesh Chandra Rakshit purchased it at such sale in 1900 that in 1906, Sarada Charan Sikdar sold his interest in the lands to Ramesh Chandra Rakshit, and in April 1920, plaintiffs obtained a settlement thereof from the said Ramesh Chandra Rakshit. He was of opinion that there was nothing to show who this Nobo Chandra Saha was or whether he was the sole landlord and whether Ratanmani was the sole tenant, and that there was no explanation why Sarada was not made a party in the rent suit which Nobo Chandra Saha instituted though Sarada along with Ratanmani were recorded in Cadastral Survey records as the tenants in respect of the two plots Nos 3315 and 3316, which were also described therein as one holding with defendant 1's father as a korfa tenant under them. On the whole he was of opinion that the rent decree and the sale was a shady and suspicious transaction. He, however, decided the appeal on the ground of limitation holding that the suit failed as neither the plaintiff nor his lessor Ramesh was in possession within 12 years before the suit. It is this finding on the question of limitation that is challenged on behalf of the plaintiff who has preferred this second appeal.

To the maintainability of the appeal a preliminary objection has been taken on behalf of the respondents. It is pointed out on their behalf that this appeal was filed on 24th June 1925, that prior to filing the appeal the plaintiff had filed an application for review on 30th April 1925, before the Subordinate Judge and the application for review was allowed on 14th September 1925, the result being that the appeal was again heard; and on 20th January 1926, a fresh judgment was delivered by which the original judgment was held to stand good and a fresh decree was prepared and signed on 27th January 1926. It is urged that the present appeal is in the circumstances not maintainable. The appellant, on the other hand, urges that by the order granting the application for review the Subordinate Judge merely

kept his original judgment "in abeyance," as he expressly said in his order passed on 14th September 1925, and that when by the judgment ultimately passed on 28th January 1926, and the decree prepared and signed on 27th January 1926, the original judgment was held to stand good, the appellant is competent to attack the original judgment and the original decree in this appeal. In my opinion the effect of allowing an application for review is to vacate the decree originally passed, and the decree that is subsequently made on the review, even if it does not modify the decree originally passed, is a new decree superseding the original one. For this view that I take, I do not find any authority directly or clearly in point. The case of *Kanhaiya Lal v. Baldeo Prasad* (1) was one in which the former decree was modified in important particulars on the review; so also in the case of *Brijbasi Lal v. Salig Ram* (2) there was a modification. In the case of *Pyari Mohan Kundu v. Kalu Khan* (3) it is said at p. 1016 (of 44 Cal.) that if the application for review is successful the appeal cannot proceed, and *Kanhaiya Lal v. Baldeo Prasad* (1) is quoted in support. The decision of the Lahore High Court in *Basheshar Nath v. Ram Kishen Das* (4) is perhaps the only authority which may be cited as fully supporting my view.

In the circumstances I think it proper to record my views on the merits of the appeal on which also I think the appeal must fail. The argument on the merits is that as the defendants cannot claim any higher rights than those of under-ryots, and inasmuch as Ratanmani's and Sarada's names were recorded as ryots in the Cadastral Survey records, and because the defendants cannot dispute the purchase by Ramesh of Ratanmani's interest at the rent sale and of Sarada's interest by private purchase, or challenge the lease granted by Ramesh to the plaintiff, it should be held that the under-ryoti tenancy which was at one time held under Ratanmani and Sarada still continues and, therefore, the possession of Ramesh and also of the plaintiff is established. In other words, it is contended that the relationship as between ryot and

his under-ryot; not having been determined, even though no rent may have been paid or received, Ramesh must be held to have been in possession and so the plaintiff. This argument assumes that a mere assignment or transfer is sufficient to put the assignee or transferee in possession as against persons claiming to hold under the assignor or transferrer, a proposition which cannot be seriously put forward. In my opinion, the finding of the Subordinate Judge on the question of possession is a question of fact and should be viewed as such.

The appeal fails and is dismissed with costs.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 419

B. B. GHOSH AND S. C. MALLIK, JJ.

Dwijendra Nath Biswas, Narendra Nath Biswas and Surendra Nath Biswas
—Defendants—Appellants.

v.

Jitendra Nath Roy—Plaintiffs—Respondent.

Appeal No. 1394 of 1924, Decided on 22nd March 1927, against decree of District Judge, Jessore, D/- 14th March 1924.

Landlord and Tenant—Lease—Construction—Stipulation that rent should not be changed on any ground—Decrease of two-thirds land by diluvion—Tenant was held not entitled to any abatement of rent.

A lease provided: "You (lessee) shall not be entitled to take a plea for remission of the jama fixed on the ground of failure of crops on account of inundation or drought, on account of dearth, abandonment, land lying fallow or being in a water logged condition, dispossession and on any other ground. If you do that, it shall not be entertained. I (lessor) shall not be competent to demand anything in excess of the rent fixed on any ground." Two-thirds of land was diluviated by a river, and the tenant claimed a proportionate abatement of rent.

Held: that he was not entitled to any abatement on the general principle of law as the kabuliya contained a stipulation that no abatement could be claimed on any ground. [P 421 C 1]

Jogesh Chandra Roy, Rupendra Kumar Mitter and Rajendra Bhushan Bakshi—for Appellants.

B. L. Mitter and Hemendra Ch. Sen—for Respondent.

Judgment.—This is an appeal on behalf of the defendants against the decree of the District Judge of Jessore modifying the decree of the Munsif, second

(1) [1905] 28 All. 240=(1905) A. W. N. 265.

(2) [1912] 34 All. 282=14 I. C. 472=9 A. L. J. 183.

(3) [1917] 44 Cal. 1011=41 I. C. 497.

(4) [1919] 140 P. R. 1919=54 I. C. 966.

Court of Narail, in a suit for rent brought by the plaintiff who is the respondent in this appeal. The facts are these : In the year 1884, the plaintiff's predecessor granted a dar-mourasi lease in favour of the predecessor of the defendants. The lease was with regard to a certain area of land which the District Judge has found to have been 1,183 bighas at the time when the lease was granted. It was for a consolidated rent of Rs. 176-8-0-15 gds. per year. It was obtained on payment of a selami of Rupees 1,181-4-0. All the rights which a permanent tenure-holder is entitled to get under mourasi lease was granted to the lessee, that is, he was entitled to enjoy and possess the leasehold from generation to generation with all the powers of an owner on payment of the fixed rent. It has been found by the Courts below that during the period for which the suit for rent was brought, that is, from the last half of 1325 B. S. to 1328 B. S. nearly two-thirds of the demised land had been diluviated by the river Madhumati. The question involved in this case is whether by reason of diluvion the tenants-defendants are entitled to a proportionate abatement of rent for the period in the suit. The Munsif allowed the abatement. The District Judge on appeal has held that having regard to the terms of the patta the tenant had contracted himself out of his right to claim abatement of rent on any ground whatsoever. Upon that finding the District Judge passed a decree for the sum claimed at the rate stipulated in the patta.

It is contended on behalf of the appellants that they are entitled to a proportionate abatement of the rent on the ground of diluvion. It is argued that the right to obtain abatement in case of diluvion is based upon the general principle of law which should be enforced as a rule of justice, equity and good conscience, and, unless there is any special contract by which the tenant precluded himself from obtaining the abatement he is entitled to claim it. Reliance has been placed upon certain cases, notably the cases of *Sheikh Enayatollah v. Sheikh Elaheebaksh* (1) and *Salimullah Bahadur v. Kali Prosonno Parbat* (2), in support of the contention on behalf

the tenant. The general proposition of law as enunciated is not contested by the respondent. But the contention on behalf of the respondent is that upon a true and proper construction of the agreement entered into in this case the tenant is not entitled to abatement on the ground of diluvion. We have, therefore, to see whether the contract, is such that the tenant cannot rely upon the rule which has been considered as a rule of the nature of justice and equity under which he is entitled to abatement of rent on account of diluvion. The first thing to be noted in the kabuliyat is that it is a mourasi mokarari lease. The rent is fixed ; but that does not prevent the tenant from claiming an abatement on the ground that a part of the leasehold property is lost by diluvion. The express contract runs thus :

You shall not be entitled to take a plea for remission of the jama fixed on the ground of failure of crops on account of inundation or drought, on account of dearth, abandonment, land lying fallow or being in a waterlogged condition, dispossession and on any other such ground. If you do that it shall not be entertained. I shall not be competent to demand anything in excess of the rent fixed on any ground.

There is also this further passage :

If Government acquires any land under the dar-mourasi for its own use or for works for the public good you will get the compensation but shall not get any abatement of rent on that account.

There is another passage which it is necessary to mention :

If you find it necessary to surrender the jama on account of inability to pay rent at the rate stipulated you shall surrender after paying in full all arrears of rent, and on delivery of possession of the land and jama to me to my satisfaction. Otherwise you shall remain liable for the rent as stated above.

The contention on behalf of the appellant is that there is no special stipulation that even on account of diluvion the tenant will not be entitled to any abatement of rents : and, therefore, his right to claim abatement has not been taken away by the contract. While the contention on the other side is that taking all the provisions that I have already cited, it is quite clear that the stipulation was that there should be no abatement of rent nor increase of rent on any ground whatsoever. If the tenant considers that he is being made to pay more rent than what he is capable of paying it was open to him to surrender the land and he cannot say that he is

(1) [1864] W. R. (Act. 10, R. 42.)

(2) [1915] 22 C. L. J. 569 = 33 I. C. 349.

entitled to keep the land which has not been diluviated and is not bound to pay rent at the rate stipulated in the kabuliya. In our judgment it seems to be beyond reasonable doubt that the stipulation of the parties was that there should be neither increase nor decrease of the rent on any ground whatsoever. If there is any accession to the land by alluvion the landlord would not be entitled to any increase of rent. If there is a decrease of land by diluvion the tenant will not be entitled to any abatement of rent. There is no question of justice and equity in this case because it is within the power of the tenant to surrender the land at any time he chooses.

In one of the cases cited on behalf of the appellant, *Sallimullah v. Kali Prosonno* (1), the learned Judges decided the question with reference to the stipulation then made by which the landlord reserved the right to increase the rent if it was found on measurement that the land was in excess of the area let out. The learned Judges held that in the absence of an express stipulation the tenant would not be deprived of the right to abatement of rent on the ground of diluvion. It would be unreasonable to hold that the tenants placed themselves in a position of manifest disadvantage without any corresponding benefit. In this case, upon a proper construction of the kabuliya, it seems to me that the tenant was placed in a better position than the landlord. The landlord would not be entitled to get any increase of rent whatever. The stipulation is in general terms, and notwithstanding the fact that under the provisions of the Bengal Tenancy Act and under the Regulation (1825) he would be entitled to claim rent for the land accreted to the leasehold he has precluded himself from claiming anything in excess of the rent fixed. He cannot ask the tenant to give up the land on any ground whatsoever, while the tenant has the right to surrender it at any time he chooses. Under these conditions it seems to me that this appeal must be dismissed with costs. The appellants' learned vakil has stated before us that they are willing to surrender the land. The Advocate general, on behalf of the respondent, is willing to accept the surrender. But we cannot give effect to the statements by the

learned counsel on both sides. It would be quite desirable if the tenant surrender the land by giving a proper notice to the landlord in which case the landlord will be bound to accept the surrender.

N K

Appeal dismissed.

A. I. R. 1928 Calcutta 421

RANKIN, C. J., AND MITTER, J.

Phanindra Krishna Dutt—Plaintiff—Petitioner.

v.

Raja Promatha Nath Malia—Defendant—Opposite Party.

Civil Rule No. 693 of 1927, Decided on 23rd August 1927, against order of Sub-Judge, Ansangol, D/- 16th May 1927.

(a) *Civil P. C., O. 26, R. 1.*—A commission ordered to be issued after being satisfied that the person is sick and unable to attend the Court—Such order cannot be revised.

Where a Court is satisfied under R. 1, O. 26 that the person is sick and unable to attend Court and then has exercised its discretion as to whether in those circumstances a commission should issue and has issued a commission, that discretion cannot be revised under S. 115, Civil P. C., whether the judgment of the Court below on this interlocutory application consists of a complete treatise on the subject or an incomplete treatise on the subject : *A. I. R. 1927 Cal. 43 ; A. I. R. 1923 P. C. 73 (P. C.) ; Ref. : 36 Cal. 566, Dist.* [P 423 C 1]

(b) *Civil P. C., O. 26, R. 1.*—Commission issued on the ground of sickness—It cannot be used unless witness is prevented from giving evidence.

Where a commission has been ordered on the ground of sickness or any other sufficient cause no one can look at it unless it is found that, at the time of the hearing, sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way : *36 Cal. 566, not foll. ; A. I. R. 1923 P. C. 73, Rel on.*

[P 423 C 2]

Amarendra Nath Bose with Radhika Ranjan, Guha and Sitangshu Bhushan Bose—for Petitioners.

Bejoy Kumar Bhattacharjee—for Opposite Party.

Rankin, C. J.—This is a rule in revision obtained by the plaintiff calling upon the defendant to show cause why an order should not be set aside whereby the defendant was ordered to be examined on commission at his own request.

It appears that the suit was launched in 1925 for the recovery of some Rs. 49,000 as remuneration due for work done as a managing contractor of a colliery and that the defendant had paid Court-fee on a counter-claim for some two and half

lacs, on account of damages alleged to have been caused to the defendant's colliery by the negligence of the plaintiff. The issues which were settled in 1925 contained a great many matters arising out of the counter-claim.

In April 1927 the defendant put in a petition that he might be examined on commission on the ground that he was suffering from lumbago which made it impossible for him to remain in the same position for more than ten minutes. He filed a medical certificate to that effect. The plaintiff objected. He says that he took the point that the defendant in respect of the counter-claim was really in the position of a plaintiff. He disputed that the defendant was ill as alleged and that there was any necessity for his examination on commission, and he attacked the independence of the doctor who gave the medical certificate. The application was repeated and by the order of 6th May 1927 the Subordinate Judge granted the application. It appears from the order recorded that the main ground of opposition was that

the case may not be taken up at an early date and that the witness, even if he is unwell, may recover in the meanwhile. The plaintiff does not admit that the witness is really ill. It is not known when the case can be taken up.

Having set out these matters the learned Subordinate Judge goes on to say this:

After hearing the pleaders I do not think that it is a fit case in which the prayer for the examination of the witness on commission shall be refused. I should however, recoup the other party by giving the cost of pleader for the examination of the said witness.

He went on to order that the applicant should deposit Rs. 96 as plaintiff's pleader's fee for three days and if the examination should last for more than three days the witness would be required to pay at the rate of Rs. 32 per day as the plaintiff's pleader's fee.

This Rule was obtained by way of challenging that order and reliance has been placed by the learned advocate who appears for the applicant upon several decisions of this Court. To begin with: it has to be observed that the present case is within O 26, R. 1, Civil P. C., and that it is not a case under R. 4 to which different considerations may apply. That rule says :

Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or

who is from sickness or infirmity unable to attend it.

In this class of cases we have not to deal with the case of a plaintiff who has a choice to bring his own suit in a particular forum and then asks to be examined on commission on the ground that he cannot attend at the place where he has chosen to sue. We are dealing with an application on the ground of sickness or infirmity and, broadly speaking, even although a man's defence consists of an equitable counter-claim it would *prima facie* be more just that the defendant even if he has a counter-claim, if he really cannot attend to give his evidence in Court should be examined on commission. No doubt it was the duty of the learned Subordinate Judge to satisfy himself very carefully as to the seriousness and reality of the sickness that was alleged and, if I may be allowed to say so, the judgment of the Subordinate Judge is very unhappily phrased. It is phrased in flabby language and it is indefinite to a degree.

The question is not whether this is a fit case in which the prayer for the examination of the witness on commission should be refused. The question is whether it is a case in which it has been established by reason of the illness of the defendant that the prayer for examination on commission must in justice be granted. It is however, in my opinion, an unjust hypercritical attitude to take to say that the learned Subordinate Judge has not intended to find that the defendant is ill and suffering from lumbago as alleged, and we have therefore to consider whether there is any real reason why this order should be interfered with under S. 115, Civil P. C. It is, quite clear that in a case of this character the whole jurisdiction to make such an order arises out of the fact, which has to be found, of the sickness of the person in question. When it is found that he is unable to attend Court by reason of sickness or infirmity the rest is a question of discretion. Indeed, it may be said that in such a case it would be a very strong measure to refuse an examination on commission.

Learned advocate for the applicant relied upon certain cases of this Court and of the High Court of Patna. These cases proceeded usually under R. 4, O. 26 and they have reference to the question whether a plaintiff choosing his forum should

be examined on commission. So far as those cases are concerned there appears to be authority for the proposition that if a Court does not think that the discretion given to the Court by R. 4, O. 26, is properly exercised it can treat the matter as a material irregularity. Other cases seem to go upon the footing that the Court can treat the matter as a material irregularity unless it appears from the order recorded by the lower Court that the principles of law which may be thought applicable to the subject-matter being disentangled they were all considered and separately applied. Whether these cases are in the least consistent with the interpretation of the Privy Council, from time to time, of S 115 of the Code may be seriously doubted. In the present case it is not necessary for me to discuss that particular question. Given the fact that the Court is satisfied under R. 1, O. 26, that the person is sick and unable to attend Court and that the Court has exercised its discretion as to whether in those circumstances a commission should issue and has issued a commission, I am clearly of opinion that that discretion cannot be revised under S. 115, Civil P. C., whether the judgment of the Court below on this interlocutory application consists of a complete treatise on the subject or an incomplete treatise on the subject.

In the present case however, it is advisable to call attention to R. 8, O. 26. In a recent case in this Court *Mahim Chandra v. Naba Chandra* (1), before Sir Nalini Ranjan Chatterjee and Mr. Justice Panton, it has been pointed out that that rule is to be treated as a reality. That is a case of a man who got himself examined at a time when he was outside the jurisdiction. At the time of the hearing he was within the jurisdiction and the other party wanted him to give his evidence in Court in the ordinary way. The Court as the man's evidence had been taken on commission allowed the commission evidence to go in and it was pointed out that in those circumstances the evidence taken on commission could not be read as evidence in the case against the defendant in view of the provisions of O 26, R. 8, there being no material which would ground the exercise of a discretion on the part of the Court to dispense with the proof of the

various matters mentioned in that rule. Again, in the case of *Bon Behary Chatterji v. Satish Kantha Roy* (2), Lord Atkinson, delivering the judgment of the Judicial Committee, commented upon a case where it appears that in December 1916 a commissioner was appointed, evidence was given on commission in January 1917 and the trial commenced in February 1917; and the Judicial Committee there pointed out:

Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in Court or is absent or for other sufficient reason. If Satis went to the Court he could and presumably would have been accommodated with a seat and so on. The whole procedure in this matter strongly suggests that it was his aversion to undergo the ordeal of an examination in open Court, in the presence of those who knew him, rather than ill health, which kept him from the witness box.

I take this occasion to point out that when this case comes on for trial the mere fact that this commission has been ordered now will be no reason whatever by any one to look at it unless it is found that at the time of the hearing sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way. I say that the more emphatically as there is some authority in the books particularly in the case of *Dhanu Ram Mahto v. Murli Mahto* (3), which gives colour to the view that once a commission has been ordered and executed the commission evidence goes in ipso facto and without further consideration. I do not say that that proposition was intended to be laid down in the case in which I have referred, but the decision and the reasoning lend colour to that view and I am particularly anxious, therefore, that it should be made clear to the lower Court that R. 8, O. 26, is as much a rule of procedure in the mofusil as anywhere else and that what the Privy Council has laid down and this Court has recently laid down in the case to which I have referred is the proper method for conducting the case. It does not seem to me that in this case the question whether the man is shown to be so ill that it was advisable to take his evidence on commission is a question of such a character that the learned Subordinate Judge is bound to answer it cor-

(2) A. I. R. 1923 P. C. 73.

(3) [1909] 36 Cal. 566=11 C. L. J. 150=1 I. C. 386=13 C. W. N. 525.

(1) A. I. R. 1927 Cal. 43.

rectly on pain of being guilty of a material irregularity.

In these circumstances I am of opinion that this rule should be discharged with costs : hearing fee two gold mohurs.

Mitter, J.—I agree.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 424

MUKERJI, J.

Khenta Kamini Dutt—Pro forma Defendant—Petitioner.

v.

Aswini Kumar Dutt and others—Plaintiffs—Opposite Parties.

Civil Rule No. 823 of 1927, Decided on 2nd December 1927, from decree of 1st Munsif, Small Cause Court Judge, Dacca D/- 21st March 1927, in Small Cause Suit No. 1694 of 1926.

Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Art. 31—Suit for recovery of money wrongfully realized is not excluded unless accounts are asked for.

Unless a decree for accounts is asked for, a suit for money against a person who is alleged to have wrongfully realized moneys due to the plaintiff does not come within the article.

[P 424 C 2]

Mohendra Kumar Ghose—for Petitioner.

Trailakhya Nath Ghose and Amarendra Nath Mitra—for Opposite Parties.

Judgment.—The only ground on which this rule has been issued is that the Small Cause Court had no jurisdiction to try the suit in view of Art. 31, Sch 2, to the Provincial Small Cause Courts Act.

There were two defendants in the suit, defendant 1 being the principal defendant and defendant 2 the pro forma defendant.

The plaintiffs claimed to recover Rs.170 as house rent, together with Rs. 10 for compensation, against defendant 1 who was the tenant in the house. The claim against defendant 2 was worded thus in the plaint :

If it appears and is legally proved that defendant 1 has in good faith paid to defendant 2 the rent claimed or the rent for any month, then a decree may be passed against defendant 2 for such amount as may be so found to have been paid.

In the course of the trial the plaintiffs appear to have reduced their claim to two-thirds share of the rent, defendant 2 being entitled to the remaining one-third.

Defendant 2 having admitted to have realized the rents and the learned Munsif having found that defendant 1 had made the payments in good faith, he passed a decree against defendant 2 for two thirds of the amount which he had realized.

It is urged in support of the rule that the suit, in so far as it is against defendant 2, is to recover the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. That no doubt is so. But, as pointed out by the Full Bench decision of this Court in the case of *Kunjo Behari Singh v. Madhub Chandra Ghose* (1), the only class of suits excluded by Art. 31 are those in which the plaintiff claims an account of the moneys which the defendant has received and to an account of which the plaintiff is entitled because the moneys belonged to him (per Petheram, C. J., at p. 889). A suit in which accounting is involved is not necessarily a suit for account. Trevelyan, J., also at p. 890 says :

But the jurisdiction of the Small Cause Court is in my opinion only excluded by the Act where such suit is a suit for an account, that is, a suit which seeks for a decree, not for a definite sum of money but ordering the defendant to account to the plaintiff for moneys received by him. The machinery necessary for the putting in force of that decree is of a kind with which the Small Cause Courts have never been supplied, and it has always been the object of the legislature to confine Small Cause Courts to simple suits which are concluded by the first decree. A suit for an account is a suit which seeks for discovery in pursuance of that decree.

It is clear from these observations that unless a decree for accounts is asked for, a suit for money against a person who is alleged to have wrongfully realized moneys due to the plaintiff does not come within the article. The plaintiff in a suit of the present nature can have a decree for money so long as he is able to prove what moneys were so realized by the defendant.

The ground of the rule in my opinion fails. In view of the limited character of the rule it is not necessary for me to consider whether on any other ground the rule may be supported, nor indeed have I been asked to do so. The rule is discharged with costs : 1 gold mohur.

S.J.

Rule discharged.

A. I. R. 1928 Calcutta 425

RANKIN, C. J. AND MITTER, J

Sadhu Kathalia and others — Defendants—Appellants.

v.

Dhirendra Nath Roy and others — Plaintiffs—Respondents.

Appeal No. 700 of 1925, Decided on 4th August 1927, from appellate decree of Dist. Judge, Faridpur, D/- 12th February 1925.

Specific Relief Act, S. 42—Person interested to deny or denying plaintiff's title is not pro forma defendant—Civil P. C., O. 1, R. 1.

If a person has denied the plaintiffs' title and asserted possession in himself so that the plaintiff is entitled to sue him for a declaration removing a cloud upon his title such a defendant is in no sense of the word a pro forma defendant. [P 428 C 1]

B. M. Sen and Manmatha Nath Roy (Jr.)—for Appellants.

Hemendra Chandra Sen and Surendra Nath Bose (Sr)—for Respondents.

Biraj Mohan Mujumdar — for Deputy Registrar.

Rankin, C. J.—This is a somewhat unusual case and a very good illustration of the difficulties which are created for the lower Courts and which they themselves assist to create. The plaintiffs are eight persons called Roy who claim to be interested in a certain revenue-paying estate under the Collectorate of Jessore and to have in addition a *kaiemi mokurari mourashi jote* thereunder; in other words they claim to be entitled to the superior interest in the suit lands and the share they claimed is 13 annas four pies share. Among the many defendants there is a group of defendants described as co-sharer pro forma defendants who are entitled to the remaining share. The cause of action might be very simply stated. It is that six persons, one Erfanaddi and five others, whom I may call the Bairagis, having agreed on certain terms to become tenants of certain lands and to execute a *kabuliyat* refused to do so and by executing and causing to be registered a false *kabuliyat* which the plaintiffs never accepted and by seizing by force the lands of schedule (*gha*) became trespassers whom the plaintiffs are entitled to eject.

The plaintiff's case is that these six persons have put themselves into exclusive possession of the properties of Schedule (*gha*) and that they have no right or

claim to be in occupation as their tenants. On any ordinary principles such a suit would be brought against those six persons and those only, it being elementary that the proper defendants in an action of ejectment are the persons in possession. That however did not content these plaintiffs. They impleaded apart from their co-sharers 107 persons in addition to the six persons who have been described in the cause-title as principal defendants. These 107 persons are described in the cause-title as pro forma defendants. When the plaint is examined it contains no claim whatever for relief against any of the 107 pro forma defendants. It contains two statements with reference to them that have any importance. One is that these 107 persons are or that some of them are tenants under the plaintiffs of other lands. There is no suggestion that they are not perfectly law-abiding and well-behaved tenants. The second is a statement that there was an arrangement by which these persons, represented by one of their number made, a bargain with the plaintiffs, and apparently with the principal defendants also, that the plaintiffs would give them tenancy of certain other lands—the lands in Schedule (*ga*). The lands which the principal defendants are said to have trespassed upon and the lands which these pro forma defendants are said to have some promise of tenancy in are different lands with the exception of two plots—plots 72 and 485. Of these two plots I shall say something hereafter. These two statements referring to the pro forma defendants are the only statements affecting them so far as I can discover in the plaint and there is no explicit prayer for any relief whatever at the end of the plaint so far as these 107 persons are concerned. In these circumstances before issuing summonses upon 107 persons one would have thought that the trial Court would have examined this plaint under O. 7, Civil P. C., and would have rejected or returned it for amendment so as to disclose some cause of action. It may, however, be said that the plaint which is somewhat complicated was difficult to understand and that such a summary proceeding was not thought desirable.

It appears that summonses were issued, but no written statements were filed on behalf of these pro forma defendants. Some time afterwards the plaintiffs com-

promised with the principal defendants and the case came before the Court for a decree. As against the principal defendants the suit was decreed in terms of the compromise. As against the absent pro forma defendants something, which was supposed to be a decree, was passed ex parte. It was a statement that as against these pro forma defendants the suit was decreed ex parte, but it did not state what was decreed. It did not give any declaration even by reference as no amount of reference to the plaint will enable anybody to see that anything in particular was asked for as against these pro forma defendants. What as against them was decreed and was supposed to be meant it is not easy to discover. I am glad to say that I do not find that this decree was passed against the pro forma defendants for any costs. Thereafter several of these defendants applied to the Court for restoration of the case so far as they were concerned and the decree as against them was set aside and they were allowed to file written statements. A written statement was put in on their behalf in which they objected, first, that the plaint disclosed no cause of action against them and secondly, that certain of them had claims to particular plots of the lands in suit as being persons who were in possession as tenants of those plots. On this basis they objected to the plaintiff's suit as against the principal defendants being decreed in terms of the solenama.

The matter went to trial on that basis. No amendment was made in the plaint, but certain issues were framed which include issue (1):

Have the plaintiffs any cause of action against the answering defendants? (2) Is the suit barred by limitation? and (6). Have the answering defendants any tenancy in respect to the lands mentioned in their written statements? Is the plaintiff entitled to obtain khas possession to those lands?

The learned Subordinate Judge who tried the case found that no one of these answering defendants had any claim to, or had any possession in, or any right to, any of the plots with the exception that defendant 92 had a tenancy right in dag No 33. Accordingly he framed what was considered to be a suitable decree. The answering defendants 11, 12, and 14 who made no claim to any of the plots were struck out and they, therefore, escaped from the suit altogether. As re-

gards the other defendants those who had failed to establish any right to any plot he declared that they had no title or possession to the plots to which they laid claim and no locus standi to question the plaintiffs' title to those dags or claim to khas possession to the suit lands. It will be observed that these defendants' claim to be in possession of, and to have right to, certain plots was fought out and tried in a suit in the cause-title of which they were called pro forma defendants; and when the learned Subordinate Judge came to defendant 92 who had established his claim to plot 33 he dealt with the matter in this way: he removed defendant 92, because he had succeeded, from the category of pro forma defendant to the category of principal defendant. The learned District Judge in the end affirmed (with a slight correction for the fact that the plaintiffs were only entitled to 13 annas 4 pies share) the decree of the Subordinate Judge. He too declared that the various defendants except No. 92 had no locus standi to question plaintiffs' title or right of khas possession in respect to the various dags. He too made the pro forma defendant 92 a principal defendant because as to one dag he has succeeded.

On appeal before us it has been argued on behalf of these defendants that the whole proceedings were misconceived, that there were no proper pleadings, no claim for relief, no statement of facts which would ground any right to relief against them. It was also contended before us that the Courts below have not properly dealt with the question of limitation inasmuch as the case being one under Art. 142 the plaintiffs had to prove that they were in possession within twelve years. In my judgment there is no reason to think that the Courts below have made any mistake upon the matter of limitation. Their findings are that these defendants are not in possession at all and as it is clear that none of them claimed any right except a tenancy right it is difficult to see how the plaintiffs' claim, if they have any claim against the pro forma defendants, is defeated by any principle of limitation. But I entirely agree with the contention on behalf of the defendants that the proceedings in this case have been an abuse of the process of the Court.

Yesterday, being desirous to ascertain whether any of these 106 pro forma defendants (I omit defendant 8) were persons who, prior to the issue of the plaint, had by word or act done something to deny the plaintiffs' title to or right to possession of any portion of the suit lands, we adjourned this case in order that the learned vakil for the plaintiffs might have an opportunity to see whether there was any evidence of any such conduct which would justify the inclusion of the pro forma defendants in this plaint. We have been this morning informed by him that at the time when the plaintiffs issued their plaint they had no knowledge of any claim on the part of any one of those 106 defendants to the suit lands or any part thereof.

In these circumstances, we have to consider what effect we ought to give to the contention on the part of the appellants that these proceedings as against the pro forma defendants have been a scandal from first to last. It is quite clear that the real reason why summonses were issued on these 106 persons was simply this: that the lands of the plaintiffs having been at various times occupied during a time of dispute between the plaintiffs and the Choudhuris by various squatters and other people, the plaintiffs were apprehensive that some of those 106 persons might hereafter lay claim to some right or interest in the suit lands. They had no reason to suppose that any such claim had been made. They did not know in the least which defendant was likely to make a claim to which plot and the plaint was really a public circular issued as widely as possible calling upon any person out of the 106 who had any mind to invent or discover or assert any claim to any part of the suit lands to come in and make a claim now, or ever after hold his peace. No other interpretation can be put upon this plaint. I need hardly say that that is not a proceeding which can be tolerated by a Court. When this plaint was issued and summonses were served the first thing which the pro forma defendants should have done was to apply at once to have it amended or struck out. If it was to be amended it was necessary for it to contain statements showing that the pro forma-defendants had done

something which entitled the plaintiffs to sue them at all, and until the plaint alleged something of that sort it is clear enough that there was nothing to which any written statement need be directed. It is a matter of considerable wonder that any learned Judge should have decreed this suit in the first instance ex parte against any of those defendants. The defendants in question however failed to do that and in failing to do that they committed their first mistake. They filed in the end a written statement in which they not only took the line that they were accused of nothing that was actionable but they took the line that they were in possession of and had a tenancy right in certain of these dags. That is a question upon which they invoked the Court's decision and that question was litigated with the plaintiffs and these defendants have lost. It is true that they did not abandon their contention upon issue 1. They then went to the learned District Judge. Again they urged that there was no cause of action against them. Again they urged that they were in possession and had a tenancy right to certain of these dags. Again they lost and they have come before this Court with the same two pleas: first that their case has not been dealt with properly on the merits and, secondly, that as against them there was no case to decide. If there were any reason to think that the absence of proper pleadings in this case had prejudiced these defendants with regard to their claim to particular plots our course would be very clear, but there is no question of that sort.

The next question is whether there is any real cause of action disclosed now at the end of the day by the evidence in the case against these defendants. It is conceded that the evidence in the case does not show that before the plaint was issued any claim was being made by them, but it is said that as they made a claim in their written statement and as the merits of that claim have been adjudicated upon there is no reason now to set aside the proceedings merely because their claim was made after the plaint instead of before. No doubt from a common sense point of view there is a great deal in this contention and we have to consider whether that contention ought really to prevail. The idea

that any one of these 106 people is a pro forma defendant in any proper or intelligible sense is one which has to be discarded. If a person has denied the plaintiffs' title and asserted possession in himself so that the plaintiff is entitled to sue him for a declaration removing a cloud upon his title such a defendant is in no sense of the word as pro forma defendant. "Pro forma defendant" is not a term that ever ought to appear in the cause-title of any suit or proceeding. It does happen sometimes that a person is impleaded merely for the sake of conformity as, for example, the plaintiffs' co-sharers in the present case. A person may be impleaded to represent the legal interest although he is a bare trustee having no real interest in the matter, or he may be impleaded because he has a right or title which is affected by the order sought though not prejudicially affected. There are circumstances under which it is not improper in ordinary language to describe a defendant as being joined pro forma. But the present case is a very different one. The defendants are persons against whom the plaintiffs—if they are asking for anything—are asking for a declaration. The plaintiffs would seem to have come under S. 42, Sp. Rel. Act which entitles a person entitled to any legal right as to any property to institute a suit against any person denying or interested to deny his title to such character, but I need hardly say that it is prima facie a very curious discretion to grant a declaration against persons who have made no specific claim hostile to the plaintiffs' interest and who have in no way asserted or formulated any claim of a hostile character.

If at the time the plaint had been issued the plaintiffs had said that the defendants so and so (mentioning those defendants who ultimately appeared) claim to be entitled to dags Nos. so and so and the plaintiffs ask for a declaration against them that they are not so entitled their plaint would have been in substance good. They did not say that, but the defendants made a claim in their written statement and the question is whether these appellants can at the same time contend that they were in possession of the suit lands with tenancy-interest and also that prior to the plaint they had done nothing to justify the plaintiffs in bringing their suit

against them. In my judgment those two positions are inconsistent and, although the plaintiffs' course has been as irregular as it well could be, I think that these appellants by claiming not merely to have a right in but to be in possession of parts of the suit lands have debarred themselves from succeeding on the ground that the plaintiffs cannot prove any claim on their part before the issue of the plaint. That is the point on which this appeal turns.

As regards defendant 8 : it seems to me that he was possibly a proper defendant though not a pro forma defendant in respect of dags Nos. 72 and 485 because it would seem that he had been the plaintiffs' tenant in respect of these; but the plaintiffs had purchased the holding in execution of a decree and had only got symbolical delivery of possession from this defendant. When the plaintiffs came to evict a trespasser from those plots, defendant 8 as a tenant from whom the plaintiffs never obtained possession was not unreasonably impleaded.

With the exception of defendant 8 I think the plaintiffs' proceedings against all the other "pro forma defendants" have been extremely irregular. I hope that if ever again a Court finds a hundred defendants called pro forma defendants against whom there is no real case made in the plaint it will take the necessary steps to deal with that situation and put an end finally to the litigation. It is no part of the duty of a law Court to issue notices round the world to persons to come in to make claims, if any, or take objections if any, to the plaintiffs' evicting the persons who are in actual possession of the plaintiffs' property.

I think, therefore, that this appeal ought not to succeed and should be dismissed but without costs.

Mitter, J.—I agree.

D.D.

Appeal dismissed.

A I. R. 1928 Calcutta 428

CUMING AND MUKERJI, JJ.

Sarat Kumar Roy — Plaintiff — Appellant

v.

Surendra Nath Joardar and others — Defendants—Respondents.

Appeal No 1417 of 1925, Decided on 19th January 1928, from appellate decrees of Sub-Judge, Nadia, D/- 3rd Mar. 1925.

Landlord and Tenant—Rent—Tenant dispossessed from a portion of the property—Whether suspension of the entire rent should be ordered or only abatement of rent should be allowed depends on facts of each case.

It is not possible to lay down any hard and fast rule as to when suspension of entire rent should be ordered or when only abatement of rent should be allowed where the tenant has been dispossessed from only a portion of the demised properties. Each case has to be decided on its particular facts. Where a tenant in possession had been dispossessed by the landlord from a considerable portion of the demised property and where the settlement was for a lump sum of rent and not so much per bigha. *Held*: the tenant was entitled to entire suspension of rent : A. I. R. 1925 P. C. 97 and A. I. R. 1927 Cal. 737, *Dist.*

[P 429 C 2 ; P 430 C 1]

R. C. Mitter—for Appellant.

H. P. Mukherji—for Respondents.

Cuming, J.—In the suit out of which this appeal arises the plaintiff sued the defendants to recover arrears of rent from the last two kists of 1326 to pous kist of 1329 at an annual rental of Rs. 34-5-3½ pies with cesses and damages. His allegation was that the defendants' father purchased the holding in question on 15th September 1919, at an auction-sale and that the defendants had been holding this jama since their father's death. The defendants contested the suit. They raised a number of objections. The only one with which we are concerned in the present appeal is that they claim to be entitled to the suspension of the entire rent on the ground that they have been dispossessed from a large portion of the holding by the landlord.

The Munsif overruled the objection of the defendants and decreed the suit. In appeal the learned Subordinate Judge found that the defendants had been dispossessed from some portion of the holding and that they were entitled to the suspension of the entire rent.

The plaintiff appealed to this Court and the appeal was heard by my learned brother Mr. Justice Roy and myself and we remitted the case to the lower appellate Court for a definite finding as to how much land the defendants' father actually came into possession when he purchased the holding at the auction-sale and how much land they had been dispossessed from, if any, by the plaintiff and, if so, when. The learned Subordinate Judge has found that the defendants came into possession of at least 30 bighas of land when they pur-

chased the holding at the auction-sale and that they were subsequently dispossessed by the plaintiff from no less than ten bighas of land in Baisakh or Joistha 1327.

Mr. Mitter who appears on behalf of the appellant contends and his contention has not been opposed by the learned vakil who appears on behalf of the respondents that at any rate he is entitled to the rent and cesses for the two kists of 1326. The Court having found that the dispossession did not take place till Baisakh 1327 clearly he is entitled to the rent for the last two kists of 1326.

With regard to the rent for the period subsequent to the dispossession Mr. Mitter contends first of all that the tenants are not entitled to the suspension of the entire rent. He argues that as the tenants have been dispossessed from a portion of the demised property they are entitled only to an abatement of rent for the portion from which they have been dispossessed. He argues that the doctrine of entire suspension of rent in a case where the tenant has been dispossessed from only a portion of the demised properties does not apply with full force. He has referred us to the decision of the Privy Council in the case of *Katyayani Debi v. Udey Kumar Das* (1) and to a decision of Mr. Justice B. B. Ghosh and Mr. Justice Roy in the case of *Susil Kumar Biswas v. Rajani Kanta Chakrabutty* (2). Neither of these decisions dealt with a case where the tenant, though once in actual possession, had been actually dispossessed by his landlord. In both those cases the tenant never got possession of the demised property. Further in the case of *Katyayani Debi v. Udey Kumar Das* (1), their Lordships of the Judicial Committee remark that the doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha. This remark, as far as I can see, does not assist the appellant in any way. No doubt every one of these cases is to be decided on the particular facts of the

(1) A. I. R. 1925 P. C. 97 = 52 Cal. 417 = 52 I. A. 160 (P. C.).

(2) A. I. R. 1927 Cal. 737.

particular case and it is not possible to lay down any hard and-fast rule when suspension of entire rent should be ordered or when only abatement of rent should be allowed. The learned vakil for the appellant has been unable to point out to me any single case where a tenant in possession has been dispossessed of a considerable portion of the demised property and only an abatement of rent has been allowed, more specially in a case where the settlement was for a lump sum and not for so much per bigha. I think this contention of the appellant cannot succeed.

Mr. Mitter has further contended that it is not a case of dispossession by a landlord *qua* landlord. The landlord purchased the adjacent property in execution of a rent-decree which he himself had obtained against the tenant of that land and in execution of this decree he dispossessed the present defendant of some ten bighas of land. It would only be a refinement of the word "dispossession" to say that this dispossession of the tenant is not dispossession by the landlord *qua* landlord but in his capacity as a tenant.

These are the only points urged in the appeal. The appeal, therefore, fails except for the modification regarding rent for the last two kists of 1326 with cesses and damages thereon.

There will be no order as to costs in the appeal.

Mukerji, J.—I agree.

N.K.

Appeal dismissed.

* A. I. R. 1928 Calcutta 430

CUMING AND MUKERJI, JJ.

Hazrat Gul Khan — Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 618 of 1927 and Death Reference No. 8 of 1927, Decided on 15th November 1927, from judgment of Addl. Sess. Judge, 24 Parganas.

* (a) *Penal Code, S. 302*—(Per Cuming, J.) *Non-proof of motive is immaterial*—(Per Mukerji, J.) *Motive, though not necessary to bring home the charge, it is relevant to prove intention.*

Per Cuming, J.—When in a case of murder facts are clear, it is immaterial that no motive has been proved. The motive which induces

a man to do any particular act is known to him and to him alone. At the highest the prosecution can only suggest what is or may be the motive for any particular act. It may be known only to the accused or possibly to the deceased and it is quite impossible to prove.

[P 432 C 1]

Per Mukerji, J. Motive though not a *sine qua non* for bringing the offence of murder home to the accused is relevant and important on the question of intention.

(b) *Criminal P. C., S. 374*—*High Court has to form independent opinion—Question of misdirection is therefore immaterial.*

The questions of misdirection are of less importance in a case of reference, for in a case of reference the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused person independently of the verdict of the jury or of the opinion of the Judge.

* (c) *Penal Code, S. 302*—*A plunging knife into B's stomach*—(Per Cuming, J.) *A is presumed to intend the natural consequences of his act and therefore A must be held to have intended to cause death or such bodily injury as is likely to cause death*—(Mukerji J. contra)

Per Cuming, J. The natural result of plunging a knife into a man's stomach is death or such bodily injury as is likely to result in death. The man who plunges a knife into another man's stomach must know that it would cause death or such bodily injury as is likely to cause death and that hence death would be the probable result of his act. The man who does such an act therefore must be held to intend to cause death or such bodily injury as is likely to result in death, for a man is presumed to intend the natural consequence of his action. If he had not that knowledge or intention in the circumstances and he did the act with some other knowledge or intention then it is for him to prove it, for that is a fact peculiarly within his own knowledge.

Per Mukerji, J. The presumption that one must be taken to intend the natural or probable consequences of his act—a rule of English criminal law which, originally but a rule of evidence, has now acquired the dignity of a legal axiom—is not always quite easy to apply to the Indian criminal law in view of the distinction that the Indian Penal Code makes between intention and knowledge. On the question of knowledge much depends on the intellectual capacity of the actor.

Camell, Sures Chandra Taluqdar, Surajit Chandra Lahiri and Basanta Kumar Sen—for Appellant.

Lalit Mahan Sanyal—for the Crown.

Cuming, J.—This is the case of one Hazrat Gul Khan who has been tried by the learned Additional Sessions Judge of 24 Parganas sitting with jury. The jury found him guilty of murder under S. 302, I. P. C. The learned Judge agreeing with the verdict of the jury has sentenced the accused to death; and his case has been referred to this Court under S. 374, Criminal P. C. for confirmation

of the sentence. The accused has also preferred an appeal against his conviction and sentence.

I may here note that the accused Hazrat Gul Khan was tried on the same charge once before. In that trial the jury unanimously acquitted him. The learned Sessions Judge who tried the case referred the case to the High Court and a retrial of the case was ordered.

The facts of the case are shortly these: The accused Hazrat Gul Khan and the deceased Mohammad Alim whom he was accused of murdering are Peshwaris. The deceased was the brother-in-law of the accused. On the day of occurrence, the 6th of November 1926, at about 8 or 9 p m, Hazrat Gul Khan and a number of other persons were sitting in a certain baitlak khana attached to the house in which the deceased Mohammad Alim lived. Mohammad Alim was lying on a khatia. The accused Hazrat Gul Khan came there and after some time got up and went to a certain waterpot for taking a drink of water. As he did so on passing the khatia on which Mohammad Alim was lying he pulled out a knife and struck the deceased Mohammad Alim in his stomach. The accused then ran away pursued by some of the witnesses. On their way they met one Gul Hamid who is a watchman in the service of the railway company at Naihati railway station. They told him to try to arrest Hazrat Gul Khan. These witnesses then went to the thana. The thana officer behaved with what can only be described as great slackness. They did not take the trouble of recording statements these persons made to them or of taking cognizance of the case. They told them to fetch the wounded man. The witness returned to fetch him and found him dead. They then took the dead body of the deceased to the thana and a first information was then recorded. Meanwhile the accused Hazrat Gul Khan was arrested at or near Naihati railway station by Gul Hamid and some other railway servants and brought to the thana. On these allegations the accused has been charged with murder. The defence is a plea of innocence. He states that he was arrested as he got down from the train having come from a place called Matiabruz. He did not himself suggest why he had been falsely accused of the charge. It is

suggested that some one else, perhaps Habib Sha, one of the witnesses, committed the deed and for some reason or other, which is not given, Hazrat was accused of doing it.

Now, the two principal witnesses against the accused are Habib Sha and Abdul Kayem. Habib Sha is a man of some 60 years of age and Abdul Kayem is a boy of about 15 or 16. According to their statements they were actually present at the time when the murder was committed and saw the occurrence. They pursued the accused. After a very careful consideration of their evidence I am convinced that they have spoken the truth. Their evidence certainly agrees with each other. A few minor discrepancies have been pointed out between these two men's evidence. For instance one says that the assailant jumped over the bed after striking the blow, while the other says that the accused ran away round the end of it. Further Habib Sha states in one part of his evidence that there was a quarrel between the deceased and the accused some 11 days before and that that was the last quarrel between them, while further on he states that there was a quarrel on the day of occurrence. These are obviously petty discrepancies of minor importance. One fact goes strongly to prove the truth of what they state, namely, that the name of Hazrat Gul Khan as the assailant was given out almost immediately after the occurrence. That is quite clear from their evidence and also from that of Gul Hamid, the railway watchman. Unless Habib Sha had given out the name of Hazrat Gul Khan to the watchman Gul Hamid, Gul Hamid would have had no reason whatever for arresting Hazrat Gul Khan when he found him at Naihati railway station and taking him to the thana. Further it is clear I think from the evidence of the police officers that when Habib Sha and Abdul Kayem went to the thana the first time they gave out the name of the assailant. The police officers say that they did, but they, the police officers, did not trouble themselves to take down or remember it. But it is very difficult to imagine that Habib Sha would dare to give a different name when he came back to the thana a second time with Mohammad Alim's dead body. He could not possibly know whether the police officers did or did not remember

the name he had given out when he first came there. In such circumstances he would not venture to change the name.

Mr Camell who appears for the accused has argued that the story which this witness told is improbable, first, because Habib Sha and those accompanying him gave up the chase after meeting Gul Hamid and went to thana. There is nothing improbable at all in this conduct. Habib Sha is a man of about 60 years of age and Abdul Kayem is a boy of about 15 or 16. The assailant was armed with a knife and these witnesses, if their story is true, had just seen him use his knife upon Muhammad Alim. It was most unlikely that they were at all anxious to catch him up. He might have used the knife on them if they had caught him. Obviously their safest course was to go to the thana and to report the matter to the police and to leave it to them to arrest the accused person.

Then it is contended that it is very unlikely that the assailant would have gone to the railway station. I cannot see why. Probably or possibly his intention was to get away by train. But for the fact that Habib Sha had met Gul Hamid he would have probably succeeded. The evidence would go to show, I think, that Hazrat Gul Khan was lurking about the outskirts of the railway station when he was arrested. It is impossible to argue that a man must follow some particular course of action in particular circumstances,

Next it is argued that there was no motive to commit the crime. It would be more correct to say that the prosecution has not proved any motive. When facts are clear it is immaterial that no motive has been proved. The motive which induces a man to do any particular act is known to him and to him alone. At the highest the prosecution can only suggest what is or may be the motive for any particular act. It may be known only to the assailant or possibly to the deceased and it is quite impossible to prove. Had the story been a concocted one it is more than probable that some story of quarrel at the time of assault would have been invented to explain the assault. The fact that there is none, to my mind, goes some way to show that the witnesses were relating exactly what they had seen.

Then it is contended that there must

have been blood on the ground where the murder was committed and on the charpai on which he was alleged to have been lying and as there was not it was probable that the murder was committed somewhere else by some one else and the body was brought to the thana from some other place. There is really no substance in this contention. For there is no evidence on the point one way or the other. It may be that the bowels protruded and stopped the external bleeding. The medical evidence would go to show that there was a large amount of internal bleeding. No question was put to the doctor specifically on this point, possibly because this view of the case is attempted to be made out for the first time in the appellate Court. Habib does say in his evidence and in the cross-examination that part of the bowels protruded. This would certainly to some extent support the view that the prosecution has set up why there was not a large amount of external bleeding.

Then it has been argued that the learned Judge misdirected the jury as to the way in which they were to deal with the evidence of the witness Mir. Ali whom the prosecution had declared to be hostile. Mr. Camell contends that the learned Judge told the jury that so far as the prosecution is concerned his evidence should be totally disregarded and might be used by the accused adversely. Possibly this is the correct view of law. But the questions of misdirection are of less importance in a case of reference, for in a case of reference we are obliged to come to our own independent conclusion as to the guilt or innocence of the accused person independently of the verdict of the jury or of the opinion of the Judge. Neither as far as I can see the misdirection, if any, really affected the verdict of the jury.

There is the usual suggestion that there were many witnesses who must have seen or known what had occurred and that these witnesses had not been examined. After the first trial this Court did give direction that certain persons named should be examined as witnesses. They were the persons who lived in the vicinity. But they were unable to throw much light upon the occurrence.

I have no hesitation in coming to the conclusion that it was the accused Hazrat Gul Khan who stabbed the deceased

Mahomed. Alim. The accused Hazrat Gul Khan made no attempt to prove the case he put forward that he was arrested on getting down from the train on his way from Matiabruz.

As to what the act of Hazrat Gul Khan amounts to, the view I take is that it would amount to murder. The natural result of plunging a knife into a man's stomach is death or such bodily injury as is likely to result in death. The man who plunges a knife into another man's stomach must know that it would cause death or such bodily injury as is likely to cause death and that hence death would be the probable result of his act. The man who does such an act therefore must be held to intend to cause death or such bodily injury as is likely to result in death, for a man is presumed to intend the natural consequence of his action. If he had not that knowledge or intention in the circumstances and he did the act with some other knowledge or intention then it is for him, in my opinion, to prove it, for that is a fact peculiarly within his own knowledge. I would therefore hold that the offence was murder and that seeing that the attack was made on an unsuspecting and apparently unarmed man the proper punishment is the extreme penalty of the law.

My learned brother, however, for certain reasons is of the opinion that the act of the accused amounted to causing grievous hurt with a cutting weapon. Although I do not agree in that view I am not prepared to differ from him.

We set aside the finding and sentence under S. 302 and find the accused Hazrat Gul Khan guilty under S. 326, I. P. C., and sentenced to ten years rigorous imprisonment.

Before parting with this case I think we ought to draw the attention of the Inspector-General of Police to the perfunctory way in which the police has dealt with the case. When complaint was first made at the thana, according to the statement of the police officer, the complaint was of a cognizable offence yet no attempt was made to record the statement of the person making the complaint or to make any enquiry.

Mukerji, J.—Having given the case the anxious consideration that it deserves I have come to the same conclusion as my learned brother on most of the points

that arise in it. It will serve no useful purpose to set forth the reasons on which my findings are based as most of them are the same which my learned brother has given in the judgment he has just delivered. I agree with him in his conclusion that the injury on the deceased was inflicted by the prisoner and none else, that the whole of the occurrence took place in what is referred to as the baithakkhana ghar in the evidence, and that the blow was struck when the deceased was lying on the khatia, as is the case for the prosecution. The two eye witnesses, P. W. 3 Habib Shah Mir and P. W. 4 Abdul Kayem, notwithstanding the variance that has on behalf of the prisoner been pointed out in their evidence, are in my judgment worthy of credit, and nothing, in my opinion, has been established which would entitle the Court to reject their evidence as untrustworthy, in so far as they purport to attribute the injury on the deceased to a blow dealt by the prisoner with a knife. The argument that P. W. 3 Habib Shah Mir himself might have dealt the blow is too fantastic to deserve any serious consideration. The enmity that has been sought to be established as between this witness and the deceased as affording a motive on his part to commit the crime is based upon an inference which even if sound is too far-fetched; and on the other hand his conduct immediately or soon after the occurrence chasing the supposed culprit, taking steps to get him arrested, and seeking the help of the police is utterly inconsistent with the supposition that we have been asked to make. I think the witness named the prisoner as the assailant immediately or very soon after the occurrence and there can be no vestige of a suspicion that there was any opportunity, far less any endeavour, to concoct a case as against the prisoner, or to implicate him falsely.

I think it may be reasonably held upon the evidence, such as it is, that the name of the assailant was given at the thana by the witness when he went there for the first time at about 8 p. m. and I am not prepared to put upon the passage in the evidence of P.W. 21, Sub-Inspector Kamala Pati Sen Gupta, the meaning which the prisoner's learned counsel desires us to do, the passage which runs in the words:

Beyond saying that one man had struck another with a knife they said nothing further then about the accused.

I do not think the witness meant to suggest that the name of the accused was not given, having said a few moments earlier that he could not remember the names that were given. In my opinion the passage only means that no further details as to what the accused did were given beyond the infliction of the injury with a knife. If the assailant was then named at the thana, it is inconceivable that it could be any other than the one who was charged in the first information lodged at the same thana only two hours after by the same informant. Again, it is fairly clear that the arrest of the prisoner took place in consequence of the information which P. W. 3 Habib Shah gave to P. W. 6, the railway watchman, Gul Hamid Khan, very soon after the occurrence and before Habib Shah and others started out for the thana. Added to this is the evidence of the other eye-witness P. W. 4 Abdul Kayem against whom I can find nothing which can lend the slightest colour of a suspicion that he would be party to a conspiracy to save the real culprit and implicate an innocent man against whom he had no cause of grievance whatsoever.

I may say in passing that P. W. 5 Mir Ali was allowed to be declared hostile and cross-examined by the prosecution for no appreciable reason whatever. For this, however, the trial Court was not to blame; the mistake was made in the Court of enquiry. The reason given in the petition filed by the prosecution for this purpose in the Court of the committing Magistrate was utterly inadequate and the course thus adopted is to be deprecated as having contributed to the difficulties in the case.

I am not prepared to say that the witnesses P. W. 8 Jumayet Khan, P. W. 9 Debi Miah and P. W. 10 Miajan Shah are not truthful witnesses; but I am unable to set much store by their evidence in view of the fact that they were not examined before the committing Magistrate in the enquiry that was held prior to commitment and were not examined at all at any stage until after the case was remanded by this Court, and more especially as two of them were not even examined by the police in the in-

vestigation that was held before the prisoner was sent up.

As regards the witnesses who speak to the arrest of the prisoner nothing much turns upon the details, so long as we can find, as I do find, that it was in consequence of the information given by P. W. 3 Habib Shah to P. W. 6 Gul Hamid Khan that the arrest was made.

The main difficulties in the case have been due to a combination of circumstances, notable amongst which is the want of promptitude on the part of the thana staff in dealing with the information that was conveyed to them at 8 p. m., when Habib first went to the thana and to the perfunctory character of the investigation that followed the first information which was recorded at 10 p. m. The whole thana, not excluding the thana clock itself, seems to have been out of order on the day in question. The police diary does not show that in this case, in which a charge of murder was being investigated, the statements of all the eyewitnesses were fully recorded under S. 161, Criminal P. C. Learned counsel for the prisoner has not been slow to make such use as he was legitimately entitled to make of the evidence of the police witnesses, their want of recollection, their defect of observation, the inquest report and the first information. But for the force of circumstances that exist, and the satisfactory nature of the direct evidence that there is in the case, a miscarriage of justice would probably have resulted.

A more difficult question in my opinion that calls for decision in this case is the offence of which the prisoner should be convicted. The medical evidence shows, and that is entirely consistent with the evidence of the eyewitnesses, that only one blow was inflicted on the lower part of the abdomen. It was a penetrating wound, margins being clean cut, transverse in direction 1½" long communicating with the abdominal cavity. The wound was directed backwards, the peritonium being injured by a clean cut corresponding to the injury described above. The coils of the intestine were cut in five places, three in small and two in the large intestine. All the injuries communicated with the cavity of the intestine. The left side artery was half-divided. The knife with which the injury was caused was, according to the

medical evidence, probably very sharp. It has not been found and of its dimensions nothing is known. If the evidence of the eyewitnesses be accepted in its entirety, the prisoner armed with the knife appeared in the baitakkhana, waited for some time, talked with those present there quite leisurely, drank a glass of water, asked Habib Shah if he would like to have a glass of water and on his answering in the affirmative gave it to him, dealt the blow on the deceased and quietly walked out of the room taking up his lathi that was near the door. One of two hypotheses is possible under the circumstances: either that he had come prepared to kill the deceased, or that he was suddenly seized with a homicidal mania. Either hypothesis is difficult to accept. That a man who has formed the intention to kill another and has armed himself with a knife for the purpose would think of coming up accompanied by somebody from whom he did not expect any help that he would sit down and quietly talk with two other men for some time, drink a glass of water, give a glass of water to another in the room and then in the presence of all deal the blow to inflict which he came, is a story which, in itself, is somewhat improbable or at least out of the ordinary.

But apart from it, the nature of the injury, in my opinion, is not positively indicative of an intention to kill: one blow with a knife the dimensions of which are not known, the force with which the blow was dealt being more or less a matter of speculation, and the length of wound being consistent with the supposition that it was plunged and taken out and not indicating a desire to rip the abdomen open. There is no evidence either way as to whether the prisoner was or was not in the habit of carrying a knife. Motive though not a *sine qua non* for bringing the offence home to the accused is relevant and important on the question of intention, and of motive what there is or has been established is hardly adequate to lead to a conclusion that there must have been an intention to cause death. On the question whether the prisoner intended to cause such bodily injury as he knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opi-

nion on the nature of the injury and its likely and natural effects, but in this respect his evidence is silent. I am unable to hold, therefore, that the intention requisite to constitute murder has been made out. As regards the theory of a sudden fit of homicidal mania, the intention to kill is not manifest upon the character of the injury, and there is no history at its back. To deduce knowledge on the part of the prisoner as to the likely result of his act so as to hold the prisoner liable for culpable homicide similar difficulties present themselves. Moreover the evidence seems somewhat inconclusive as to whether the prisoner had a talk with the deceased just before the act was committed, the passage in the evidence of P. W. 3 Habib Shah being not incapable of that interpretation. If there was any conversation or altercation between the two we are entitled to know what it was about and the exact nature of it, and that would have enabled us to judge more accurately of the prisoner's mentality either on the question of his intention or of his knowledge, either directly or with the aid of the presumption that one must be taken to intend the nature or probable consequences of his act—a rule of English criminal law which originally but a rule of evidence has now acquired the dignity of a legal axiom, but which it is not always quite easy to apply to the Indian criminal law in view of the distinction that the Indian Penal Code makes between intention and knowledge. It should not also be forgotten on the question of knowledge, that much depends on the intellectual capacity of the actor, a savage often thinks differently from a civilized man.

I am not sure that in the evidence we have before us all that immediately preceded the assault. The safer course in my opinion, instead of resorting to the process of inferential reasoning, in view of the circumstances to which I have referred, is to take the facts as they are and to convict the prisoner of voluntarily causing grievous hurt with a knife which falls well within S. 326, I. P. C. I am inclined therefore to convict the prisoner under S. 326, I. P. C., and sentence him to rigorous imprisonment for ten years.

R.K.

Conviction altered.

A. I. R. 1928 Calcutta 436

SUHRAWARDY AND GRAHAM, JJ.

Suresh Chandra Chatterjee — Appellant—

v.

Kanti Chandra Bhattacharjee — Respondent.

Appeal No. 2229 of 1927, Decided on 29th February 1928, from appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 28th July 1927.

Civil P. C., O. 41, R. 33—Suit by landlord to eject tenant after giving notice—Calcutta Rent Act in force when suit dismissed—Rent Act expiring at the hearing of the appeal—Rent Act was held to be not applicable—Interpretation of statutes—Calcutta Rent Act (3 of 1920).

It is true that an appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based. But if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court, the Court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it. [P 437 C 2]

The plaintiff let his premises to the defendant and standard rent was fixed under the Rent Act of 1920. On 14th March 1925, the plaintiff gave a notice to the defendant asking him to vacate the premises by the end of March 1925. The defendant not having vacated within the time allowed to him, a suit was instituted on 13th May 1925, for ejectment against the defendant. The trial Court dismissed the plaintiff's suit on the ground that the defendant was protected from ejectment under the provisions of S. 11, Rent Act. This order was pronounced on 30th July 1926. There was an appeal by the plaintiff against the decree of the trial Court. The appeal came on for hearing on 29th July 1927. In the meantime the Rent Act expired on 31st March 1927 and ceased to exist. The appeal was heard and allowed. Defendant came on second appeal.

Held : that the case was rightly decided as on the day the lower appellate Court delivered its judgment, the law applicable was the general law i. e., T. P. Act, and the tenancy having been validly determined under it, a decree ordering ejectment was correct. [P 437 C 1]

Gunada Charan Sen and Radhika Ranjan Guha—for Appellant.

Ramesh Chandra Sen, Jitendra Kumar Sen Gupta and Paresh Chandra Sen—for Respondent.

Suhrawardy, J.—This is an appeal from the decree of the Additional District Judge of 24-Parganas in a suit in ejectment. The appellant became the tenant under the plaintiff in respect of premises, 17/2-A, Kundu Lane, Bhowanipur, in the suburbs of Calcutta, at a monthly rent of

Rs. 50, in 1920. Subsequently the parties went to the Rent Controller to the standard rent of the premises under the Rent Act of 1920 which was then in force. The rent was fixed by the Rent Controller at Rs. 39 a month. On 14 March 1925 the plaintiff gave a notice to the defendant asking him to vacate the premises by the end of March 1925. The defendant not having vacated within the time allowed to him, the present suit was instituted on 13th May 1925 for ejectment against the defendant. The trial Court dismissed the plaintiff's suit on the ground that the defendant was protected from ejectment under the provisions of S. 11, Rent Act. This order was pronounced on 30th July 1926. There was an appeal by the plaintiff against the decree of the trial Court. The appeal came on for hearing on 29th July 1927. In the meantime the Rent Act expired and ceased to exist. The Rent Act was originally passed in 1920 in respect of premises in and about Calcutta and came into operation from 5th May 1920. The Act was originally enacted for three years but by subsequent enactment was extended up to 31st March 1924. Before it expired another Act was introduced and the Rent Act got a fresh lease of life till 31st March 1927, but only in respect of premises of which the rent was below Rs. 250 a month so that so far as the premises in question are concerned the Rent Act must be taken to have affected them till it expired on 31st March 1927.

The appeal was heard by the learned Third Additional District Judge 24-Parganas and allowed. The learned Judge decreed that the defendant should vacate the premises in suit within one month from the date of judgment which was 29th July 1927 and he was further directed to pay damages at the rate of Rs. 39 a month from 1st April 1925 till possession was delivered. The learned Judge took a different view of the facts relied upon by the trial Court and he found that the defendant did not pay the rent regularly to the plaintiff or deposit it in the Rent Controller's Court and was therefore not protected from ejectment by virtue of the provision of sub S. 5 of S. 11 of the Act. He was also of opinion that the evidence in the case went to show that there was no preliminary tender of rent to the landlord before

it was deposited in the Rent Controller's office and hence it was not a proper payment of rent within sub-Cl. 4, S. 11, Rent Act. We have examined these clauses in the light of the evidence in the case and the findings of the first Court and we do not think that they can be supported. But the learned vakil for the respondent has supported the decree passed by the appellate Court upon a different ground, namely, that on 29th July 1927 there was no Rent Act in operation and the defendant's tenancy having been terminated by a valid notice he was liable to be ejected and hence the decree of the lower appellate Court is correct. This seems to be the correct position to take. Under the general law a landlord is entitled to determine the tenancy of a tenant under him by a valid notice and he is further entitled to recover possession of the property let out to the tenant on the termination of the tenancy. This right of the landlord for a certain period became interrupted by the Rent Act which laid down certain circumstances in which recovery of possession of land could not be obtained by the landlord. That bar ceased to exist on 31st March 1927. On the day on which the learned Judge delivered his judgment the law which is the general law under the Transfer of Property Act was in operation and he having found that the tenancy was validly determined he had authority to pass a decree ordering ejection of the defendant. The effect of a temporary Act running out and ceasing to have any further operation has been considered in many cases. The principle is thus laid down in Craies on Statute Law, 3rd edn., at p. 342 :

As a general rule and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. As soon as the Act expires any proceedings which are being taken against a person will ipso facto terminate.

In *Quilter v. Mapleson* (1), it was held that the Court of appeal could grant to a party relief to which he was entitled according to the law as it stood at the hearing of the appeal. In his judgment Bowen, L. J. observed :

The rules were intended to enable the Court of appeal to do complete justice. If the law has been altered pending the appeal, it seems to me to be pressing rules of procedure too far to say

that the Court of appeal cannot decide according to the existing state of the law.

The same view has been taken in several cases in this country of which reference may be made to *Kanakayya v. Janardhan Padhi* (2), *Muthuswami Ayyar v. Kalyani Ammal* (3). This principle is based upon another principle that a Court of appeal must in certain exceptional circumstances take notice of events which have happened since the institution of the suit and afford relief to a party on the basis of the altered circumstances : *Ram Ratan v. Bishun Churn* (4), *Ramyad Sahu v. Bindeswari Kumar* (5) ; *Udit Chobey v. Rashika Prasad* (6) ; *Rustomji v. Purshotamdas* (7) ; and *Dinanath Mahish v. Nabakumar Hazra* (8). All the relevant cases on this point have been considered by Mookerjee, J., in *Rai Charan Mandal v. Biswa Nath Mandal* (9). It is true that an appellate Court has to decide a case as it was presented before the trial Court and on a consideration of which the original judgment is based. But if the right claimed is one which has either ceased to exist or been modified by certain events which have transpired since the decree of the trial Court the Court is bound to take notice of it in order to give just and proper relief to the parties to the appeal before it. Upon these and similar considerations R. 33, O. 41, Civil P. C., was introduced for the first time by the Act of 1908. A Court of appeal is empowered thereby to make such a decree or order as the case may require. I am accordingly of opinion that the decree passed by the learned Judge was correct on the findings arrived at by him namely that the defendant was tenant-at-will whose tenancy was determined by a valid notice and he was liable to be ejected, though not on the grounds on which the lower appellate Court has relied in support of its decree.

The learned advocate for the appellant has argued that before a decree could be passed against his client for ejection the validity of the notice should have been determined. In the trial Court an

(2) [1910] 36 Mad. 439=21 M.L.J. 31=8 I.C. 736=(1910) M.W.N. 841 (F.B.).

(3) [1916] 40 Mad. 818=38 I.C. 223=5 M.L.W. 334.

(4) [1907] 6 C.L.J. 74=11 C.W.N. 732.

(5) [1907] 6 C.L.J. 102.

(6) [1907] 6 C.L.J. 662.

(7) [1901] 25 Bom. 606=3 Bom. L.R. 227.

(8) A.I.R. 1921 Cal. 792.

(9) [1914] 20 C.L.J. 107=26 I.C. 410.

(1) [1882] 9 Q.B.D. 672=52 L.J. Q.B. 44=31 W.R. 75=47 L.T. 569.

issue was raised with regard to the sufficiency and validity of the notice of ejectment. But that Court having found in favour of the defendant on the law did not enter into a discussion of it. In the appellate Court this question was raised and the learned Judge observed that notice was served on 14th March requiring the defendant to vacate at the termination of the month of March. The defendant signed an acknowledgment of the receipt of the notice but did not vacate the premises. The learned Judge further observes that the defendant admits the receipt of the notice to quit and no evidence has been given to show that the notice is not valid :

There can be no doubt, therefore, that were it not for the Rent Act the defendant could not resist ejectment.

It is also contended that the learned Judge has misplaced the onus of proving the validity of the notice upon the defendant whereas it being the basis of cause of action in the suit the plaintiff ought to prove that he had validly determined the tenancy. None of these contentions ought to prevail. The learned Judge has dealt with the question of the proof of notice and he has come to the conclusion that it was valid inasmuch as it was not shown that the notice was invalid. This is really not a question of misplacing the onus. It was a tenancy-at-will. The notice was served on 14th March 1925 ending with the last day of the month. Apparently it was a good and sufficient notice under S. 106, T. P. Act. The plaintiff if there was any onus on him, had discharged it by proving the receipt of the notice; and if the defendant contended that it was not a sufficient and valid notice it was for him to show that it was so. I am, therefore, of opinion that it is not necessary to remand the case to the lower appellate Court for a further finding with regard to the sufficiency of the notice. The appeal accordingly fails and is dismissed with costs.

There is a cross-objection on behalf of the respondent, that the amount of damages fixed by the lower appellate Court is insufficient. The learned Judge has decreed damages from 1st April 1925 till possession is given at the rate of Rs. 39 a month that being the standard rent fixed under the Rent Act. The contract between the parties was Rs. 50 a month and this the plaintiff-respondent

claims should have been allowed to him by way of damages. It is the plaintiff's case that he terminated the defendant's tenancy by a notice from 1st April 1925 and from that date the defendant was a trespasser in occupation of the premises. He cannot, therefore, claim as a matter of right that damages must be in the shape of rent which was stipulated between the parties. But it is open to the Court to assess damages which the plaintiff is entitled to get from a trespasser in wrongful possession of the premises. The Rent Controller has found that Rs. 39 was the fair rent of the premises and we cannot say that the principle upon which the learned Judge has assessed damages is so obviously wrong as to entitle us to interfere in second appeal. The cross-objection must accordingly fail. But the decree of this Court will be that the defendant will vacate the premises on 31st March 1928 and in the event of his doing so he will pay damages to the plaintiff (less the money deposited by him in the Rent Controller's office and any amount paid by him for or on behalf of the plaintiff) at the rate of Rs. 39 a month from 1st April 1925 till March 1928. If the defendant fails to vacate the premises on or before 31st March 1928 he will be liable to pay damages to the plaintiff at the rate of Rs. 50 a month from 1st April 1927 till the date of delivery of possession to the plaintiff. We make no order as to costs of the cross-objection. The plaintiff is entitled to the amount that has been deposited to his credit by the defendant in the proceedings under the Rent Act.

Any amount in excess of what is decreed by this order and deposited by the defendant may be refunded to him.

The appeal and cross-objection are dismissed with the modification stated above.

Graham, J.—I agree.

R.K.

Decree modified.

A. I. R. 1928 Calcutta 438

CHOTZNER AND GREGORY, JJ.

Satindra Nath Sen Gupta —Accused
—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1083 of 1927, Decided on 10th February 1928, from order of Sub-Divl. Magistrate, Barisal.

Criminal P. C., S. 107—A person can be proceeded against if, for any wrongful act on his part, other persons do things which occasion the breach of peace or disturb the public tranquility.

If a person himself is likely to commit a breach of the peace he may be dealt with under S. 107. He would equally become amenable to the provisions of the section if for any wrongful act on his part other persons may do things which would probably occasion a breach of the peace or disturb the public tranquility. [P 440 C 1]

Sures Chandra Taluqdar, Mritunjoy Chattopadhyaya and Radhica Ranjan Guha—for Petitioner.

A. K. Basu and Sachindra Nath Banerji—for the Crown

Judgment.—This is a rule granted to the petitioner Satindra Nath Sen Gupta on certain grounds mentioned in the petition. Proceedings were taken under S. 107, Criminal P. C., against the petitioner on 18th March last by the Sub-Divisional Magistrate of Barisal and after hearing the evidence the Sub-Divisional Magistrate directed him to execute a bond of Rs. 5,000 with two sureties of Rs. 2,500 each to keep the peace for one year. On appeal to the learned Sessions Judge the order requiring security was upheld but the amount of the bond was reduced to Rs. 500, together with two sureties of Rs. 250 each.

The facts found by the learned Sessions Judge in concurrence with the Sub-Divisional Magistrate are that the petitioner is the leader of the Satyagraha movement in the district of Bakerganj, the object of which is to enforce the right of the Hindus to lead processions with music before mosques on public highways at all times. The assertion of such a right, to use the words of the learned Judge, has excited the Mahomedans and they decline to let any procession with music pass in front of their mosques. On 16th March 1927 the Sub-Divisional Magistrate, in view of the state of feelings then existing between the Hindus and the Mahomedans, issued an order under S. 144, Criminal P. C., prohibiting any such procession upon the ensuing Doljatra day which would be held either on 18th or 19th March. On the morning of 17th March a Hindu procession tried to pass Lakhutia which we are told is a place within the Barisal sub-division, but owing to the objection of certain Mahomedans the procession withdrew. On the same evening the

Superintendent of Police sent for the petitioner and asked him what his attitude was with regard to the prohibitory order made by the Magistrate under S. 144. The petitioner stated in his presence and that of the District Magistrate who came in during the meeting, to use the words of the learned Judge, that he would lead processions with music before mosques highways and would not desist either for the opposition of the Mahomedans nor for any orders of the police or the Magistrate. The learned Judge observes :

As he is a leader of a large number of young men he was in the circumstances arrested on 18th March and the present proceedings were instituted against him.

The question for our decision is whether in the circumstances such an order requiring the petitioner to execute a bond should be sustained. A great volume of evidence was laid before the Sub-Divisional Magistrate and it was accepted by him as well as by the learned Sessions Judge. He found this, to quote the words from the judgment of the learned Magistrate :

Put in a nutshell, the case for the Crown is that Satindra Nath Sen had during a period of extremely strained feeling between the two communities on religious matters enunciated the principle that it was the Hindus' inherent right to pass with music before all mosque, at all times of the day and night. In pursuance of this principle he had collected men and money and had organized a movement commonly known as the Satyagraha movement. His followers were numerous and loyal to him. He had been responsible for processions at Meghia and Barisal which had flouted orders lawfully promulgated and he had asserted that he would resort to violence if necessary. During the Doljatra festival in spite of orders under S. 144, Criminal P. C., he told the District Magistrate that if he organized a procession it would be on the lines of the others for which he had been responsible. Further he was prepared to organize these processions before any mosque in the district where Mahomedans opposed it. The prosecution has succeeded in proving these facts and alleges that Satindra Nath Sen is in a position to carry out his threats. In the present condition of the district, action as described above is likely to lead to clashes between the two communities and disturbances of the public tranquility are probable.

These findings which have been accepted by the learned Judge are so clear that prima facie we should find the greatest difficulty in interfering with the order for security. It has, however, been strenuously contended by Mr. Taluqdar who has appeared in sup-

port of the rule that the evidence on which these findings have been arrived at is for the most part inadmissible in law. His first contention has been that whatever academic ideas any person may entertain he is not liable to be dealt with under S. 107, Criminal P. C., unless overt acts are committed as the result of the expression of these ideas. This seems to us to be misconstruing the provisions of S. 107, Criminal P. C. This section says :

Whenever a Magistrate is informed that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility the Magistrate may proceed.

Now it is plainly true to say that if a person himself is likely to commit a breach of the peace he may be dealt with under the section. But it is also true to say that if for any wrongful act on his part other persons may do things which would probably occasion a breach of the peace or disturb the public tranquility he would equally become amenable to the provisions of the section.

The second argument which has been addressed to us is that the conversation between the petitioner and Mr. Blandy, the District Magistrate, and the Superintendent of Police, Mr. Taylor, is inadmissible in evidence because it was made under an implied seal of secrecy. We fail to appreciate this argument. The position was, as we understood it, that the Superintendent of Police sent for this gentleman to enquire what attitude he proposed to take in regard to the suggested procession on the Doljatra day. Mr. Blandy happened to come in there and took part in the conversation. To say that that constitutes a conversation held under an implied seal of secrecy seems to us to import a meaning which it cannot possibly bear. The petitioner frankly admitted that he did not propose to hold his hand; on the contrary he would take the procession with music past a mosque as he pleased irrespective of any order already made or any order that might be made. Plainly that evidence is admissible to show what his intention was. Mr. Taluqdar has then referred to certain findings of the learned Sessions Judge in regard to the Satyagraha movement at Patuakhali, the Saraswati Puja incident in 1926 and the B. M. College incident of the 13th

February. In the last case the petitioner was put on his trial but was acquitted. It is argued that a reference to these particular incidents is irrelevant to the present enquiry. No doubt the fact of the petitioner having been acquitted on 13th February made that matter one upon which little reliance can be placed. But the rest of the evidence is clearly admissible under S. 11, Evidence Act, to show the particular line of action the petitioner would probably take.

It is then contended that the petitioner cannot be held responsible for the Lukutia incident of 19th March as he had by that time been arrested. Mr. Taluqdar has dealt at some length with the evidence which shows that the Hindu processionists acted with self-restraint in waiting till after prayer time to pass by the mosque. He has referred in particular to the evidence of Mr. Higgins P. W. 12, who says that the procession approached at about 5-10 p. m., that he met and stopped them 75 yards from the mosque and spoke to certain gentlemen. He told them that the Mussalmans were saying their prayers and told them not to pass by the mosque. They consulted amongst themselves and at 10 minutes to 6 p. m. they insisted on passing by the mosque with music. The Mussalmans were annoyed and excited. He arrested the processionists under S. 296, I P C., and put his force between the Hindus and Mussalmans as both sides were excited and there was possibility of a breach of the peace. He says further that the Hindu processionists behaved well and that they were not violent, insolent or insulting. Plainly, therefore, a breach of the peace was averted chiefly by the presence of the police force because, although the Hindu processionists were neither violent nor insulting, their action in taking the procession by the mosque where prayers were still in progress was provocative and likely to annoy the Mussalmans. The procession seems to have been directly inspired by the petitioner, as it was led by men whom the Magistrate has found to have been his close associates. We think, therefore, on a full consideration of the facts that when the petitioner took the line of action which he did the Magistrate had no option but to make the order he passed

and in view of the position the petitioner occupies we can not say that the security required from him is excessive. The rule is, accordingly, discharged.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 441

RANKIN, C. J., AND MITTER, J.

Jaynal Abedin and others—Defendants—Appellants.

v.

Hyder Ali Khan Pani—Plaintiff—Respondent.

Appeal No. 704 of 1925, Decided on 17th August 1927, from appellate decree of 1st Sub-Judge, Zillah Mymensingh, D/- 11th December 1924.

Transfer of Property Act, S. 52—Rent suit by landlord compromised—Transfer of durputni pending the suit but before compromise—Doctrine of lis pendens was held not applicable.

To make lis pendens a notice to a purchaser of an estate, the question in the action must relate specifically to the estate and not, merely to the money secured on it. [P 443 C 1]

A landlord executed a durputni patta in favour of C in respect of some mouzas, fixing some rent. Later, the terms of the lease were modified by another registered deed of agreement increasing the rent. Subsequent to this deed of agreement, the Court of Wards took charge of the landlord's estate and brought a rent suit against C, the original holder of durputni. The suit was ultimately compromised and a decree was passed embodying the terms of the compromise. During the pendency of the suit but before the compromise took place, A and B purchased the durputni from C.

Held : that alienations of the property in favour of A and B were not affected by the doctrine of lis pendens : 29 All. 339 (P. C.), Ref. [P 443 C 2]

Nuruddin Ahmed and Nausher Ali—for Appellants.

Surendra Nath Guha—for Respondent.

Mitter, J.—This is an appeal from a decree of the Subordinate Judge of Mymensingh, dated 11th December 1924, which affirmed a decision of the Munsif of Tangail dated 28th February 1923.

The suit in which this appeal arises was commenced by the plaintiff for recovery of arrears of rents and cesses together with damages for the years 1327 and 1328 B. S. from the defendants who are three in number at the rate of Rs. 135-8-0 per year. The plaintiff alleges that defendant 1 was the original holder of the durputni to which the suit relates and

that defendants 2 and 3 are transferees from defendant 1 of the durputni interest and they have consequently been impleaded in the suit.

The defence of the defendants, who filed separate written statements, is substantially this :

That plaintiff is not entitled to recover any rent as the defendants have been kept out of possession of two mouzas, Haria and Gajaria, comprised in the durputni and that the rate at which the rent has been claimed cannot be recovered as the solenamah, on the basis of which this rent was adjusted, was invalid and inoperative.

In order to understand the points raised before the lower Courts which have been repeated before this Court it is necessary to set forth briefly the following material facts. The plaintiff executed a durputni putta (Ex. B) in respect of six mouzas mentioned in the plaint and mouza Haria by which the rent stipulated to be paid was Rs. 165 per year. On 14th of Aughrayan 1310 B. S. (1903) the terms of the lease were modified by another registered deed of agreement (Ex. 4), by which the annual jama was raised from Rs. 165 to Rs. 188-2-2 per year. Subsequent to this deed of agreement the Court of Wards took charge of the plaintiff's estate and brought a rent suit against defendant 1 in the Court of the Subordinate Judge of Mymensingh for rents for the years 1321-1326 B. S. The suit was ultimately compromised and a decree was passed embodying the terms of the compromise. Neither the petition of compromise nor the decree embodying the compromise has been placed before us and we are left to gather the terms of the compromise from the following statements regarding its contents in the Munsif's judgment.

... and on the strength of this solenamah the defendant relinquished all claims in mouza Haria, the plaintiff admitted defendants' right and possession in Gajaria mouza and rent payable by the defendant was accordingly reduced to Rs. 135-8-0 and in consideration of the defendants' relinquishing his claim in Haria mouza the plaintiff relinquished his rents for the period he claimed in that rent suit. Besides these stipulations the defendant affirmed the genuineness of the deed of agreement Ex. B.

This solenamah was embodied in the decree and the suit was dismissed accordingly : vide Exs. 5 and 9.

It is to be noted here that defendants 2 and 3 were no parties to the solenama although the plaintiff was informed of the purchase by defendants 2 and 3 from defendant 1 of the durputni in question as the landlord's fee was deposited. The purchase of defendants 2 and 3 was alleged to have been made for a valuable consideration of Rs. 1,500 and was in the nature of a hibabilewaz and was made four or five months before the compromise decree and during the pendency of the rent suit in which the compromise was made. The plaintiff has instituted the present rent suit on the basis of the compromise decree. The case made in the Courts below by the defendants is: (1) that the solenama cannot be admitted in the evidence as it was not registered and this notwithstanding its being embodied in the decree, as the compromise (solenamah) had the effect of creating a new durputni with new terms, and that consequently it required registration, having regard to the provisions of S. 17, Cl. 1 (d), Registration Act; and (ii) that defendants 2 and 3 are not bound by the compromise as they were no parties to the said compromise decree. The Munsif held that the effect of the compromise (solenama) was not to create a new lease but only to make a certain variation in the old rental and in certain other incidents of the tenancy and as such it did not require registration having regard to the provisions of S. 17 (2), Cls. 1 and 6, Registration Act. The Munsif further held that the transfer in favour of defendants 2 and 3 which are evidenced by two deeds (Exs. A and A-1) are affected by the doctrine of *lis pendens* as embodied in S. 52, T. P. Act and defendants 2 and 3 took the property subject to the result of the previous rent suit which ended in the compromise decree. The Munsif accordingly decreed the suit of the plaintiff and directed that defendant 1 will be liable for rents, cesses, damage and proportionate rents up to the end of Pous 1327 and that he should be absolved from liability from the date of Hiba which is 20th of Pous 1327 B. S. and that defendants 2 and 3 be liable for rents from beginning of March 1327 B. S.

An appeal was taken by the defendants to the Court of the Subordinate Judge who affirmed the decision of the Munsif.

In second appeal the same two objections which were taken in the Courts

below have been repeated before us by the learned vakil for the defendants now appellants. With regard to the first objection it is sufficient to state that the effect of the solenama in the previous rent suit has been not to create a fresh lease so as to attract the operation of S. 17, Cl. 1 (d), Registration Act, and make registration of the solenama compulsory. All that was done was that mouza Haria was excluded from the durputni and a separate jama of Rs. 52 odd fixed for the mouza was deducted from the entire rent of the durputni and the present rental was fixed as being the sum total of the rents of the different mouzas. There might have been a variation of rent of the original lease by the solenama which, in order to be effective, would have required registration but for the provisions of S. 17 (2), Cl. (1) and (6), Registration Act. There is, therefore, no substance in this objection of the defendants which must be overruled.

The second objection raised is one of substance and must prevail. It has been contended that the Courts below are in error in holding that the transfers in favour of defendant 2 and 3 are effected by the doctrine of *lis pendens*. The argument is that S. 52, T. P. Act, can not apply as the suit was a rent suit and was not a suit in which "any right of immovable property was directly and specifically in question" within the meaning of the said section. A suit for rent is primarily a suit for money and although rent is a first charge on the property no charge is created until, in any event before decree. For it has been pointed out in the case of *Basant Kumar v. Khulna Loan Co* (1) that

the rent payable by a putnidar to his zamindar, which has been transformed into a judgment-debt, is a first charge on the tenure.

The same rule applies with regard to the rent payable by the durpatnidar to the putnidar. It is open to the holder of the rent decree to proceed if he likes against properties of the lessee other than the lease-hold property. It is of the essence of the rule of *lis pendens* that in order to obtain the protection of the rule the property must be directly and specifically in question in the suit. In the previous rent suit there was no question of any title to the properties

(1) [1914] 20 C. L. J. 1=26 I. C. 197=19 C. W. N. 1001.

transferred. All that was said was that defendant 1 had not been given possession of some mouzas of the tenure and therefore was entitled to entire suspension of rent.

In the case of *Faiyaz Hossain v. Prag Narain* (2) at p. 345, the Judicial Committee of the Privy Council made the following observations with regard to the doctrine of *lis pendens* as enunciated in S. 52, T. P. Act.

The doctrine of *lis pendens* with which S. 52 of the Act of 1882 is concerned is not, as Turner, L. J. observed in *Bellamy v. Sabine* (3), founded upon any of the peculiar tenets of a Court of equity as to implied or constructive notice.

It is a doctrine common to the Courts both of law and of equity and rests upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail. The correct mode of stating the doctrine as Cranworth, L. C., observed in the same case, is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent."

It will appear clear from the above observations that alienations of the property in dispute were not affected by the doctrine of *lis pendens*. In the rent suit there was no dispute with regard to the title to the *durputni* as between plaintiff and defendant. There was allegation by the defendants of dispossession by the plaintiff from some *durpatni* mouzas. The rent suit was not a suit to establish the title but was a suit to recover a debt. Neither did the defence raise any question of the title of the plaintiff to the superior interest in the disputed *durputni* so that by the pleadings in the rent suit title of the plaintiff in such superior interest was not drawn into controversy, nor was there any dispute with regard to the title to the *durputni* interest which was alleged to have been transferred by the *hibas* in favour of defendants 2 and 3, but the allegation only was that defendant 1 had not been put in possession of all the mouzas covered by the *durputni*.

To make a *lis pendens* notice to a purchaser of an estate, the question in the action must relate specifically to the estate and not merely to the money

secured on it: see White and Tudor's *Leading Cases on Equity*, 5th edn Vol. II, pp. 75 and 76.

In the case of *Ex parte Thornton* (4) Lord Justice Cairns said:

Then the *lis pendens* being a technical expression well known, it seems to me to be perfectly clear that it always implied a claim of right, or a claim to charge specific property.

A suit for rent can hardly be regarded as a claim to charge specific property. In my opinion the transfers in favour of defendants 2 and 3 are not affected by the doctrine of *lis pendens* as embodied in S. 52, T. P. Act. In citing the English cases I am not unmindful of the observations of the Judicial Committee of the Privy Council in *Narendra Nath v. Kamalabasin* (5) at p. 26 where their Lordships quoted with approbation the remarks of Lord Herschell in *Bank of England v. Vagliano* (6) that

the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning uninfluenced by any consideration derived from the previous state of the law The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions.

But I feel myself justified in referring to the English cases for the purpose of showing that not only S. 52, T. P. Act, does not apply to the facts of the present case, but that also the general doctrine of *lis pendens* does not apply to the facts thereof. It also seems to me that it was assumed in the Privy Council case of *Faiyaz Hossain v. Prag Narain* (2), to which I have already referred, that the rule of *lis pendens* obtaining in England is the same as the rule embodied in S. 52, T. P. Act. The appeal must succeed on this ground.

The result is that the decrees of the lower appellate Court as against defendants 2 and 3 are set aside and the case is remitted to the Court of appeal in order that the Court may try the question on the evidence already taken as to whether there has been such dispossession of the defendants from the lands of the *durputni* by the plaintiff as to entitle

(4) [1867] 3 Ch. 178.

(5) [1896] 23 I. A. 18=23 Cal. 563=6 Sar. 663 (P. C.).

(6) [1891] A. C. 107=60 L. J. Q. B. 145=55 J. P. 676=39 W. R. 657=64 L. T. 353.

(2) [1907] 29 All. 339=10 O. C. 314=34 I. A. 102=4 A. L. J. 344 (P. C.)

(3) [1857] 1 De. G. and J. 566=26 L. J. Ch. 797.

defendants 2 and 3 to claim suspension of rent or proportionate abatement thereof, and to retry the appeal in the light of the above observations.

The decree against defendant 1 for rent up to Pous 1327 B. S. will stand. The appellants are entitled to costs here and in the Courts below against the plaintiff.

Rankin, C. J.—I agree.

N.K. *Appeal partly allowed.*

A. I. R. 1928 Calcutta 444

RANKIN, C. J., AND C. C. GHOSE, J.

Bepin Chandra Mandal and others—
Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 729 of 1927, Dated on 13th March 1928, from judgment of Addl. Sess. Judge, 24-Parganas.

(a) *Criminal P. C., S. 307—Majority of jury finding accused guilty twice—Trial Judge doubting as to accused's guilt but accepting the verdict and convicting them—Power of reference was held to have been rightly refused.*

In a case tried by jury, the jury by a majority of four to three found the accused guilty and the Judge accepted the majority verdict of the jury and convicted and sentenced the accused. He stated in his order: "While this is a case in which there are certain doubtful factors, I hesitate not to accept the majority verdict of the jury, as this is the second time the accused have been tried by a special jury and a second time a verdict of guilty has been returned by the majority. It was essentially a case in which the jury must decide and I therefore accept their decision while not agreeing with it. I shall be glad if the accused get relief in the appellate Court.

Held: that the power of reference was rightly not exercised as this power should always be exercised with due regard to the fact that the constitutional tribunal to decide questions of fact is the jury and not the Judge. [P 445 C 1]

(b) *Criminal P. C., S. 307—High Court in appeal thinking that the case ought to have been submitted—High Court cannot direct the case to be submitted—Sessions Judge's view is final.*

It is not correct law to say that, if the High Court thinks that the Judge, in a case tried by jury, ought to have been of opinion that it is necessary for the ends of justice to submit the case, the High Court can direct him so to do or can act as though he has, in fact, submitted the case. The conditions laid down are not merely that the Judge disagrees with the verdict of the jury, but also that the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case. It is quite impossible to direct the Judge to be clearly of a certain opinion and the language used by the

statute shows that the Judge's view on that point is to be final for that purpose. [P 446 C 1]

Suresh Chandra Taluqdar and Mohendra Kumar Ghosh—for Appellants.

Khundkar and Sachindra Nath Banerjee—for the Crown.

Rankin, C. J.—In this case six appellants were tried on a charge under S. 201, I. P. C., before the Additional Sessions Judge of the 24-Pargannas sitting with a jury. The jury by a majority of 4 to 3 found them guilty and the learned Judge accepted the majority verdict of the jury and convicted the appellants and sentenced them to four years' rigorous imprisonment each. He stated in his order:

While this is a case in which there are certain doubtful factors I hesitate not to accept the majority verdict of the jury as this is the second time the accused have been tried by a special jury and a second time a verdict of guilty has been returned by the majority. It was essentially a case in which the jury must decide and I therefore accept their decision while not agreeing with it. I shall be glad if the accused get relief in the appellate Court.

Now, the general character of the case was this that one Chintamani left his home to go to Maibibirhat and never returned. His dead body was found in a tank which may be called Nibaran's tank. There is evidence of a witness who says that he saw the accused with the body near a tank called Suren's tank. This witness is called Parameswar. He says that he confronted the six accused with the body of Chintamani on the bank of the tank. They first of all told him to get away and then called him back and threatened him. There is evidence of two other witnesses, one called Adyait and another called Kansari, who were coming from a place called Dharmacharak at Panapukur, and as they crossed a bheri west of Nibaran's tank they say they saw these six accused with the dead body. They appear to have been dragging the dead body, but the witnesses' evidence as to seeing the actual dragging is not very definite.

The learned Judge put the case to the jury quite fairly, without laying undue stress either way. He left them to consider whether upon this evidence they were entitled to find that the accused were taking the dead body there. He left to them very fairly and properly the evidence on either side as to whether it was proved that Chintamani had been murdered and whether it was possible that

Chintamani had been drowned by accident. He told them that unless they were satisfied as to the commission of the offence of murder they could not on a charge under S. 201 go any further.

If one looks to the charge as a whole one finds, and indeed Mr. Taluqdar for the appellants very fairly says and admits, that the charge is a fair one. It contains no error of law and cannot be said to be inadequate. It is noticeable that the learned Judge has called the attention of the jury to the fact that the important witnesses did not state what they had seen until after a substantial delay, that they have an explanation that they were threatened and that they were afraid, and that the case, therefore, was essentially a case which the jury had to determine on the facts. The learned Judge appears to have been of opinion that sitting as a jurymen he would not have been prepared to act upon the evidence taken as a whole but would have given the prisoners the benefit of the doubt. Three of the jury took this view and four of the jury took the view that they were prepared to act upon the evidence, in particular, the definite evidence of these three men. Our right to interfere in such a matter is limited to a case where there has been misdirection on a point of law or where we are satisfied that the jury must have misunderstood the Judge's direction upon a point of law; and this case cannot be brought under either of these characters.

The question then arises as to the propriety of the order made by the learned Judge. His view is that it is a fair question for the jury. If he had been a jurymen, he would have been in favour of a verdict of not guilty, but he said that he accepted the majority verdict of the jury, and while his reasons about this being a second trial may not have very much in them the position is that he accepted the majority verdict of the jury and did not refer the case. This is not a case in which it can be said that there was no evidence or only a scintilla of evidence against the accused to go before a jury. There is far more than that.

The question, therefore, arises whether it is right or possible for us to interfere with the action of the learned Judge under our revisional or appellate jurisdiction and to say that he ought to have referred the case, and to deal with the

case upon the footing that the facts and the law are open to us. There seems to be some authority, though it is only an obiter dictum, in the case of *Saroda Charan Mistri v. Emperor* (1). That was a case where the Judge's order was particularly difficult to understand and in the end, the Court decided the case on the footing that there was a misunderstanding on the part of the jury as to the law laid down by the learned Judge. On that footing the High Court was entitled to interfere, but it was said by my learned brother, Mr. Justice Mukherjee:

The learned Judge felt that the verdict of the jury was wrong, and if he accepted the verdict in its entirety he was unable to do justice to the accused. It follows therefore that the ends of justice demanded a reference to this Court. The conditions necessary for the application of S. 307, Criminal P. C., being clearly present the duty of the learned Judge was to make such a reference, and once the conditions are present that course is obligatory and is no longer a matter of discretion at all; it should be remembered that the word used is "shall." If under circumstances such as those that are in this case the learned Judge fails to do what the law requires him to do and thus deprives this Court of an opportunity to deal with the case on its merits, he does something more than merely acting in the erroneous exercise of his discretion. He fails to exercise his jurisdiction and this failure operates to the prejudice either of the Crown or of the accused, and, speaking for myself, I am of opinion that it is well within our power under S. 439, Criminal P. C., to direct him to submit the case to us for our consideration under S. 307, Criminal P. C.

Now as to that I desire to say two things: First of all, that the rights of the Court of appeal ordinarily include all the rights of revision and a reference to S. 439, Criminal P. C., would show that a case which comes within S. 439 is merely a case in which the High Court is given the power to exercise any of the powers conferred on a Court of appeal.

The second thing I desire to say is this: that if one looks at S. 307, Criminal P. C., one finds, as the learned Judge has pointed out that the word used is "shall"—"he shall submit the case accordingly;"—but the conditions laid down in the first subsection are: if the Judge disagrees with the verdict of the jurors or of a majority of the jurors and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, it is only then that, it is said, he shall submit the case accordingly. Now, I am not of opinion that it is correct

(1) A. I. R. 1925 Cal. 795.

law to say that if the High Court thinks that the Judge ought to have been of opinion that it is necessary for the ends of justice to submit the case this Court can direct him so to do or can act as though he has, in fact, submitted the case. The conditions laid down are not merely that the Judge disagrees with the verdict of the jury, but also that the Judge is clearly of opinion that it is necessary for the ends of justice to submit the case. The Judge is either clearly of opinion or not clearly of opinion and according as he acts in that matter the consequences must be. It is quite impossible, in my judgment, to direct the learned Judge to be clearly of a certain opinion and the language used by the statute shows that the Judge's view on that point is to be final for that purpose; and I am not prepared, in a case such as this, to enquire into the question whether or not the learned Judge ought to have been of opinion that it was necessary for the ends of justice to submit the case.

This matter is a little complicated and some learned Sessions Judges seem to be a little unhappy as to the way in which they express themselves when acting under Ss. 306 and 307. S. 306 says that when the Judge does not think it necessary to express disagreement with the verdict of the jurors he shall give judgment accordingly. That shows, as indeed is obvious, that it is no necessary part of the function of the Judge to have an opinion of his own about mere questions of fact and to assert it. His power only arises when having an opinion contrary to that of the jury he thinks that it is necessary for the ends of justice to submit the case to the High Court; and, in my judgment, this power should always be exercised with due regard to the fact that the constitutional tribunal to decide questions of fact is the jury and not the Judge.

It remains, however, that three jurymen and the Judge were not impressed with the reliability of the witnesses and four jurymen did accept their evidence. If, in these circumstances the executive authorities think fit to take action in the matter, I desire to say nothing that it would in any way fetter their hands. In my judgment it would be wrong on our part to interfere with the conviction or the sentences, and this appeal must be dismissed.

The appellants will surrender to their bail and serve out the remainder of their sentences.

C. C. Ghose, J.—I agree.

R K.

Appeal dismissed.

A. I. R. 1928 Calcutta 446

CHOTZNER AND GREGORY, JJ.

Ram Gopal Goenka—Petitioner.

v.

Narayan Das Chandra — Opposite Party.

Criminal Revns. (Cross) Nos. 952 and 1038 of 1927, Decided on 18th January 1928, from order of Dy Mag., Howrah

Criminal P. C., S. 144—Mode of enjoyment of one's own property likely to lead to a breach of the peace—Order under S. 144 restraining that person temporarily from enjoying the property in that way is justified.

Though a person has an absolute right to use his property as he pleases, yet, if the mode of enjoyment of his property, innocent and lawful though it might be, results or tends to result, in a series of acts which are likely to lead to a breach of the peace, an order under S. 144, restraining the person temporarily from enjoying the property in that way is amply justified: 10 B. L. R. 434 (F.B.), Rel. on; 11 C. W. N. 79, Dist. • [P 447 C 2]

Langford James, A. C. Mukerji and Suresh Chandra Taluqdar—for Petitioner.

Mrityunjoy Chattopadhyaya, Manindra Nath Banerjee II and Sitansu Bhushan Bose—for Opposite Party.

Judgment.—*Criminal Revision No. 952 of 1927.*—This Rule has been granted in regard to an order made by the Deputy Magistrate of Howrah under S. 144. Criminal P. C. The material portion of the order was in these terms :

Whereas it appears from the petition filed on 21st July 1927 by Narain Das Chandra of 12 Shib Kristo Daw Lane, Calcutta, and the report dated the 26th July 1927 submitted thereupon by the Sub-Inspector of Golabari police station that Ram Gopal Goenka, of 20 Central Avenue, Calcutta, is holding a new market at Nos. 97 and 99 Haragunj Road, Sulkea, adjacent to the old Haragunj Bazar belonging to the Daw Babus of Jorasanko, Calcutta, for which a breach of the peace is apprehended, I do hereby prohibit the said Ram Gopal Goenka from holding new market at Nos. 97 and 99, Haragunj Road, as the holding of such market will lead to an imminent breach of the peace.

Now the order was only in force for two months and it expired on the 27th September 1927. Prima facie, therefore,

the necessity for vacating it is not clear except on the ground that proceedings have been taken against the petitioner under S. 188, I. P. C., for violating it.

There is no dispute that the market which has been prohibited is situated on the petitioner's own land. The findings in the present case are that he applied to the Howrah Municipality to construct certain buildings upon this land and, according to the petition, sanction was first accorded by the Municipality but was afterwards revoked on the 30th June 1927. The facts found by both the Courts below are that the petitioner continued the work of construction in spite of the fact that sanction had been withdrawn. It is said also that he had no license as required under the Municipal Act, though this matter does not appear to be entirely clear. The further finding is that certain Nepali durwans in the employ of the petitioner forcibly dragged vendors to the new market and otherwise molested the public by conducting passers-by into the market presumably with the view of making them buy their commodities there rather than in the adjacent bazar belonging to the Daw Babus. Both the lower Courts have found that it was likely to result in an imminent breach of the peace. The question, therefore, we have to consider is whether the Magistrate was in these circumstances, justified in passing an order which admittedly is intended to operate only in cases of extreme urgency. Mr Langford James who has appeared for the petitioner has contended that S. 144, Criminal P. C., is never intended to be used in any case of dispute between the owners of two rival bazars and that if some servants of one of these owners are shown to have acted illegally or oppressively, S. 107, Criminal P. C. is the proper section to be proceeded under to bind them down and to restrain them from committing further offences. He has referred to two cases, namely the cases of *Satish Chunder Roy v. Emperor* (1), and *Bidhu Ranjan Mojumdar v. Romesh Chunder Rai* (2). The learned Judges who decided the first of these two cases were of opinion that the Magistrate could not, by passing successive orders under S. 144, Criminal P. C., extend the operation of the order beyond the time

limited by sub-S. (5) of S. 144, Criminal P. C. and that the most appropriate section of the Code to deal with cases of rival *hats* which might cause a breach of the peace was S. 107 of the Code. No doubt, that view must be treated with respect. But we are of opinion that the powers of a Magistrate to deal with the situation where a breach of the peace is, in his opinion, imminent have been so clearly defined in the Full Bench case of *Bykuntram Shaha v. Meajan* (3), to which our attention has been drawn by Mr. Chatterjee who appears for the opposite party that we cannot do better than set down some of the findings therein contained. What the learned Chief Justice Sir Richard Couch, in interpreting the words of the section, said is this:

The word "certain" placed before the word act and afterwards repeated twice in the expression "to take certain order with certain property in his possession" leaves no reasonable doubt in our minds that the legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district, to restrain any person from doing any act or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent or even tends to prevent a riot or an affray; and again the learned Chief Justice said :

A particular act or a particular mode of enjoyment of property might be perfectly innocent or lawful in itself. But the act may be done or the property enjoyed in that particular mode under circumstances calculated to lead to a serious breach of the peace attended even with loss of human life; and it would be by no means proper or desirable to hold that even in such cases the chief peace officer of the district has no power to issue an order such as that contemplated by S. 62 of Act 25 of 1861.

While, therefore, in the present case, it may be conceded that the petitioner has an absolute right to use his property as he pleases, yet, if the mode of enjoyment of this property, innocent and lawful as it might be, resulted or tended to result, in a series of acts committed by the petitioner's servants which in the Magistrate's judgment, were likely to lead to a breach of the peace, we cannot but think that the order under S. 144, Criminal P. C., restraining the petitioner temporarily from holding his market there was amply justified. We accordingly discharge this Rule.

Criminal Revision No. 1038 of 1927.—
In view of the judgment just now deli-

(1) [1907] 11 C. W. N. 79.
(2) [1907] 11 C. W. N. 223.

(3) 10 B. L. R. 434 (F.B.).

vered in Revision Case No. 952 of 1927, the learned vakil for the petitioner does not press this Rule. It is accordingly discharged.

N.K.

Rule discharged.

A. I. R. 1928 Calcutta 448

CUMING AND MUKERJI, JJ.

Abinas Chandra Majhi and another—
Defendants—Appellants.

v.

Pratul Chandra Ghose — Plaintiff—
Respondent.

Appeal No. 569 of 1925, Decided on 17th January 1928, from decree of Addl. Sub-Judge., Howrah, D/- 31st January 1925.

(a) *Bengal Tenancy Act, S. 167—“Purchaser” includes assignees or transferees from a certificated purchaser—A real owner is not precluded from giving notice under S. 167.*

The person for whose benefit notice under S. 167 is to be given is the real purchaser and there is no reason to limit the meaning of the words “purchaser” to the certificated purchaser at an execution sale. The word “purchaser” includes assignees or transferees from a certificated purchaser, and therefore a real owner for whom the benamidar merely holds the property in trust cannot be precluded from giving such notice when, as a matter of fact, he is perfectly entitled to enforce his right in a Court of law as against a third party: 21 C. L. J. 65, *Dist.* [P 449 C 2]

(b) *Civil P. C., S. 66—A real owner can seek for a declaration of his real title against one who does not claim under a certificated purchaser.*

The principle of S. 66 (1) cannot be invoked in a case where the real owner seeks for a declaration of his real title against some one who does not claim under a certificated purchaser and asks for a remedy which the law entitles him to. [P 449 C 2]

*Nasim Ali—*for Appellants.

*Pyari Mohan Chatterjee—*for Respondent.

Mukerji, J.—This appeal has arisen out of a suit which was instituted by the plaintiff for recovery of khas possession of and for declaration of his title to a certain plot of land. The suit was decreed by the trial Court and that decision was affirmed on appeal by the learned Subordinate Judge. The defendants have thereupon preferred this second appeal. The plaintiff's case was that the land in suit formed part of an occupancy holding which consisted of

30 bighas odd of land and bore a rental of Rs. 59 odd and it was held by one Yasin Mallick, that in execution of a decree for rent which was obtained by the landlord against the said Yasin Mallick the said holding was put up to sale and was purchased by the plaintiff, that the plaintiff thereupon served a notice under S. 167, Ben. Ten. Act, upon the defendants alleging that the defendants were under raiyats and thereafter the plaintiff instituted the suit for declaration of his title to and for recovery of khas possession of the land of which the said defendants were in such possession. The plaintiff's case was that this particular plot of land originally stood in the name of one Daimali Mullick and appertained to the jote of one Porabaddi Mallick who held as a raiyat under the said landlord. The defendants' case, on the other hand, was that the land in suit did not appertain to the raiyati holding of the said Porabaddi Mallick, but that, as a matter of fact, it was land which had been purchased by the wife of the said Porabaddi Mallick and from her the land descended to her son Deratulla, from whom it was transferred by a gift to one Ohidannessa Bibi under whom the defendants held not as an under-raiyat but as an occupancy raiyat. The defendants' case further was that their landlords were tenure-holders having a lakheraj right to the land.

The grounds that have been urged in support of this appeal are four in number. The first ground relates to the question of admissibility of a chitta and a khatian of the year 1261 which was proved in evidence on behalf of the plaintiff and upon which reliance has been placed by both the Courts below for the purpose of holding that the land in suit appertained to the jote of Porabaddi Mallick and that Porabaddi Mallick, as well as the tenant, in execution of a decree for rent as against whom the property was sold and purchased by the plaintiff, was a raiyat and not a tenure-holder. So far as this question is concerned it would appear that the chitta and the khatian are dated 1261 and it is not disputed that the person who made the entries in these documents relating to the land in question is now dead. If that be the position the documents, in my opinion, come clearly within the provisions of S. 32, sub-S. (2), Evidence Act. The

amin who made the measurement and prepared the khatian and chitta must be taken to have made the entries in these documents in the ordinary course of his business or in the discharge of his professional duties within the meaning of that sub-section. It is unnecessary in this view of the matter to consider whether these documents are or are not also relevant under the provisions of S. 13, Evidence Act.

The next ground that has been urged is to the effect that the onus of proof was wrongly placed upon the defendants. Reading the judgment of the learned Subordinate Judge as a whole upon the question of the status of the defendants it does not seem to me that this contention is wellfounded. As a matter of fact the learned Subordinate Judge appears to have taken the whole of the evidence that there is on the record and upon that evidence has come to the conclusion that the disputed land was held by Daimali Mallick, the predecessor of the defendants, as a raiyat. In the circumstances I do not think any question of onus really arose in the case. The learned Subordinate Judge has observed that the khatian and the chitta to which reference has already been made prove that the disputed land was held by Daimali as a raiyat. He has then referred to the fact that the area of the land being only 30 bighas, no presumption arose to the effect that Daimali was a tenure-holder; and, being of opinion that upon the whole of the evidence the fact that Daimali was only a raiyat has been proved, he has recorded a finding to that effect. It may be stated in this connexion that the case which the defendants put forward, namely that they had been paying bhag paddy to Mohammad Sheik on the footing of their case to the effect that it was Bijari Bibi and not her husband Porabaddi Mallick who was the holder of these lands, has not been believed by the learned Subordinate Judge.

The third contention is to the effect that the notice that was served under the provisions of S. 167, Ben. Ten. Act, was not a valid notice. It has been urged in this connexion that the word "purchaser," as used in that section, means only a certificated purchaser and in support of this position reliance has been placed upon an observation which

is to be found in the judgment of the Maclean, C. J., in the case of *Jogesh Chunder v. Rohini Kumar* (1). The passage runs in these words:

We are not in a position to decide that point (that is the question of sufficiency of notice under S. 167, Ben. Ten. Act.) upon the materials before us. If the sale certificate were made out in the name of the benamidar, then, in my view, he would be the proper person, as the certificated purchaser to give the notice under the Act.

The passage in question, no doubt, supports the appellant's contention. But it does not appear what the actual facts of the case were in connexion with which these observations were made. As far as can be made out, the judgment being of a date prior to those cases in which it has been held that a benamidar is competent to sue and is not precluded from obtaining those reliefs which really belonged to the real owner, the contention that must have been urged in the case in which that judgment was passed was that a benamidar had no right to give notice under S. 167, Ben. Ten. Act. It was apparently that contention that was dealt with by the aforesaid observation. It cannot be disputed that the person for whose benefit such notice is to be given is the real purchaser and I see no reason to limit the meaning of the words "purchaser to the certificated purchaser" at an execution sale. It may be observed further that it has been held in a series of decisions that the word "purchaser" includes assignees or transferees from a certificated purchaser. If that be so I do not see how a real owner for whom the benamidar merely holds the property in trust can be precluded from giving such notice when, as a matter of fact, he is perfectly entitled to enforce his right in a Court of law as against a third party.

Lastly it has been urged that the suit is not maintainable in view of the provisions of S. 66, sub-S. (1), Civil P. C. This objection, in my opinion, is not wellfounded, because the whole object of that sub-section is to prevent a real owner from relying on his secret title as against a person claiming title under a certificated purchaser. The principle of this section cannot be invoked in a case where the real owner seeks for a declaration, his real title against some

(1) [1916] 21 C. L. J. 65=34 I. C. 215.

450 Calcutta CORPORATION OF CALCUTTA v. JALAJBASINI DEBI (Cuming, J.) 1928

one who does not claim under a certificated purchaser and asks for a remedy which the law entitles him to. I do not see how the provisions of this section can be a bar to the maintainability of this suit. In this view of the matter, I am of opinion that all the grounds urged in this appeal on behalf of the appellants fail and the appeal should be dismissed with costs.

Cuming, J.—I agree.

N.K.

Appeal dismissed.

* A. I. R. 1928 Calcutta 450

RANKIN, C. J., AND C. C. GHOSE AND
BUCKLAND, JJ.

Corporation of Calcutta—Appellant.

v.

Jalajbasini Debi—Respondent.

Letter Patent Appeal No. 1 of 1927, Decided on 13th December 1927, from order of Cuming, J., D/- 4th July 1927.

(a) *Calcutta Municipal Act* (3 of 1923), S. 140—*Land Acquisition Act* (1894), S. 12.

Cuming, J.—There is no analogy between the Land Acquisition Collector making an award and an executive officer of the Municipality passing orders under S. 140 as to assessment: 32 Cal. 605, *Ref.*

* (b) *Calcutta Municipal Act* (3 of 1923), S. 142 (3)—*Appeal to High Court*—*Question of fact can be gone into*—*Civil P. C.*, S. 100.

An appeal to the High Court under S. 142 (3) is not a second appeal as contemplated by S. 100, *Civil P. C.*, and the appeal is not restricted to questions of law only (**Cuming, J.**, *contra*): *A. I. R.* 1927 Cal. 802, *Ref.*

[P 451 C 1, 2, P 452 C 2]

(c) *Calcutta Municipal Act* (1923), S. 131—*Onus is not on Corporation to prove increase in value of land* (**Cuming, J.**, *contra*): *A. I. R.* 1927 Cal. 802, *Ref.*

The onus is not on the Corporation, where the Corporation seek to increase the assessee's assessment, to show that the value of the land has increased; it is for the assessee to show that it has not increased. [P 451 C 2, P 452 C 1]

(d) *Tax—Validity.*

Cuming, J.—An assessment based on no material whatever cannot be considered a valid assessment. [P 451 C 1]

(e) *Calcutta Municipal Act* (1923), S. 141—*Assessee not adducing evidence against assessment—Assessment should be confirmed.*

The appeal which is given to the Court of Small Causes by the Calcutta Municipal Act is really a proceeding by which an administrative act is challenged before a judicial tribunal. It is intended that it should not be treated as an ordinary appeal from a civil Court, but is an occasion on which the party complaining must have an opportunity of adducing evidence if he wants, to show that the decision of which he

complains is wrong. If, therefore, no evidence at all is adduced to show that the Chief Executive Officers' determination is wrong, it is the Judge's duty to dismiss the appeal and confirm the assessment. [P 455 C 1]

Brojo Lal Chakravarti and *Krishna Lal Banerjee*—for Appellant.

Gunada Charan Sen, *Monmatha Nath Roy (Jr.)* and *Prokash Chandra Majumdar*—for Respondent.

(The judgments against which Letters Patent appeal was filed are as follows:)

Cuming, J.—The facts of the case out of which this appeal has arisen are these: The respondent Srimati Jalaja Bashini Devi is the owner of premises No. 125, Harish Mukerjee Road. The Corporation of Calcutta in March 1924 assessed the land with the premises thereon to consolidated taxes. In arriving at the assessment the Chief Executive Officer valued the land at Rs. 2,750 a cotta and the house on it at Rs. 20,365. Under S. 141, Calcutta Municipal Act, the assessee appealed to the Court of Small Causes at Sealdah. She objected both to the value of the house and value of the land. The learned Judge of the Small Cause Court held the value of the building was Rs. 18,123 and the value of the land was Rs. 2,200. Against this decision the Calcutta Corporation have appealed to this Court under S. 142 (3), Calcutta Municipal Act.

There is also a cross-objection by the respondent. Her contention is that the burden of proof has wrongly been placed on her and that it was for the Corporation to prove that the present value of the land was more than it was in 1917 when she purchased the property. She also contended that Rs 350, the price of the electric fittings, should not be included. The appellant contends first of all that the learned Small Cause Court Judge has wrongly placed on him the burden of proving what was the value of the land at the time of the assessment in March 1924, Secondly that the Judge has come to a wrong finding of fact on the evidence as to what the value should be of the land.

A preliminary point has been discussed at some length as to what are the powers of the Court in dealing with this appeal. The appellant would seem to contend that it is open to us to go into facts. His contention would seem to be that this is not a second appeal as con-

templated by the Civil Procedure Code and that S. 100 and S. 101, Civil P. C., have no application. It will appear that when the Corporation desire to make an assessment or re-assessment they proceed under S. 131 (1). The valuation and assessment are apparently made by the Executive Officer.

A notice is given to the assessee to object if he so desires. The Executive Officer must hear and decide the objection and pass orders under S. 140, Calcutta Municipal Act. Against this order an appeal lies to the Judge of the Small Cause Court and against his decision a further appeal to the High Court.

In these circumstances what is the nature of the proceedings before the Executive Officer. If the order is an executive order pure and simple how can there be an appeal to the Small Cause Court Judge, a Court of law, with a further appeal to the High Court.

It has been suggested that as it has been held that the Land Acquisition Deputy Collector is not a Court, so it must be held that the Executive Officer making an assessment is not a Court.

There is no analogy between the two. Anyone dissatisfied with the award of the Land Acquisition Deputy Collector may ask the Collector to refer the matter to the Judge and on such a reference the Judge hears and decides the matter.

But this is not an appeal against the order of the Deputy Collector and hence there is no analogy between the two cases. In the case of *Ezra v. Secy. of State* (1), it was held that the Land Acquisition Deputy Collector was not a Court because the decision was merely a decision as to what sum shall be tendered to the owner of the land and was binding only on the Collector, and if a judicial determination was required the owner could obtain it by requiring the matter to be referred by the Collector to the Court.

In the present case, unless the valuation is objected to, it is final. S. 141 also provides that part 2 and part 3, Lim. Act, shall apply to every appeal presented under the section, and sub-S. (4) provides that no appeal shall be admitted unless an objection has been determined under S. 140. It seems difficult to escape from the conclusion that

the appeal to this Court must be regarded as a second appeal and that the appeal does not lie on fact but on law only. It has been suggested that the order of the Executive Officer assessing the premises was an execution order. It might be that the first order of the Executive Officer by which he made the valuation and assessed the tax to be paid was an executive order but it is not against this order that an appeal lies. It is clear no appeal lies against that order. See S. 141 (4).

The appeal lies against his order made under S. 140 which he makes after hearing objection. It may seem perhaps somewhat remarkable that the same person who made the assessment should determine the objection to the assessment. It might well be argued that he is the defendant and also the Judge in the matter. Possibly, so far as the objection is concerned, the objector must be considered as one party and the Corporation the other. But it seems to me that if there is an appeal against the order to the Judge of the Small Cause Court and second appeal to the High Court the order must be considered as a judicial order. I cannot conceive a purely executive order being the subject of an appeal first to the Small Cause Court Judge and then to the High Court.

Both parties have argued that the burden of proof has wrongly been thrown on them by the Judge. The Corporation urges that it is for the assessee to show that the assessment made is incorrect, in other words to prove what the present value of the land is. The assessee on the other hand contends that it is for the Corporation who desire to raise the assessment to show what the present value of the land is. The Judge has found that there is no evidence whatever to prove what the present market value of the land is.

There is only evidence as to the value of land in the locality in 1921-22 at a time when the land boom was on. Admittedly since then the value of land has fallen. He goes on to state that these prices cannot be accepted for the purpose of assessment now. He concluded by saying:

Considering the position of the disputed land and also the fact that the price of land has considerably fallen I assess the value of the land at Rs. 2,200 a kata.

The figure is a obviously purely arbitrary one arrived at on no data whatever

(1) [1905] 32 Cal. 605=9 C. W. N. 454=1 C. L. J. 227.

the Judge having himself stated that there is no evidence on the point. There being no evidence admittedly as to what the present value is, the question of onus is all important.

If the onus is on the Corporation they have absolutely failed and if on the assessee she has equally failed. The onus I think is obviously on the Corporation. The Corporation seek to increase the assessee's assessment. It is for them to show that the value of the land has increased and not for the assessee to show it has not increased.

It cannot for one moment be open to the corporation to fix any arbitrary valuation that they please as has clearly been done in this case, for there is admittedly no evidence whatever to show what the present value of the land is, and then say to the assessee that he has to prove it as something different. Even if there were a presumption that the assessment was correct and the burden lay on the assessee to prove it was incorrect she has clearly done so, for she has proved that the corporation had no material whatever on which they could have based the present assessment. An assessment based on no material whatever cannot be considered as a valid assessment. I would, therefore, dismiss the appeal of the corporation and allow the cross-objection of the assessee as to the value of the land, the land to be valued for the purpose of assessment at Rs. 1,200 per cotta. On both the appeal and cross-objection my learned brother has taken an entirely different view. He would allow the appeal and dismiss the cross-objection.

There is a further objection by the assessee which relates to the value of the premises for the purpose of assessment. The Judge for some reason or other has included in the valuation of the buildings Rs. 350 for the electric light installation. The corporation never claimed to include it and it is perhaps difficult to understand why the Judge should give the corporation a relief they never asked for. The assessee is entitled to have Rs. 350 deducted.

The result is that both the appeal and the cross-objection as to the value of the land must fail and are dismissed with costs. The cross-objection of the assessee regarding the valuation of the building is allowed with costs. We as-

sess the hearing-fee in the appeal and also in the cross-objection in so far as it is dismissed and in so far as it is allowed at one gold mohur in each.

Graham, J.—(After stating facts the judgment proceeded) The learned vakil for the appellant before us stated at the outset that the appeal was confined to the value of the land, and he contended that the burden of proof being upon the respondent, who had failed to adduce any evidence as to the market value of the land at the time of assessment, the Court below ought not to have reduced the assessment of the value of the land.

There are two preliminary matters which it is I think necessary to determine before dealing with the appeal on its merits: firstly, the question of the burden of proof just referred to above; and secondly, the question of the form of the appeal, and whether it is a first appeal or second appeal. I will deal first with the second point. A decision on this point would ordinarily be necessary in order to ascertain what our powers are in disposing of the appeal, since if it is a first appeal, we can go into the evidence, whereas if it is a second appeal, we cannot disturb the findings of fact. It happens, however, that in the particular circumstances of this case the question involved is one of merely academic interest because neither party adduced the necessary evidence either affirmative or in rebuttal, and, that being so, there is no evidence for us to consider, even if the appeal be treated as a first appeal. It follows that the decision of the appeal will turn entirely upon the question of onus. Incidentally I may say that in my judgment the appeal is in proper form and is a first appeal against an original order. It can not, I think, come within the purview S. 100, Civil P. C., since the appeal before the Small Cause Court is not an appeal against a decree, but is rather in the nature of an appeal against an executive order. Speaking for myself I do not see how the Executive Officer or Deputy Executive officer can be regarded as a judicial officer merely because at the second stage of the assessment proceedings he is required to decide the objection after hearing the assessee.

With regard to the first point, question of burden of proof: my learned brother, while recognizing that it is all im-

portant, has come to the conclusion that the onus was upon the corporation, and in that view of the matter holds that the appeal should be dismissed. I have the misfortune to differ from him. That the question of onus is important I entirely agree. Indeed, having regard to the nature of the evidence adduced in the Court below, or rather the absence of any such evidence as remarked above, the determination of the appeal really hinges, as I have said, upon this question. If the onus was on the corporation, the appeal must succeed. If it was upon the assessee, the appeal must fail. Now what is the right answer to this question? Was it incumbent upon the corporation to prove in the Small Cause Court that the assessment was right, or was it the duty of the assessee, the appellant, to establish that it was wrong? The rule of onus stated in general terms is that the burden of proof is upon the party who would fail if no evidence is adduced by either side. If this test be applied the burden was on the assessee, since, if she failed to adduce any evidence, the assessment must stand. In this connexion reference may be made to certain sections of the Calcutta Municipal Act in order to ascertain the scheme and purpose of the Act. These sections, it seems to me, throw some light upon the question of onus. S. 131 provides for assessment of annual value and duration of the assessment. S. 138 requires notice to be issued when valuation is first made, or increased and objection to such valuation is provided for in the following section. Under S. 140 all such objections are to be investigated and determined by the Executive Officer or a Deputy Executive officer, and in S. 141 an appeal is given against the order of that officer to the Small Cause Court. Under S. 142, there is a further appeal to the High Court. It is important to note that under sub-S. (1), S. 142 every valuation made by the Executive Officer under S. 131 is final, subject to the provisions of Ss. 139, 140 and 141. And under sub-S. (2) of this section similarly every order passed by the Executive Officer, or Deputy executive Officer, under S. 140 is subject to the provisions of S. 141 final.

Thus it seems to be clear that the orders made by the executive officers of the corporation at the two first stages of the proceedings are according to the

scheme of the Act to be treated as final subject to the right of appeal provided in the Act whereby those orders may, if so desired, be subject to the test of the judicial determination.

My learned brother has observed that it cannot for one moment be open to the corporation to fix any arbitrary valuation that they please, but I do not think it ought to be assumed that officers holding responsible positions will act in an arbitrary manner or abuse their powers. And, even if they do so, a remedy is provided in the judicial proceedings in the Small Cause Court where the assessee has the right and opportunity to prove that the assessment is wrong, and there is in addition the further appeal to this Court.

My learned brother has observed that, even if the burden lay on the assessee, she has discharged that onus, since she has shown that the corporation had no materials whatever on which they could have based the present assessment. Speaking for myself I do not understand how the assessee has proved that there were no materials. There could not be any such materials before the Small Cause Court which had previously been before the Executive Officer because there was not at the former stage any judicial proceeding and, therefore, no record. The proceedings became for the first time judicial proceedings in the Small Cause Court, and it was at that stage that it was incumbent upon the assessee qua plaintiff to place before the Court the necessary evidence to establish that the assessment was wrong.

For the reasons I have given, I regret, that I am unable to agree with the conclusion arrived at by my learned brother. In my judgment the appeal succeeds, and should be allowed with costs in both Courts.

In the cross-objection two points are involved: firstly as to the value of the land, and whether it should be Rs. 1,200 as claimed by the assessee or Rs. 2,760 as fixed by the Executive Officer; and secondly, with regard to the sum of Rs. 350 for electrical installation included by the Judge in the Court below in the valuation. As to the first point I have already expressed my opinion that the onus was on the assessee and that she has failed. As to the second point: it does not appear to be clear whether

the electric installation had been made at the date of assessment or not and the Corporation did not at that time make any claim on that account. That being so I am of opinion that this item should not have been included by the learned Judge and to this extent only I would allow the cross-objection with costs in proportion.

(A Letters Patent appeal, No. 1 of 1927 was filed against the judgment: The judgment therein was as follows:)

Rankin, C. J.—This is an appeal under the Letters Patent from a judgment pronounced by my learned brother Mr. Justice Cuming in a case in which he differed from Mr. Justice Graham. The appeal to the High Court was an appeal brought by the Corporation of Calcutta and was directed against a decree or order of the Judge of the Court of Small Causes of Sealdah dated 6th August 1925. That order was made in what it is apparently a custom of that Court to call a municipal appeal.

It seems that there was a certain piece of land which in 1917 was bought by the present appellant from the Corporation for the price of Rs. 1,200 per cotta. It seems that up till 1921 the annual value for the land was taken for the purpose of assessment at Rs. 223, but this was increased in February 1921 to Rs. 510. In March 1924 the property was being re-assessed by reason of the fact that a new building had been put upon the land and it was necessary to value the land and the building together. The Chief Executive Officer of the Calcutta Corporation who had in the first instance the duty of putting a figure on the value of the land put a value of Rs. 730 and to that the assessee objected in the manner prescribed by the Calcutta Municipal Act. Thereupon it became the duty of the Chief Executive Officer to deal with her objection and, so far as the present question is concerned, he overruled her objection. If the matter had stood there then the annual value of Rs. 730 would have been a final determination, but the lady took an appeal as is provided by S. 141, Calcutta Municipal Act of 1923 to the Court of Small Causes. That appeal was brought on 2nd July 1924 and it was heard and decided in August 1925.

The evidence (so far as it matters) adduced before the learned Small Cause

Court Judge was the evidence of Babu Jodu Nath Majumdar, the lady's husband. So far as it matters, the evidence adduced by the Corporation was that of their Sub-Assessor, Babu Rajendra Lal Dutt. It is quite true that no expert evidence giving an expert opinion in favour of a particular figure was adduced on the part of the lady. It is equally true that the person who was responsible for fixing the value of the land, namely, the Corporation Assessor, was not called on their behalf though the Sub-Assessor was called who had taken a part in valuing the new building.

Now, when one looks at the evidence given by the lady's husband one finds that it is perfectly sensible and relevant evidence going to the value of the property. He states the date of the purchase and the price Rs. 1,200 per cottah. He states the annual valuation in past years. He states what the building is that has been put upon the property. He points out that from 1917 onwards till 1920 there was a land boom, but he says from his own knowledge that since 1921 the price has gone down. He then describes the particular road and he explains that the premises are at present rented and what rents are obtained therefrom. He points out that this particular part of Harish Mukherji Road is not the most valuable part and is not so valuable as the northern portion near to the Calcutta maidan. He says that it has huts on its eastern boundary and has got a municipal night soil depot and mehtars' quarters not very far away. He says that in these circumstances the most that by way of annual value should be put upon the land is Rs. 1,500 per cottah, the land having been bought in 1917 at Rs. 1,200 per cottah. On that he is cross-examined and a particular transaction is put to him of a vacant plot of land enclosed by pucca walls at 64, Harish Mukherji Road. That is very much further to the north and presumably therefore is a much more valuable site. That apparently, although it was 17 cottas, fetched a price of Rs. 2,573 per cotta in April 1924, which was the time with which we are concerned.

Further evidence is given, and when the Corporation witness is put into the box he gives evidence of the sale of premises No. 192, Harish Mukherji Road, in September 1922 at Rs. 3,000 per cotta.

and of other sales in 1921 and 1922 of more valuable parts of that road at prices at and above Rs. 3,000 per cottah.

In these circumstances the learned Judge dealt with this matter and considered the materials. He had to arrive at a finding of fact like a jury and he did not have the assistance of any expert surveyor. He came to the conclusion that he would assess the value of the land at Rs. 2,200 per cottah.

The only observation that has to be made upon his judgment is that, when he was dealing with the question of the value of the building, apparently by mistake, a sum of Rs. 350 was added which he had no right to add. This refers to the cost of electric installation; and, by consent at the hearing before us, it has been agreed to treat that Rs. 350 as wrongly included by the Small Cause Court Judge. Except as to that small point of Rs. 350 with the map of this locality before me and the evidence before me which was before the learned Small Cause Court Judge, I ask myself what is there wrong in his finding of Rs. 2,200 per cottah as a fair value of this land? I am of opinion that there is nothing wrong in that finding and that it is a fair and reasonable finding arrived at on proper materials by the learned Judge who was no doubt competent to give an opinion on that point.

That being the position, the rest of this case appears to me to be a comedy of errors, because the Corporation brought their appeal and the contention apparently before this Court, when that appeal came on for hearing, was that the learned Judge had proceeded upon no evidence at all and that there was no evidence on either side. Accordingly much interesting discussion arose as to the party upon whom the burden of proof lay in an appeal of this character from the determination of an objection to an assessment by the Chief Executive Officer to the Judge of the Court of Small Causes. That was not the only point of argument, but another question was argued as to whether an appeal to this Court from the Court of Small Causes was a special appeal, that is to say, a second appeal of the limited character defined in S. 100, Civil P. C.

Mr. Justice Cuming held that the burden of proof was on the Corporation. He further held that the appeal to the

High Court was not one in which it was open to the High Court to discuss questions other than mere questions of law. In my judgment, the learned Judge's decision on both of these points was wrong and, so far as both of these points are covered by the judgment of a Division Bench in the case of the *Corporation of Calcutta v. Keamuddin* (2), I agree with that decision of Mr. Justice Page and Mr. Justice Graham.

The view taken by Mr. Justice Graham, who also proceeded upon the footing that there was no evidence before the learned Judge, was that in the absence of evidence it was the learned Judge's duty to dismiss the appeal and confirm the assessment.

I agree with Mr. Justice Graham that if it be really true that there was no evidence before the Judge of the Court of Small Causes it would follow that this particular kind of appeal would fail. The appeal which is given to the Court of Small Causes by the Calcutta Municipal Act is really a proceeding by which an administrative act is challenged before a judicial tribunal. It is quite clear that it is intended that it should not be treated as an ordinary appeal from a civil Court, but is an occasion on which the party complaining must have an opportunity of adducing evidence if he wants to show that the decision of which he complains is wrong. If, therefore, it had really been the case that no evidence at all, to show that the Chief Executive Officer's determination was wrong, had been laid before the Court of Small Causes I should have agreed with the view of Mr. Justice Graham. In my judgment that is not the position in the present case. The moment it was shown what price for this property had been paid in 1917, the moment it was shown what had been considered to be a fair assessment of the annual value in past years, the moment evidence was given as to the character of the site and the price paid for other properties and so on, materials were laid before the learned Judge of the Court of Small Causes on which he was entitled, if he thought fit, to put a figure on the value of this property.

In my judgment, the result of this appeal is that the appeal of the Corporation cannot succeed and it must be dis-

(2) A. I. R. 1927 Cal. 802=55 Cal. 228.

missed with costs; but, in my judgment, the reasons given by Mr. Justice Cuming in favour of this conclusion were not sound. It seems to me that this matter was properly disposed of in August 1925 when the Small Cause Court came to its finding. The result is that this Letters Patent appeal is dismissed with costs and the Corporation are also to pay the costs of the assessee of the hearing before Mr Justice Cuming and Mr. Justice Graham. We assess the hearing-fee in this Court at five gold mohurs. We do not say anything on the cross-objection.

C C. Ghose, J.—I agree.

Buckland, J.—I agree.

D D

Appeal dismissed.

* A. I. R. 1928 Calcutta 456

**RANKIN, C. J. AND C.C. GHOSE AND
MUKERJI, JJ.**

In the matter of Commercial Properties, Ltd.

Reference under S 66 (2), Income-tax Act 11, 1922, Decided on 9th January 1928.

(a) *Income-tax Act, S. 66 (2)—Findings of fact of the Commissioner are binding.*

It is the function of the Commissioner of Income-tax to find the facts and it is for the High Court to accept his findings on all matters of mere fact. [P 456 C 1]

(b) *Income-tax Act, S. 9—Assessee a company doing business to acquire land, build houses and let premises to tenants—Assessee are liable to income-tax under S. 9.*

Even where the assessee is a registered company of which the sole object is to acquire land, build houses and let premises to tenants and its sole assets consist of certain properties and its sole business is the management and collection of rents from the said properties, the income derived by the assessee from the "property" cannot be regarded as income derived from business, and, therefore, the assessee are to be assessed under S. 9 of the Act. [P 457 C 2]

Rankin, C. J.—This is a case stated by the Commissioner of Income-tax, Bengal, and the question for decision is whether or not the assessee are liable to income-tax under S. 9, Income-tax Act, 1922 or only under S. 10 of that Act.

It is the function of the Commissioner to find the facts and it is for this Court to accept his findings on all matters of mere fact.

The facts stated are that the assessee, The Commercial Properties, Limited, is a

registered company of which the sole object is to acquire land, build houses and let premises to tenants in Calcutta or elsewhere in India. The sole assets of the assessee consist of three properties and the sole business of the assessee is the management, and collection of rents from the said properties.

The opinion of the Commissioner, of income-tax is that

even if the assessee are held to be a business, they must be assessed in respect of the property owned by them according to the special provisions relating to property.

It will be observed that S. 6, Income-tax Act states that

the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely.

Then comes six heads of which the third is "property" and the fourth is "business." By S. 9

the tax shall be payable by an assessee under the head "property" in respect of the bona fide annual value of property consisting of any building or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business;

and it goes on to lay down the method in which the quantum of the tax to be computed. It points out, for example, that where the property is in the occupation of the owner, or where it is let to a tenant and the owner has undertaken to bear the cost of repairs, then one-sixth is to be the deduction for repairs. In like manner, a deduction is to be allowed for insurance. Questions of mortgage interest and ground-rent are covered and there are specific provisions as regards allowance to be made for parts of the property being unoccupied from time to time. Again, it is to be noted that the "annual value" is to be deemed to be the sum for which the property might reasonably be expected to let from year to year so that this class of property is not to be taxed on the basis of de facto rent alone, and it is further provided that where the property is in the occupation of the owner for the purposes of his own residence, the annual value is not to be deemed to be more than 10 per cent of the total income of the owner. I mention these matters to show that special computations which arise in the case of house property are dealt with under S. 9 which is a particular, detailed and special scheme for ensuring that any property

which comes within that section shall be taxed in a particular way.

Section 10 which dealt with business—"profits or gains of any business carried on by him"—is also provided with certain rules as to allowances to be made before computing profits. These rules, in so far as they refer to house property, refer to "the premises in which such business is carried on," but with regard to insurance premiums, land revenue rates and taxes refer to buildings and premises "used for the purposes of the business."

In the present case we have a company which owns three estates. It does not appear that any part of that property is outside the definition given in S. 9. It is found to let the houses from time to time, to see to the payment of rents and (doubtless) the doing of repairs. If that is carrying on a business, then this company carried on a business in the sense in which every landlord or owner of this type of property must necessarily carry on business. We know from S. 9 itself that it is applicable to property which is let out to tenants and it has been argued before us that when one looks at the case-law one finds that, at all events, where the owner is a company and the objects of the company include the object of owning and managing house property then the income that is derived from the tenants is an income that is derived from business. It is in that way that it is contended that these assesses should be charged under S. 10. It is said that if the question were to arise under S. 10 these assesses would not be liable to pay income-tax at all so that no income-tax would be recovered in respect of any of these estates, the reason being that, in point of fact, they have traded so unsuccessfully during the year in question that they have actually made a loss. This is certainly a very important question, from the point of view of the treasury because if this argument be right then it will depend to some extent upon the success of the management whether or not the public treasury should derive any income-tax in respect of house property of this character. It is obvious, too, that if we are to depart in such a case as this from the careful provisions contained in S. 9 for purposes of computing the correct figure in the case of house property on which tax is to be levied we will get under S. 10 all sorts of

complicated questions special to house property upon which the law will be absolutely at large. In my judgment the words of S. 6 and S. 9 and S. 10 must be read so as to give some effect to the contrast that is there made between income, profits and gains from "property" and from "business" and I entirely refuse my assent to the proposition that because it happens that the owner of a property is a company which has been incorporated for the purpose of owning such property, therefore, the income derived from "property" must be regarded as income derived from "business." In my judgment, income derived from "property" is a more specific category applicable to the present case.

The cases to which we have been referred are cases in England with, I think, one exception which is a case from Burma. The case in Burma *In re Kaladan Suratee Bazar Co Ltd.* (1) arose out of the Excess Profits Duty Act, 1919. The Excess Profits Duty Act laid a special tax upon the profits of business, and although it contained a special protection for the earnings of a man in his profession there was no special provision applicable to the case of an owner of property. There was a company called the Kaladan Suratee Bazar Co. Ltd., which owned certain plots of land and stalls at Moulmein at a bazar there. Its income was derived from the rents of houses and bazar stalls belonging to it, and the financial Commissioner not disputing that it was subject to income-tax under S. 9 maintained that it was liable to excess profits duty because it was a "business" within the meaning of the Excess Profits Duty Act. The decision of the Court was that these two Acts were to be interpreted in the same way. It was pointed out that a person or a company drawing income from house property was clearly not contemplated in the Indian Income-tax Act, as carrying on a business but was treated as a person who derived income from the property; and in the same way, when the question of excess profits duty had to be decided the Court determined that the company was not carrying on a business within the meaning of that Act. It was pointed out that if the mere letting of stalls was carrying on a business within the meaning of that Act, then every per-

(1) [1919] 56 I. C. 914.

son who had invested his capital in house property was liable to excess profits duty when his income rose above the minimum limit. It was further said that a man who had invested his capital in house property and who kept a rent office and staff of rent collectors, clerks, etc., for the purpose of letting out his houses and collecting the rents was not carrying on a business. He was merely taking the ordinary steps necessary for enjoying the income from his property. That, therefore, is the Indian case which bears upon this question and it is not in favour of the assesseees.

Of the English cases to which we have been referred, the first is the case of *Commissioners of Inland Revenue v. Sangster* (2). That was a decision of Mr. Justice Rowlatt. It was the case of a man who was an inventor and who derived considerable sums of money from royalties paid to him by companies of which he was a manager. He had sold one invention it is true, but that was a good long time ago, and in these circumstances it was contended that he carried on the business of an inventor and was, therefore, liable under the provisions of the Finance Act of 1915 to excess profits duty. That argument was rejected Mr Justice Rowlatt saying that he was not carrying on a business because he was an owner of royalties and that he was not carrying on a business because he was a shareholder in a certain company.

Much reliance has been placed, however, upon certain cases of which the case of *Commissioners of Inland Revenue v. Korean Syndicate Ltd.* (3) is the chief. There, again, was a question not whether the company was liable to pay under Sch. A, Income-tax Act, or under Sch. D, but whether it was liable to excess profits duty as carrying on a trade or business at all. It was a very complicated case and I do not propose to set out the facts, but it is clear that the company was originally incorporated to get and work a concession in Korea, but ultimately it obtained a share and had an agreement with a co-sharer to do the actual working of the concession; a certain sum was to be paid to it under this agreement. The document, purported to be a lease and the sum

by the document was called a royalty; but, on a close examination of the particulars by the Master of the Rolls, Lord Sterndale, it was held that the company was carrying on in this particular way the business of obtaining a working concession for which it has been incorporated, that the document was not really a "lease," that the payments were not truly and strictly "royalties" and that, therefore, it was not entitled to say that it was outside the scope of the excess profits duty. Very similar are the decisions under the corporation profits tax imposed by S. 52, Finance Act of 1920. There tax was put prima facie upon every British company which carried on trade or business or anything of that kind. Cases arose on the border line, such as a case where a company having put up money to build an Indian railway and an Indian railway having been built by the Secretary of State and managed more or less successfully the company was now in the position of receiving under its agreement, certain payments and it was contended on the one hand that it was not carrying on a business at all. It has ultimately been decided by the House of Lords that if you look at the matter from the beginning as a whole the company was carrying on the business of financing this Indian railway and that although it had finished finding the finance and only had to receive what was due to it under the agreement it could not be said that it was no longer carrying on business.

In my judgment, these cases are not authorities to the effect that as between the "property" and the word "business" in S. 6, Income-tax Act, 1922, a case of this character is to be put under the word "business." It comes more directly and specifically under the word "property." In my judgment, the mere fact that the house owner is a company does not change the incidence of the tax in the way contended for. The income of the assessee is income derived from its ownership of buildings and their curtilages. To obtain such income a certain amount of management is always necessary but the Act does not regard such income as profits of management. To own houses one must buy or build them, but the Act does not regard such income as profits of investment. In my opinion the Income-tax Commissioner was right

(2) [1920] 1 K. B. 587.

(3) [1921] 3 K. B. 258.

and we should answer the question which he has put to us that the assessee are to be assessed under S. 9 of the Act. The assessee must pay the costs of the reference.

C. C. Ghose, J.—I agree.

Mukerji, J.—I agree.

N.K. *Reference answered.*

* A. I. R. 1928 Calcutta 459

SUHRAWARDY AND GRAHAM, JJ.

Sasi Mohan Saha and others—Defendants—Appellants.

v.

Hari Nath Saha—Plaintiff—Respondent.

Appeal No. 1017 of 1927, Decided on 16th February 1928.

* *Hindu Law—Partition — Principles of maintainability of a subsequent suit for partition of property left out in the previous suit for partition and still held in joint possession indicated.*

If, in the previous suit for partition, a property is left out either intentionally or by mistake and no objection is taken by any party to a partial partition and the properties in that suit are partitioned, a subsequent suit for partition of the property so left out and still held in joint possession is maintainable. Where properties included in the previous suit are left out of partition with the consent of parties who agree that they should remain in joint possession of the parties they may also be partitioned in a subsequent suit; but where the decree in the previous suit dealt with the properties included in that suit and directed that some of them should remain joint between the coparceners a subsequent suit for partition thereof cannot be maintained in view of the provisions of S. 11, Civil P. C.

[P 460 C 1 & 2]

Sarat Chandra Basak and Chandra Sekhar Sen—for Appellants.

Dwarkanath Chakrabarty, Gopal Chandra Das and Bhuban Mohan Saha—for Respondent.

Suhrawardy, J.—This appeal by the defendants arises out of a partition suit. The facts are that the plaintiff Hari Nath, Madhu Sudan and Radha Charan (father of the appellants Sasi Mohan and others) were three brothers living jointly in the common ancestral house. In 1916 the present plaintiff Harinath instituted a suit for partition of their family properties against his

two brothers. In that suit a Commissioner was appointed who proposed a partition of the homestead of the parties in a certain way. The matter came up before the Court which accepted the Commissioner's report with a slight modification with which we are not concerned at present. The decree passed in the suit was in effect that the suit be decreed the Commissioner's report and map form parts of the decree, and the allotments made by the Commissioner subject to the modification noted above be the basis of the partition.

By that decree the residential portion of the homestead was partitioned but some portions were left ejmali or joint among the parties. They consisted of pathways, tanks, cremation ground, ditches &c. . . &c. . . Subsequent to this suit the plaintiff purchased the share of Madhu Sudan and is now entitled to two-thirds of the homestead. The present suit is brought by him for partition of those portions of the homestead which were kept ejmali and joint in the former suit. Both the Courts have decreed the plaintiffs' suit. They have held that the properties in suit were excluded from partition in the previous suit and hence are liable to re-partition. The learned District Judge in the appellate Court remarked:

It should be noted that at the request of the parties the properties which form the subject-matter of the present appeal were excluded from partition and were subsequently held jointly.

It is proper that at this stage we should understand correctly the position in which the parties stand at the present moment. The expression used by the learned Judge that the properties in suit were excluded from partition in the previous suit should be understood as meaning that the properties in suit were by agreement of parties left out of partition and allowed to remain joint as before. Objection is taken by the learned advocate for the appellant to this remark on the ground that it is not correct to say that the properties which were left joint under the former decree were so left at the request of the parties. He has placed before us the report of the Commissioner in the previous suit and we find on a perusal of it that the objection taken to the remark that at the previous partition the parties agreed that some of the properties should remain joint is not without substance.

It has been broadly argued before us on behalf of the respondent that under the law if a property is left undivided in a suit and continues to be joint it can be subsequently partitioned. As a bare proposition of law no exception can be taken to it. Co-owners have the absolute right to divide all joint properties amongst themselves either privately or through the assistance of the Court. They can by agreement, if they are so minded, divide some of the properties either out of Court or through the assistance of the Court leaving some in joint possession. Such properties which are left out with the consent of the parties at the time of partition may undoubtedly be partitioned later. But the present case stands on a different footing. The question to be decided in this case is whether the decree in the previous suit operates as *res judicata* in the present case in so far as it bars the plaintiff's right to claim partition of the properties which were dealt with in that suit.

In support of the proposition that has been argued before us by the learned advocate for the respondent, reference has been made to several cases. They are not exactly in point but there are observations in them which certainly support the respondent's contention. In *Bhuban Mohini Dasi v. Kumudbala Dasi* (1) the lower Court passed a preliminary decree for partition and ordered that an enquiry be made as to the extent of the joint properties to which the preliminary decree for partition should apply. Objection was taken in that case that such a decree was not a proper decree. The learned Judges, after holding that a decree like the one passed in that suit ordering a partition of the joint properties in suit and directing a subsequent discovery of such joint properties could be passed in a partition suit, observed that properties left out of partition might also be subsequently partitioned and hence the decree which ordered partition and directed ascertainment of all the joint properties of the parties some of which were not included in the suit could not be bad in law. In *Jogendra Nath Rai v. Baladeo Das* (2), a mehal was partitioned among co-owners but a portion of it which was jungly was left out of parti-

tion by mistake. It was held that the portion of the mehal which was left out of partition by mistake could be re-partitioned. In *Bhawani Prasad Shaha v. Juggernath Shaha* (3) the assets of the joint properties were determined but certain properties which were ignored were not included in the amicable partition between the parties. The learned Judges held that if they were joint properties and were not included in the previous partition and if they still continued to be joint properties the plaintiff was entitled to a share therein. In the case of *Monsharam Chakravarty v. Ganesh Chakravarty* (4) there was a suit for partition of properties held jointly by the plaintiffs and the defendants. Subsequent to the decree in that suit there was another suit brought by a party to that suit for partition of some of the properties which were owned and possessed jointly and were not partitioned by the previous suit. These properties fell under two heads; some of them were properties which were included in the previous suit but were left undivided by the consent decree made therein and some others were not included in the previous suit for partition. In respect of the latter class of properties the defendants contended that the claim was barred by S. 43, Civil P. C. (O. 2 R. 2) of 1882. The trial Court overruled the objection but the lower appellate Court held that the suit was barred. The question that arose in that suit was whether one of two tenants-in-common who had sued for partition of a part of the properties jointly held by them was at liberty to bring a suit for partition of the remainder of the properties. This question was answered in the affirmative. In discussing the proper construction to be put on S. 43 and as to whether the cause of action alleged in the plaint in the subsequent suit was identical with the cause of action alleged in the former suit it was observed:

Where there has been an infringement of one right and one cause of action has arisen the plaintiff must make his whole claim, once for all, in one suit. Now, the right on the part of a tenant-in-common to have each field separately divided between himself and his co-tenant is one thing, his right to claim a partition of all the fields held by them as tenants-in-common is another thing, and the

(1) A. I. R. 1924 Cal. 467.

(2) [1907] 35 Cal. 961=6 C. L. J. 735=12 C. W. N. 127.

(3) [1909] 9 C. L. J. 133=3 I. C. 241=13 C. W. N. 309.

(4) [1913] 17 C. W. N. 521=16 I. C. 383.

circumstances that there has been an adjudication as to certain parcels of land on the footing of an alleged right of the former sort does not preclude a subsequent suit for partition of what is still jointly owned and held by the co-parceners.

Their Lordships held that the causes of action of the two suits were not so identical as to attract the operation of S. 43, Civil P. C. No observation was made by the Judges with reference to the first class of properties which were left undivided by the consent decree made in the previous suit. These are all the cases in support of the respondents' contention.

There is a case of the Bombay High Court in which the observation made by one of the Judges lends support to the appellants' contention. In *Shantaram Balkrishna v. Waman Gopal* (5), the Acting Chief Justice held that where a strip of land was reserved as common passage for the use of the co-parceners who were Hindus, the land so reserved could not be partitioned subsequently according to the Hindu law. Crump, J., agreed with the view of the Hindu law taken by the learned Acting Chief Justice, but also based his decision on the general principle that when there is no bona fide error or that the partition was of a partial nature the effect of the decree in the previous suit was to decide that the properties of which partition was subsequently sought should be reserved as a common passage; it would follow from the decree itself that that passage was not property such as could be the subject of a further partition.

On an examination of these authorities and on considerations of justice and equity and of the law applicable the following results seem to be evident:

(1) If in the previous suit for partition a property is left out either intentionally or by mistake and no objection is taken by party to a partial partition and the properties in that suit are partitioned a subsequent suit for partition of the property so left out and still held in joint possession is maintainable; (2) where properties included in the previous suit were left out of partition with the consent of parties who agreed that they should remain in joint possession of the parties they may also be partitioned in a subsequent suit; (3) where the decree in the previous suit dealt with the pro-

perties included in that suit and directed that some of them should remain joint between the coparceners a subsequent suit for partition thereof cannot be maintained in view of the provisions of S. 11, Civil P. C. If a party institutes a suit invoking the assistance of the Court to partition the properties which he has held jointly with the defendant and the Court in effecting the partition holds that a certain portion of the properties cannot conveniently be partitioned or are in their very nature indivisible and impartible a subsequent suit for partition of such properties will not lie as that might mean a reopening of the partition made in the previous suit.

Applying these deductions which I have made to the facts of the present case it appears that proper enquiry has not been made in the Courts below with regard to the nature of the properties left joint under the decree in the previous suit. It is possible that some of the properties were left joint with the consent of parties. These will be according to the view I have ventured to take on the question of law capable of partition. But such portions of the properties in suit which the Court in that suit held as incapable of partition or should not be partitioned having regard to the equitable enjoyment of the other portions of the properties cannot be partitioned in a subsequent suit. It is necessary therefore that an enquiry should be made by the Court as to the nature of the properties left joint in the previous suit. It should be ascertained what portions of the properties in suit were left joint in the former suit by the decision of the Court. The suit with reference to such portions must fail. If any portions were kept joint with the consent of the parties or under such circumstances as not to make them subject of the decision of the Court and were not rendered subject of the decision of the Court they may be partitioned subject to the decision of the Court as to what portion of them should in justice and equity be not partitioned.

In the result the decrees of the Courts below are set aside and the case remanded to the Court of first instance for decision according to law in view of the observations made above. Costs of this Court as well as of the Courts below will

abide the result and will be apportioned according to the extent of the success of the parties.

Graham, J.—I agree.

N K.

Case remanded.

A. I. R. 1928 Calcutta 462

RANKIN, C. J., AND MITTER, J.

Salam Chand Kannyaram—Appellant.

v.

Joogul Kissore Ramdeo—Respondent.

Appeal No. 82 of 1927, Decided on 25th August 1927, from original order in Suit No. 3280 of 1922.

Civil P. C., S. 136—It is doubtful whether a Judge on the original side has a right to direct a District Judge of another district within appellate jurisdiction to execute a warrant of arrest for contempt—Application to that effect refused—Proper course is to ask the original side Judge to ask for express injunction.

An order was made appointing a Receiver and directing that A do make over to the Receiver the books of account of their firm. A failed to comply with the order. So an order by the High Court on its original side was made committing A to the custody of the Superintendent of the Presidency Jail for contempt of Court for having failed to make over to the said Receiver the books of account, but the warrant directed to the Sheriff failed to take effect as A was not within the limits of the ordinary civil jurisdiction of the Court, but was residing and staying within a district within its appellate jurisdiction. An application was made to the Judge on the original side for an order either under S. 136 or in the exercise of its inherent jurisdiction directing the District Judge of that district to execute the said warrant, seize the person of the defendant wherever found within the said district and convey it to the Sheriff of Calcutta to be by him conveyed over to the Superintendent of the Presidency Jail, but the application was dismissed as the Judge had no jurisdiction to make such an order:

Held: that the High Court on its appellate side in a case arising in the mofussil would have the power to make such an order but whether on its original side the Judge would have any right to direct the District Judge of a district to execute a warrant of arrest for contempt is doubtful. The appointment of a Receiver, so far as regards parties bound by the order, operates against them as an injunction and under O. 39 interlocutory injunctions are enforced under a special power which is given to Courts in the mofussil as well as to the High Court notwithstanding that such Courts have no inherent right of arrest for contempt. Instead of appealing to the appellate side of the Court the applicants here would have been better advised to make a fresh application to the learned Judge on the original side asking for an injunction in express terms. In case of breach of that injunction an order could be made under O. 39, R. 2, directing the arrest

and detention of the offender. In that case there would be no difficulty in holding that S. 136, Civil P. C., would apply: 26 *Mad.* 120; *Ref.*

[P 463 C 1]

Rankin, C. J.—In this case an order was made on 26th August 1925 appointing a Receiver and directing that the defendant firm do make over to the Receiver the books of account of their firm for a certain year and the hatchittas standing in the benami name of one Ramdeo's brother Baij Nath Motilal and those executed by various debtors of the defendant firm in acknowledgment of their debts. It was further ordered that the defendant firm do make over to the Receiver or to this Court to be placed to the credit of the suit all moneys realized by them in contravention of a certain order. By another order made on 5th July 1926, it was ordered that the Official Receiver be appointed Receiver in the suit under the order already mentioned and that the said Ramdeo do stand committed to the custody of the Superintendent of the Presidency Jail for contempt of Court for having failed to make over to the said Receiver the hatchittas mentioned in para. 22 of the said petition and that a warrant do issue directed to the Sheriff of Calcutta and to the Superintendent of the Presidency Jail commanding the Sheriff to arrest the said Ramdeo wherever he may be found within the local limits of the jurisdiction of this Court and to convey him to the said jail.

It appears that Ramdeo was not within the limits of the ordinary civil jurisdiction of the Court but was residing and staying within the District of Nadia in this Province. Accordingly the warrant directed to the Sheriff failed to take effect. In consequence of this the application which is now before us was launched on 31st March 1927, and it asks the learned Judge on the original side for an order directing the District Judge of Nadia to execute the said warrant, seize the person of the defendant wherever found within the said district and convey it to the Sheriff of Calcutta to be by him conveyed over to the Superintendent of the Presidency Jail.

The learned Judge, Mr. Justice Gregory dismissed this application not being satisfied that he had any jurisdiction to make such an order. It would appear from the minutes of the proceedings before

him that S. 136, Civil P. C., was relied upon by the applicants and that the applicants also claimed to be entitled to the exercise of the inherent powers of the Court and also to powers under S. 151 of the Code. S. 36, Civil P. C., was also referred to.

Mr. S. N. Banerji has argued upon this appeal that Ss. 36 and 136 must between them cover this case.* It is necessary therefore to observe that any order for arrest for contempt of Court committed by breach of an injunction or by defiance of the Court's Receiver may be regarded in the High Court in different ways. In so far as the order is made not under the Code but as an order for contempt of a Court of record that is one thing. In so far as the order is made under provision of the Code that is another thing. Viewed merely as an order in the exercise of the Court's inherent jurisdiction to punish for contempt I am not of opinion that it is made out that any such order as is here asked for can be made by this Court. There can be no doubt, as it seems to me, that for the purposes of execution of decrees and orders the ordinary original jurisdiction is confined within the local limits of Calcutta. The question of the Court's power derived from the old Supreme Court to arrest for contempt of Court a person in the mofussil have not been argued before us and I make no pronouncement with regard to them. There can be no doubt that this Court on its appellate side in a case arising in the mofussil would have the power to make such an order as is here asked for. That on its original side the Judge would have any right to direct the District Judge of Nadia to execute a warrant of arrest for contempt is a proposition which I doubt extremely. That matter, however, need not be further discussed. It has to be observed that this question is one which might arise just as easily in a mofussil Court as in the High Court. Any mofussil Court may appoint a Receiver and if a person residing outside its jurisdiction interferes with the Receiver then the same problem arises as arises here. In my judgment it is eminently desirable to proceed regularly under the Code so far as possible. It is trite law that the appointment of a Receiver so far as regards parties bound by the order operates against them as an injunction. It is an injunction necessarily against inter-

ference with the Court's Receiver whether by withholding possession or property or otherwise. Under the Code permanent injunctions are enforced in execution, but under O. 39 interlocutory injunctions are enforced under a special power which is given to Courts in the mofussil as well as to the High Court notwithstanding that such Courts have no inherent right of arrest for contempt. The provision is contained in R. 2 of O. 39 where it says :

In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months.

It seems to me that instead of appealing to this Court the applicants here would have been better advised to make a fresh application to the learned Judge on the original side asking for an injunction in express terms. In case of breach of that injunction an order could be made under O. 39, R. 2 directing the arrest and detention of the offender. In that case there would be no difficulty in holding that S. 136, Civil P. C., would apply. This Court would have a statutory right to make the kind of order which is now asked for. If there be any objection to this course and after all it is no part of the duty of this Court to give advice to these appellants, then these appellants must discover some other method of procedure for themselves. In the case of *Rajah of Ramnad v. Seetharam Chetty* (1), it was held that the High Court on its original side could not execute decrees by arrest outside its territorial limits; but there are observations which would appear to distinguish the case of arrest for contempt on the ground that is in its nature a criminal matter. Accordingly the same reasoning may not apply in such a case. But apart altogether from any question of jurisdiction it has to be remembered that there is a question of machinery to be considered and as the Sheriff of Calcutta no longer functions outside the limits of the ordinary civil jurisdiction of this Court grave difficulties arise if it be attempted in any way to exercise criminal jurisdiction by this summary proceeding over a person in the mofussil. That, however, was not touched upon in the arguments before us

(1) [1903] 26 Mad. 120.

and it is a question upon which it is not necessary now to pronounce any opinion.

In my opinion this appeal must be dismissed. We make no order as to costs.

Mitter, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 464

C. C. GHOSE AND CHOTZNER, JJ.

Commissioners for the Port of Calcutta
—Defendants—Appellants.

v.

Suraj Mull Jalan and others — Plaintiffs—Respondents.

Appeal No. 469 of 1927, and Civil Rule No. 1533 M of 1927, Decided on 19th December 1927, from original order of 2nd Sub-Judge, Howrah, D/- 23rd November 1927.

(a) *Calcutta Port Act (3 of 1890), S. 84—Proceedings for contravention of S. 83 cannot be stopped by an injunction by a civil Court.*

The Commissioners for the Port of Calcutta cannot be restrained by injunction by a civil Court from proceeding with a certain criminal prosecution instituted by them against certain persons under S. 84, Calcutta Port Act, for contravention by the said persons of the provisions of S. 83 of the Act. [P 464 C 1, 2]

(b) *Specific Relief Act, S. 56 (e)—Where the legislature has indicated a mode of procedure before a Magistrate, a civil Court will not interfere by way of injunction or declaration of rights.*

Under S. 56, sub-S. (e), a civil Court has no jurisdiction to stay by means of a permanent injunction proceedings in any criminal matter and it is settled law that where the legislature has indicated a mode of procedure before a Magistrate, a civil Court will not interfere, except in very special circumstances, by way of injunction or declaration of right: *A. I. R. 1924 Cal. 334, Rel. on.* [P 465 C 2]

(c) *Civil P. C., S. 94 (c)—Interlocutory injunction—Applicant must make out a prima facie case that he is entitled to relief.*

On an application for an interlocutory injunction the Court has got to be satisfied that the applicant has made out a prima facie case that he is entitled to relief. [P 465 C 2]

Amir Ali and Satindra Nath Mukherji — for Appellants.

Binod Mitter, Sarat Chandra Basak and Probodh Chunder Chatterjee — for Respondents.

Judgment.—This case raises an important question of principle, namely, whether the Commissioners for the Port of Calcutta cannot be restrained by injunction by a civil Court from proceeding with a certain criminal prosecution

instituted by them against the respondents under S. 84, Calcutta Port Act (Act 3 of 1890 B. C.) for contravention by the respondents of the provisions of S. 83 of the said Act.

The facts, shortly stated, are as follows:

The plaintiffs who are the respondents before us are the lessees of certain lands on the west side of the river Hooghly near Ghuseri. They started construction of a jute mill on a portion of the said lands and it appears that during the construction of the mill they put up an earthen bund on the bank of the river nearest to their land to facilitate the landing of building materials intended for constructing the said mill. On or about 11th May 1927, the Port Commissioners wrote a letter to the plaintiffs enclosing a coloured plan depicting the bund which they stated to be an encroachment on the high-water mark of the river and directing its removal within a month, failing which action was to be taken under Ss. 83 and 84, Calcutta Port Act. The plaintiffs took no notice of this letter till 20th June and then started a correspondence into the details of which it is unnecessary to enter. On 16th August 1927, the Port Commissioners instituted a complaint against the plaintiffs before the Chief Presidency Magistrate of Calcutta, he being the authority before whom complaints relating to offences committed within the limits of the port of Calcutta could be brought. On 18th August 1927 the present suit, out of which this appeal has arisen, was instituted by the plaintiffs in the Court of the Subordinate Judge of Howrah praying inter alia that it might be declared that the bund in question was erected on the plaintiffs' lands and it was not an encroachment on the high-water mark of the river Hooghly and that the Port Commissioners might be permanently restrained from interfering in any manner with the plaintiffs' possession of the said bund and from taking any steps whatsoever in any criminal Court in respect of the said alleged encroachment. In their written statement which was filed on or about 20th September 1927, the Port Commissioners stated that the bund in question had been erected on the foreshore of the river below the high-water mark, the bund going in time of flow under the high-water mark, that the land on which the said bund had been

erected formed part of the foreshore of the river and that it was really an attempt on the part of the plaintiffs to carve out for their own purposes a portion of the foreshore. The Port Commissioners contended that in the circumstances they were entitled to have the bund removed and to institute proper proceedings in a proper Court, to wit, the Court of the Chief Presidency Magistrate of Calcutta, against the plaintiffs and that no injunction could be issued under the law for restraining them in manner referred to in the plaint. On 2nd November 1927 the plaintiffs applied before the Subordinate Judge of Howrah for a temporary injunction against the Port Commissioners in terms of the prayer in the plaint. They alleged that there was a bona fide dispute between the parties as to the location of the high-water mark of the river Hughly and that in the event of the Port Commissioners being allowed to remove the said bund before the determination of the suit, they would suffer irreparable loss and damage. The Port Commissioners, in opposing the said application, pointed out that the plaintiffs had applied, after the institution of the said criminal proceedings, to this Court in its criminal revisional jurisdiction for stay thereof and that such application had been refused by this Court. They further pointed out that if the proceedings in the criminal Court were not proceeded with and the bund removed, there would be danger to navigation with the further result that the confined area would be lost to the river by gradual siltation of the encroached part to the great detriment of river navigation and that such loss would cause considerable inconvenience and irreparable injury to them as also to the public. It was also pointed out that the Calcutta Port Act with a view to preventing such encroachments leading to siltation and interference with navigation had provided a summary procedure under S. 84, Calcutta Port Act, and that the civil Court could not and should not interfere with the said criminal proceedings. Lastly they contended that the balance of convenience was in their favour and against the plaintiffs.

The learned Subordinate Judge held that there was a substantial question to be investigated and that until the matter was finally disposed of every-

thing should remain in status quo. Accordingly he granted a temporary injunction against the Port Commissioners as prayed for by the plaintiffs restraining the former from proceeding with the said criminal proceedings.

In our opinion the order of the learned Subordinate Judge is an extraordinary one and ought never to have been made in the circumstances of this case. The plaintiffs' action in instituting the present suit two days after the institution of the complaint in the Chief Presidency Magistrate's Court was a manifest device on their part to evade the provisions of the Calcutta Port Act. Now, under S. 56, sub-S. (e), Specific Relief Act, a civil Court has no jurisdiction to stay by means of a permanent injunction proceedings in any criminal matter and it is settled law that where the legislature has indicated a mode of procedure before a Magistrate, a civil Court will not interfere unless in very special circumstances by way of injunction or declaration of right: see in this connexion *Corporation of Calcutta v. Bijoy Kumar Addy* (1). If these be the principles relating to the issue of permanent injunctions, it follows as a necessary corollary that there is no warrant for the issue of a temporary injunction against the Port Commissioners in this case. The learned Subordinate Judge states that the expression "high-water mark" has not been defined in the Calcutta Port Act and that the balance of convenience was on the side of the plaintiffs. Now, on an application for an interlocutory injunction the Court has got to be satisfied that the plaintiff has made out a prima facie case that he is entitled to relief. It appears to us on the materials placed before us that there ought not to be any difficulty in the determination of the high-water mark of the river Hughly. The learned Subordinate Judge refers to the notification issued under the Indian Ports Act, 1875, defining the high-water mark of the river Hughly and seems to throw doubt on the question whether that definition is operative at the present day. Now, under S. 83, Calcutta Port Act it is not lawful for any person save the Port Commissioners to make, erect or fix below high-water mark within the port any wharf, quay, stage, jetty, pier, erection or mooring, unless the assent of the Local

(1) A. I. R. 1924 Cal. 334=50 Cal. 819.

Government is first obtained. The limits of the Port of Calcutta, as is well known, were defined by notification under the Indian Ports Act (Act 12 of 1875) under date the 18th August 1879. Thereafter, on the 13th August 1880, a further notification was issued under the same Act defining the high-water mark of the river Hughli. The said notification was as follows:

The 13th August 1880 In continuation of the notification of the 18th August 1879, defining the limits of the Port of Calcutta which was published as p. 841 of the Calcutta Gazette of the 20th August 1879, the Lieutenant-Governor is pleased, with the sanction of the Government of India, to declare in accordance with the provisions of Ss. 5 and 6, Indian Ports Act 12 of 1875, that high-water mark shall extend to 15'09 feet above the sill of the Kidderpore Dock, that being the highest point reached by ordinary spring tides in any season of the year.

On the Howrah side of the river this boundary has been defined and marked off by stone blocks fixed level with the river bank to mark the exact position of the 15'09 feet water line between the Port Commissioners' land at Sibpur on the south and the southern boundary of the East Indian Railway Company's premises on the north as shown on a plan submitted by the Commissioners.

It is true that Act 12 of 1875 was repealed by the Indian Ports Act of 1889, (Act 10 of 1889), but by virtue of S. 2 of the last-mentioned Act the notifications referred to above were deemed to have been made and issued under the last mentioned Act and were therefore, continued. Act 10 of 1889, was repealed by Act 15 of 1908. Though there is nothing said in Act 15 of 1908 about the continuance of the notifications issued under the earlier Acts, it is to be remembered that meanwhile the General Clauses Act (Act 10 of 1897) had come into operation. Now, what was the effect thereof? Under S. 24, General Clauses Act it is provided that where any Act of the Governor-General in Council or regulation is after the commencement of this Act repealed and re-enacted with or without modification, then unless it is otherwise expressly provided any appointment, notification, order, scheme, rule, form or by-law made or issued under the repealed Act or regulation shall so far as it is not inconsistent with provisions re-enacted continue in force and be deemed to have been issued under the provisions so re-enacted unless and until it is superseded by any appointment, notification, order, scheme, rule, form or by-law made or issued under the provisions so re-enacted.

In view of the above, there would seem to be no justification for the learned Subordinate Judge's doubts as to the

existence of a recognized definition of the high-water mark of the river Hughli at the present moment. No doubt it will have to be determined in the suit itself whether the contention of the Port Commissioners, viz., that the bund in question is below the high-water mark is correct or not, but it is reasonably clear that if the Commissioners are right and if by reason of the erection of the said bund there is obstruction to public navigation, resulting in the loss of lives of passengers in vessels and also property, no amount of pecuniary compensation would be sufficient or adequate to meet such loss and that the balance of convenience is, on an interlocutory application such as was brought on before the Subordinate Judge, against the plaintiffs and in favour of the Commissioners. To restrain the Port Commissioners in manner indicated above in a matter like this is a very serious thing and in our opinion the learned Subordinate Judge would have been well advised if he had refused the plaintiffs' application and directed an early hearing of the suit.

The result, therefore, is that this appeal is allowed and the connected Rule is also made absolute with costs, the hearing fee being assessed at five gold mohurs in each case. The appellants will be entitled to the costs in the lower Court and to the costs of the preparation of the paper-book in this appeal.

N.K.

Appeal allowed.

* A. I. R. 1928 Calcutta 466

RANKIN, C. J. AND C. C. GHOSE, J.

Kadira—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 2 and Death Reference No. 2 of 1928. Decided on 13th March 1928 from judgment of Sess. Judge, Chittagong.

* *Criminal P. C.*, S. 236—Charge of a substantive offence but no charge of abetment of that substantive offence—Accused may be convicted of abetment of that offence if he is not prejudiced.

It cannot be laid down as a universal rule that in no circumstances whatsoever, where there is a charge of a substantive offence and there is no charge of abetment of that substantive offence, can the person so charged with the substantive offence be convicted of abetment of that offence. The answer to the question really depends on the facts of each case and it must

be seen in each case whether or not prejudice has been caused to the accused by reason of the conviction for abetment of the substantive offence in the absence of a charge therefor.

[P 468 C 1]

Mritunjoy Chatterjee and Sachindra Nath Banerjee—for Appellant.

Khondkar—for the Crown.

C. C. Ghose, J.—This is a reference under S. 374, Criminal P. C. by the learned Sessions Judge of Chittagong in a case in which the appellant before us named Kadira alias Abdul Kadir was tried along with five others before him and a jury under various sections of the Indian Penal Code. The appellant Kadira was charged with having committed offences punishable under Ss 302 and 120-B/302 I. P. C. The five other persons who were tried along with the present appellant and who were acquitted by the jury were charged under Ss. 302/102-B and 302/109 I. P. C. As regards the appellant, the jury brought in a verdict of not guilty under Ss 302 and 302/102-B and a verdict of guilty by 4 to 3 under Ss. 302/109, I. P. C. The learned Judge accepted the verdict of the majority of the jury under Ss. 302/109, I. P. C. and sentenced the appellant to death. In his letter of reference to this Court the learned Judge states that in his opinion the evidence on the record is sufficient to justify the conviction of the appellant under S. 302 read with S. 109, I. P. C., and that in the circumstances of this case he had no alternative but to sentence the appellant to death.

Now, the case for the prosecution, shortly stated, was as follows: It appears that at the instance of one Iasinali, one Anu Boli and some others were charged under S. 304, I. P. C., on the allegation that they had caused the death of Iasinali's brother Azimuddin. After the preliminary investigation a charge-sheet was submitted against the accused in that case and they were committed to the Sessions. One Kumud Ghosal was taking an active interest in the prosecution of that case and was assisting Iasinali. It is alleged that he was approached by Anu Boli, among others, with a view to arrange some sort of compromise of that case. Kumud Ghosal was not inclined to favour the compromise, but Iasinali, it is said, was not unwilling to effect a compromise. Be that as it may, the attempted compromise fell through.

Some days thereafter Kumud Ghosal and one Asmat Ali, along with two others named Amir Hamza, who is a brother of Iasin Ali, and Isaf Ali, set out for Cox's Bazar in the district of Chittagong. The four persons named above met at the Ferry Ghat at Balukhali and from there onwards they travelled together. They got out of the boat at a place called Tambru Ghat and from there they set out by road to Cox's Bazar. The road to Cox's Bazar passes after the dak bungalow at Ukhia through some dense jungle and thereafter the road rises for some distance and then continues on the level again. After passing this rise, the four persons named above began to pass along the higher level of the dhala; Kumud Ghosal was leading and the other three were following him. There was a gun with Kumud Ghosal; it was being carried by Asmat Ali. After they had passed some distance over the level road, a gunshot was heard from the direction of the west and it was found that Kumud had been shot on the left side. He fell down exclaiming that Kadira had shot him. The men who were with Kumud Ghosal, namely, Asmat Ali, Amir Hamza and Isaf Ali, turned their eyes towards the west and it is said that they saw a gun being withdrawn into the jungle, smoke rising and Kadira's head was peering out over the jungle growth. It is also said that these three persons also saw Anu Boli. Anu Boli, it is said, gave an order to seize the three men and thereupon a number of men came out of the jungle and advanced upon the men who were accompanying Kumud Ghosal. These latter fled in terror towards the north. They ran for some distance but when they found that the people who had been chasing them had gone away, they returned to the place where Kumud Ghosal lay and found that other passengers from the boat which stopped at the Ferry Ghat had gathered round Kumud Ghosal. When they returned they spoke to Kumud and it is said that each of the three men told Kumud that they had recognized the men who had attacked. Kumud told them to go and inform the police. One of the three men, namely Amir Hamza, went to the police station where he lodged the first information. This was about 3-30 p. m.

The Sub-Inspector of Police thereupon proceeded to the place of occurrence. He

held an inquest and sent the dead body to Cox's Bazar for post-mortem examination. The doctor who held the post-mortem examination was examined in the Sessions Court and he was of opinion that the killing of Kumud Ghosal was clearly a homicidal one.

Now the main evidence against the appellant Kadira consists of the deposition of the three witnesses, being P. Ws. 3, 6 and 7, and it is really on the evidence of these three witnesses that the charge under Ss. 302 and 302/120-B, I. P. C., was sought to be sustained. We have carefully examined that evidence for ourselves to see whether in the circumstances, apart from any question of law, it is sufficient to sustain a conviction under S. 302/109 I. P. C. In my opinion that evidence is wholly insufficient to sustain a conviction under S. 302/109 I. P. C. Further there was no charge before the jury against the present appellant of being guilty of an offence, punishable under S. 302 read with S. 109 I. P. C. As indicated above the two charges against the present appellant were under S. 302 and S. 302 read with S. 120-B, I. P. C. In these circumstances the learned vakil for the appellant has contended that the jury having found the appellant not guilty under the charges against him and which included a charge of conspiracy, and there being no charge against him under S. 302 read with S. 109 I. P. C., the verdict of the jury, that is, of the majority of the jury, against the present appellant under S. 302 read with S. 109, is one that cannot be sustained and that it is open to us on a reference under S. 374, Criminal P. C., in a case of this description, to set aside that verdict.

It is true that there was no charge of abetment of murder against the present appellant before the jury, but in my opinion it cannot be laid down as a universal rule that in no circumstances whatsoever, where there is a charge of a substantive offence and there is no charge of abetment of that substantive offence, can the person so charged with the substantive offence be convicted of abetment of that offence. The cases on the point under Ss. 236, 237 and 238, Criminal P. C., indicate a conflict of judicial opinion but the true rule seems to me, as indicated by J. Woodroffe in his Annotations to the Criminal Procedure Code, that the answer to the question really depends on

the facts of each case and that we have to find out in each case whether or not prejudice has been caused to the accused by reason of the conviction for abetment of the substantive offence in the absence of a charge therefor. I do not propose to go through the cases which were discussed at the bar as no useful purpose would be served thereby. In this case the question resolves itself whether on the record before us the appellant can be properly convicted of abetment of murder of Kumud Ghosal. The jury have found that the persons before them, i. e., Kadira and the said other persons, were not guilty of murder of Kumud Ghosal. Therefore the murder of Kumud Ghosal must have been committed by some person unknown. Now, the record before us is insufficient for conviction of the present appellant of abetment of murder of Kumud Ghosal by an unknown person. The evidence on record points to the conclusion that there was either a murder of Kumud Ghosal by the persons arraigned before the jury or nothing. There being therefore no charge of abetment of murder and no evidence to sustain such a charge, even if made, the verdict of the jury cannot be allowed to stand, and it is our manifest duty to set the same aside. In my opinion, in a case like this it would be extremely risky to allow the verdict of the jury to remain and the safer course would be to set aside the same and to allow the present appeal.

The result therefore is that the verdict of the jury is set aside and the appellant must be discharged from custody.

Rankin, C. J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 468

| **SUBHAWARDY AND GRAHAM, JJ.**

Ambika Ranjan Majumdar — Judgment-debtor—Appellant—Petitioner.

v.

Manikganj Loan Office, Ltd.—Decreeholder—Respondent—Opposite Party.

Civil Rule No. 903 (M) of 1927, Decided on 15th November 1927, from original order of 4th Sub-Judge, Dacca.

(a) *Limitation Act, S. 5—Pleader's act or default is not binding upon the client.*

In a matter falling under S. 5, the pleader does not act as an agent of his client and his

act or default is not binding upon the latter within the meaning of S. 5. [P 470 C 1]

(b) *Limitation Act, S. 5*—A mistake of a pleader cannot always and under all circumstances afford ground for extension of time under S. 5—*Appeal filed in a wrong Court on the advice of a pleader—Appeal filed in proper Court after limitation—Time was extended.*

A general rule of law cannot be laid down that a mistake of a pleader, however obvious it may be, can always and under every circumstances afford ground for extension of time under S. 5. [P 471 C 2]

The appellant instructed his pleader, of over 15 years' standing and having considerable practice, to file an appeal. The pleader, under a wrong impression that the appeal relates to the suit which was valued below Rs. 5,000, filed the memorandum of appeal in the Court of the District Judge. It was found that the appeal did not lie to the Court of the District Judge and it ought to have been presented in the High Court. The District Judge on that day returned his memorandum of appeal to the petitioner and the appeal was presented by him in the High Court. On these facts the client prayed for extension of time under S. 5.

Held: that the appellant was entitled to the extension of time as the appeal was wrongly filed before the District Judge on the advice of a pleader of some standing on whose words he had good reason to rely: *A.I.R. 1922 Cal. 247; A.I.R. 1924 Bom. 393; A.I.R. 1922 All. 490 (F.B.); A.I.R. 1918 P.C. 135; and 12 I.C. 677; Discussed and Rel. on: 34 Cal. 216 and A.I.R. 1923 Pat. 140, Dist.* [P 472 C 1]

Sarat Chandra Roy Choudhury and Bangati Sarkar—for Petitioner.

Satish Chandra Singha—for Opposite Party.

Suhrawardy, J.—This is an application by the appellant for permission to file an appeal out of time on the ground mentioned in the petition. The ground is that there were two suits brought against the appellant by two creditors: one was valued at over Rs. 5,000 and the other much below it. Both the suits were decreed and the decrees put into execution. The appellant's properties were sold in the suit which was valued at over Rs. 5,000 and the decree-holder in the other execution case applied for rateable distribution of the money realized from the sale of the properties. The appellant applied to have the auction sale set aside under O. 21, R. 90, Civil P. C. That application was after trial dismissed on 28th February 1927. The appellant's case is that as he was lying seriously ill at that time he sent the necessary costs and papers to his pleader at Dacca who was a pleader of over 15 years' standing and having considerable practice. The pleader, under a wrong

impression that the appeal related to the suit which was valued below Rs. 5,000 filed the memorandum of appeal in the Court of the District Judge at Dacca on 29th March 1927. On 27th June 1927 it was found that the appeal did not lie to the Court of the District Judge and that it ought to have been presented in the High Court. The District Judge on that day returned his memorandum of appeal to the petitioner and the appeal was presented by him in this Court on 18th July 1927. On these facts the petitioner prays for extension of time under S. 5, Lim. Act. The question that arises in this case has been very thoroughly argued before us and all the relevant authorities have been placed in support of one view or the other. The questions which present themselves before us for determination, accepting the facts as stated by the petitioner to be true and we do not see any reason to doubt the truth of those facts, are whether when a party acts implicitly relying on the advice of his legal adviser is he entitled to claim the benefit of S. 5, Lim. Act; and, secondly if the advice turns out to be wrong or when the legal adviser acts negligently, namely without due care and attention, is the party not entitled to claim such benefit?

The answer to these alternative questions in any way will lead to undesirable results. If the first question is answered in the affirmative it will be putting a premium on the carelessness or incompetency of persons practising law on whom lies a heavy duty and responsibility of giving proper advice to their clients. On the other hand, if the second question is answered in the affirmative an innocent party who has acted on the advice of his lawyer qualified for the purpose of giving advice will suffer injury without any fault of his. (The question therefore, that has come up before us in these proceedings is one of considerable difficulty and delicacy. As has been held in several cases [*Rakhal Chandra Ghose v. Ashutosh Ghose* (1), and *Krishna v. Chathappan* (2)], the discretion given by S. 5, Lim. Act, to the Court should not be defined and crystallized so as to convert a discretionary matter into a rigid rule of law. But the discretion in each particular case should be exer-

(1) [1913] 17 C.W.N. 807=19 I.C. 931.

(2) [1890] 13 Mad. 269.

cised on its own facts with a view to secure furtherance of justice. It has also been held in numerous cases that when the period fixed by the law of limitation for an action or appeal expires the defendant or respondent secures very valuable rights which should not be easily tampered with: see *Krishasami Panikondar v. Ramasami Chettiar* (3). Keeping these principles in view we have to examine the facts of the present case and the decisions that bear upon them. The explanation given for the delay in filing the appeal in this Court is that the appellants' pleader to whom the papers were sent was under the impression that the matter arose out of a suit which was valued below Rs. 5,000. It is not clear what was the basis of that impression and we cannot but observe that we are not satisfied that the pleader was so diligent as it was necessary for a lawyer to be in dealing with the interests of his client. But the fact remains that the petitioner was induced by the advice of his pleader to file the appeal in the wrong Court. On similar facts decisions have been pronounced which it is not easy to reconcile. The learned advocate for the opposite party has drawn our attention to several cases in support of his contention that if the pleader acts negligently the client is not entitled to the benefit of S. 5, Lim. Act. Before considering those cases it would be profitable to refer to the section itself which says that an appeal may be admitted after the period of limitation prescribed therefor when the appellant satisfies the Court that he has sufficient cause for not preferring the appeal. The words of the section are that the appellant must satisfy the Court that he, namely the appellant, has sufficient cause for not preferring the appeal in time. It has not been argued before us, nor can it be reasonably said, that in a matter of this kind the pleader acts as an agent of his client and his act or default is binding upon the latter within the meaning of S. 5, Lim. Act. The learned advocate for the opposite party has referred us to several cases which may be examined separately. The first case to which reference has been made is the case of *Sarat Chandra Bose v. Saraswati Debi* (4). The point on the facts of

the case there did not really arise and it was decided upon a very different consideration. The appellant there was a well-known lawyer and his explanation was that he was under the impression that the appeal lay to the Court of the District Judge instead of the High Court. Their Lordships commented upon the fact of the appellant being himself a lawyer and distinguished the cases which supported the appellant's contention in that case. They conceded that where there was a bona fide mistake on behalf of a client acting on the advice of his lawyer a good case may be made out under S. 5, Lim. Act. Thereafter their Lordships made the following observation:

But the circumstances we have already described show that there was negligence on the part of the appellant.

In that case, therefore, it was found that there was negligence on the part of the party and that he was not entitled to any indulgence. The next case is *S. C. Dey v. Mt. Rajwanti Kuer* (5). In that case Dawson-Miller, C. J., has expressed an opinion that if a party pleads that he has been misled by the mistake of his legal adviser the principle on which the Court acts is that the mistake must be of such a description that it might arise even amongst practitioners of experience. But the judgment of the Court did not depend upon this view of the law, for on the facts the learned Judges found that the allegations made by the petitioner in that case were not sufficient. In the concluding portion of his judgment the learned Chief Justice says that the affidavit of the petitioner before him did not say who made the mistake, whether it was some practitioner of experience or whether it was made by some clerk in the pleader's office. The learned Chief Justice in expressing the above view relied upon a decision of this Court in *Sunder Kuer v. Raghunath Sahai* (6). There, the mistake made by the petitioner was in calculating the time within which he should have filed the appeal in this Court taking into account the period occupied in taking copies of necessary papers. He based his case upon the advice he got from a pleader in the mofussil in that matter which turned out to be wrong. The learned Judges after considering the various cases relating to the point made the following observation:

(3) A.I.R. 1917 P.C. 179=41 Mad. 412=45 I.A. 25 (P.C.).

(4) [1907] 24 Cal. 216=5 C.L.J. 380.

(5) A.I.R. 1923 Pat. 140=6 Pat.L.J. 237.

(6) [1911] 12 I.C. 677.

The test therefore, to be applied to the case before us is whether there has been any negligence or inaction or want of bona fides on the part of the appellant. We are satisfied upon the materials which have been placed before us that the question must be answered in the negative. The appellant who is a pardanashin lady, appeared to have acted bona fide and her agent consulted her pleader who assured him that he was entitled to a deduction of all the periods mentioned.

After making this observation the learned Judges proceeded to observe further that the basis on which the wrong calculation was made was strenuously maintained by the learned vakil who appeared before their Lordships on behalf of the petitioner which fact to their Lordships indicated that a mistake of that description might arise even amongst practitioners of experience. The decision in *Sundar Kuer v. Raghunath Sahai* (6), therefore, does not support the observation of the learned Chief Justice of the Patna High Court in the case of *S. C. Dey v. Rajwanti Kuer* (5) in support of the view expressed therein. We have a large number of cases bearing on this point and some of them are decisions of great authority. It is not necessary to refer to all these cases and I confine myself to some that may be taken as typical. Reference may be made to the decision in the case of *Kumudini Roy v. Kamala Kanta Sen* (7). The importance of this decision lies in the fact that it is of Mookerjee, J., who was a party to the decision in the case of *Sarat Chandra Bose v. Saraswati Debi* (4) as well as to that in the case of *Sunder Kuer v. Raghunath Sahai* (6). In that case, in execution of a decree in a suit valued at more than Rs 5,000, an appeal from an order of the Subordinate Judge was preferred to the District Judge after the period for appealing to this Court had expired. The District Judge dismissed the appeal on merits. A second appeal was filed in this Court against the decree of the District Judge. At the hearing of the second appeal it was discovered that no appeal lay to the District Judge and their Lordships allowed the memorandum of second appeal to be converted into that of first appeal and directed that the appeal might be taken to have been presented to this Court on the day on which they passed the order and accepted it as filed within time. It may be sufficient for the present purpose to refer to two

decisions of two other High Courts on this point. In *Nagindas Motilal v. Nilaji Moraba Naik* (8), Marten, J., has very exhaustively dealt with the English and Indian law on this point and held that if a party acts on the advice of his pleader he comes within the protection of S. 5, Lim. Act. There an application for leave to appeal to the Privy Council was made within six months according to the period prescribed in the Limitation Act before its amendment by Act 26 of 1920, but after three months, as is provided by the latter Act. This was done on the advice of a mofussil pleader and the learned Judge held that it was a sufficient excuse entitling the appellant to extension of time. This point came up for consideration before a Full Bench of Allahabad High Court recently. In *Sib Dayal v. Jagannath Prasad* (9), a second appeal was filed on the last day prescribed by the law of limitation without a copy of the judgment of the first Court. When that judgment was filed and the case was properly constituted, the appeal was time barred. The appellant pleaded that the failure to comply with the rules of the Court was due to the error of the vakil of the district who had informed him that the judgment and decree of the lower appellate Court were alone necessary.

The question as to whether a mistake of the lawyer was a sufficient excuse within the meaning of S. 5, Lim. Act, was canvassed at great length and the learned Judges unanimously held that an honest mistake on the part of a litigant caused by erroneous advice given to him by his vakil in the district by reason of which an appeal was not filed until the period of limitation therefor had expired was a good ground for the application in favour of the would-be appellant of the provisions of S. 5, Lim. Act. I am not prepared to differ from the views expressed by so many learned Judges, but at the same time I want to guard myself for the present against laying down a general rule of law that a mistake of a pleader, however obvious it may be, can always and under every circumstance afford ground for extension of time under S. 5, Lim. Act. I may also refer in this connexion to the case of

(8) A.I.R. 1924 Bom. 399=48 Bom. 442.

(9) A.I.R. 1922 All. 490=44 All. 636 (F.B.).

(7) A.I.R. 1922 Cal. 247.

Sunderabai v. Collector of Belgaum (10), which supports the view I have taken. In the present case we accept the statement that the appeal was filed before the District Judge on the advice of a pleader of some standing and on whose word the petitioner had good reason to rely.

In this view the rule must be made absolute. Let the appeal be registered. The petitioner, however, will pay to the opposite party the costs of this hearing which we assess at three gold mohurs.

Graham, J.—The question of law involved in this rule is by no means free from difficulty, and that difficulty is not solved, nor indeed it can be said to be diminished by a reference to the numerous decisions on the subject, which are far from being uniform. On the whole, however, having regard to the particular facts of this case I, think the appeal should be admitted under S. 5, Lim. Act. It would certainly be a case of great hardship to the appellant if, in the circumstances that have happened, he should lose his right of appeal. There can be no doubt that the appellant's pleader was guilty of great carelessness in filing the appeal in the wrong Court; but it seems to me to be impossible to hold that the appellant has acted otherwise than bona fide in the matter; and that he has succeeded in showing sufficient cause for not presenting the appeal within time.

I agree, therefore, that this rule should be made absolute.

N.K. *Rule made absolute.*

(10) A.I.R. 1918 P.C. 135=43 Bom 376=46 I. A. 15 (P.C.).

A. I. R 1928 Calcutta 472

MUKERJI, J.

Kiran Chandra Roy and others — Plaintiffs—Appellants.

v.

Jagannath Banik and others—Defendants—Respondents.

Appeal No 2700 of 1926, Decided on 19th April 1928, from appellate decree of Dist Judge, Zillah Faridpur, D/- 25th May 1926.

(a) *Bengal Tenancy Act, S. 105* — Suit to recover rent as settled in a proceeding under S. 105 for jama consisting of ten plots—Tenant contending that jama consisted of three plots and not of ten plots as alleged—No decision as

regards the plots of which the jama consisted by the Revenue Officer—Decision under S. 105 was held to be not operative as *res judicata* and the civil Court was held to have power to go into the question as to the rent of the holding.

In a suit by a landlord A to recover rent as settled in a proceeding under S. 105 it was contended on behalf of the tenants that the jama consisted not of ten plots of land as alleged on behalf of A, but of three plots only, and that the remaining seven plots did not appertain to Mudafat G which, according to A, was the Mudafat to which the jama appertained but to Mudafat K; and it was further pleaded that the holder of Mudafat K had instituted a title suit against the parties to this suit and that, in that suit, which was decreed in 1920, it was declared that the said seven plots appertained to Mudafat K and the possession of the holders of that Mudafat was confirmed in respect of the said seven plots. A contended that the decision under S. 105 had the force and effect of a decree of a civil Court and it should have been given effect to in that way.

Held: that the principle of constructive *res judicata* could not be applied to a decision under S. 105 and that although it was open to the Revenue Officer to have arrived at a decision as regards the plots of which the jama consisted, inasmuch as no decision with regard to that matter had in point of fact been arrived at, the decision fixing the fair rental for the ten plots of land of which the jama was alleged to consist would not in any way operate as *res judicata*: 44 Cal. 783; *Rel. on.*

[P 433 C 2]

(b) *Evidence Act, S. 13* — A decree not set aside by a competent Court can be used as evidence with regard to the matters dealt with by it.

A decree that has not been set aside by a competent Court can be used as a piece of evidence with regard to the matter dealt with by it and it will be evidence under S. 13.

[P 473 C 2]

Hemendra Chunder Sen and Surendra Nath Bose (Sr.)—for Appellants.

Bijan Kumar Mukherji for *Rupendra* —for Respondents.

Judgment.—This appeal arises out of a suit for rent. The plaintiffs claimed rent for their 13 annas 4 pies share of a certain jama which they alleged consisted of ten plots of land and bore a rental of Rs. 11-6-0 per year as settled in a proceeding under S. 105, Ben. Ten Act. Their case was that the rent due for their share was Rs. 9-7-8 per year. They claimed rent for the years 1326 to 1329 B. S. at the said rate together with cesses and damages. The defence that was taken was of a two fold character. In the first place it was alleged that the rent of the jama in the 16 annas

share was Rs. 4-10-6 and that the rent due for the plaintiff's share was Rs. 3-14-1 per year. Next, it was contended that the jama consisted not of ten plots of land as alleged on behalf of the plaintiffs but of three plots only and that the remaining seven plots did not appertain to Mudafat Govindadas Bairagi which, according to the plaintiffs, was the mudafat to which the jama appertained, but to Mudafat Kamala Kanta; and it was further pleaded that the holder of Mudafat Kamala Kanta had instituted a title suit against the parties to this suit and that, in that suit, which was decreed in 1920, it was declared that the said seven plots appertained to Mudafat Kamala Kanta and the possession of the holders of that mudafat was confirmed in respect of the said seven plots. The Courts below concurrently accepted the contention that was urged on behalf of the defendants and, holding that the decision under S. 105, Ben. Ten. Act, did not purport to decide the question as regards the plots of which the jama consisted, expressed the view that it was open to the defendants, notwithstanding the said decision, to establish that the jama really consisted of three plots of land and that the rental thereof was not what was recorded in the decision under S. 105, Ben. Ten. Act, but something else. Those Courts also found concurrently, that the decree passed in 1920 was not vitiated by fraud and, relying on the said decree, they held further that the jama in respect of which the suit for rent was brought consisted of only three plots of land as was alleged on behalf of the defendants. In that view of the matter, they were of opinion that the plaintiffs' suit as laid could not succeed, but relying on the admission of the defendants that the rent in the plaintiffs' share for the said three plots of land was Rs. 3-14-1, decreed the suit at the said rate. The plaintiffs have thereupon preferred this second appeal.

The first contention that has been urged in support of this appeal is to the effect that, in view of the decision in the proceedings under S. 105, Ben. Ten. Act, it was not open to the Courts below to go into the question as to the rent of the holding; in other words, it is urged that the decision under S. 105, Ben. Ten. Act, has the force and effect of a decree of a civil Court and that it should

have been given effect to in that way. The answer to this contention, however, is that the principle of constructive res judicata cannot be applied to a decision under S. 105, Ben. Ten. Act, and that, although it was open to the revenue officer to have arrived at a decision as regards the plots of which the jama consisted, inasmuch as no decision with regard to that matter had, in point of fact, been arrived at, it cannot be said that the decision that was actually passed, namely, that Rs. 11-6-0 was the fair rental for the ten plots of land of which the jama was alleged to consist would in any way operate as res judicata with regard to the point that has now been raised. If any authority is needed in support of this proposition, reference may be made to the case of *Nawab Bahadur of Murshidabad v Ahmed Hossein* (1). This contention of the appellants, therefore, must be overruled.

The next contention that has been urged in support of the appeal, analyzed critically, reduces itself to the question of the legal effect that should attach to the decree of 1920. The finding of the learned District Judge is to the effect that there is no evidence of service of summons in the title suit which resulted in that decree. The finding falls somewhat short of a finding to the effect that there was in fact no service of summons at all. But assuming that the finding may be regarded as one of non-service of summons at all upon the defendants in the suit, in the absence of a finding that the decree was vitiated by fraud, it cannot be urged that the said decree may not be used as a piece of evidence in the case. It is a decree, though passed ex parte, passed by a Court having jurisdiction and, although it may be that the summonses were not properly served or not served at all, it cannot be urged that the Court had no jurisdiction to pass the decree. In any event, it is a decree that has not been set aside by a competent Court and indeed there is nothing to show that any attempt was ever made to have it set aside. So long, therefore, as it stands, it can certainly be used as a piece of evidence with regard to the matters dealt with by it. It would be evidence undoubtedly under S. 13.

(1) [1917] 44 Cal. 783 = 25 C. L. J. 556 = 35 I. C. 695 = 21 C. W. N. 1004.

Evidence Act. But the use that has been made of the decree, as far as one can gather from the judgment of the learned District Judge, is to treat it not merely as a piece of evidence in the case but rather as operating as *res judicata* with regard to the question whether the seven plots of land appertain to Mudafat Kamala Kanta or to Mudafat Govinda Das Bairagi. It should be remembered that the plaintiffs and the defendants in the present suit were in the position of defendants in the suit which culminated in the decree of 1920. The difficulty of using this decree as operating as *res judicata* is that the exceptional facts and circumstances which have got to be established in order that a decision may operate as *res judicata* as between co-defendants in a suit will have to be established. But it does not appear that any of those facts and circumstances are present in the present case. The proper way, therefore, to deal with the matter is to treat this decree only as a piece of evidence and to go no further. The learned Judge has, as I have already stated, regarded this decree as binding between the parties and operating as *res judicata* on this particular question. The result, therefore, is that the decision arrived at dealing with the decree in this way cannot be supported. In this view of the matter I am of opinion that the decree passed by the learned District Judge should be set aside and that the case should be sent back to his Court so that the appeal may now be re-heard and, after treating the decree of 1920 as a piece of evidence in the case and taking into consideration the other materials on the record, the question as to whether the seven plots of land appertain to the jama which forms the subject-matter of the suit may be decided. Upon the decision that is arrived at with regard to this question will depend the final decision of the Judge as regards the rent which the plaintiffs may nor may not be entitled to in the present suit. The appeal is allowed and the case is sent back to the lower appellate Court to be dealt with in the manner indicated above. Costs, will abide the result.

N.K.

*Appeal allowed.***A. I. R. 1928 Calcutta 474**

B. B. GHOSH AND CAMMIADÉ, JJ.

Sarada Charan Sen and another—Defendants 8 and 9—Appellants.

v.

Banka Behari Das (Plaintiff 1) and others—Respondents.

Appeal No. 132 of 1926, Decided on 25th January 1928, from original decree of 2nd Sub-Judge, Sylhet, D/- 2nd January 1926.

Civil P. C., S. 2 (12)—Defendants in wrongful possession but not proving that the land was being cultivated by others—Mesne profits should be awarded on the basis that they were in khas possession.

In a suit for mesne profits defendants, who were in wrongful possession, gave no evidence to show that they could not cultivate the lands themselves or that the lands were in possession of tenants before they entered upon them as trespassers.

Held: that under these circumstances the defendants were bound to pay mesne profits on the basis as if they were in direct possession of the lands in suit. [P 475 C 1]

Sarat Chandra Basak, Benoyendra Nath Palit, Hemendra Kumar Das and Paresh Lal Shome—for Appellants.

Gopal Chandra Das and Nikunja Behari Roy—for Respondents.

Profulla Chandra Chakravarty—for Dy. Registrar.

Judgment.—Two objections have been taken to the decree made for mesne profits by the Court below. The first is that the lands with regard to Chak No. 8 and Chak No. 20 were in the possession of tenants and mesne profits should be calculated on the rent basis instead of on the basis taken by the Subordinate Judge that the defendants were in khas possession. The Subordinate Judge says in his judgment that no evidence was given before him and the commission was silent as to the fact whether the defendants had been in khas possession or in possession of the lands decreed to the plaintiffs through tenants. As a matter of fact it has been pointed out on behalf of the appellants that in the schedule attached to the commissioner's report he says that some lands are in the possession of tenants. No evidence, however, was given before the Court, but evidence apparently was adduced before the commissioner that certain lands were in the possession of tenants. That, however, does not exonerate the defendants from liability for mesne profits as defined in S. 2 (12),

Civil P. C. The defendants have given no evidence to show that they could not cultivate the lands themselves or that the lands were in possession of tenants before they entered upon them as trespassers. Under these circumstances the defendants are bound to pay mesne profits on the basis as if they were in direct possession of the lands in suit. The first ground, therefore, fails.

The second ground is that mesne profits had been allowed for a period which goes beyond the period prescribed in O. 20, R. 12, Civil P. C., inasmuch as mesne profits had been allowed for a period more than three years after the date of the decree. As a matter of fact the respondents decree holders claim only mesne profits for a period within three years of the date of the decree whether mesne profits were calculated for a period beyond that date was not taken as a ground of objection before the Subordinate Judge, nor does it appear that this point was specifically taken in the grounds of appeal. Under these circumstances we are unable to allow this question to be raised before us for the first time during the argument.

The appeal must, therefore, stand dismissed with costs. We assess the hearing-fee at ten gold mohurs.

N K. *Appeal dismissed.*

* A. I. R. 1928 Calcutta 475

B B. GHOSH AND CAMMIADÉ, JJ.

K. S. Banerjee—Claimant 1—Appellant.

v.

Jatindra Nath Paul and others—Claimants 3 and 4—Respondents.

Appeals Nos. 77, 78 and 144 of 1926, Decided on 5th January 1928, from original decrees of President, Calcutta Improvement Tribunal, D/- 8th May 1926.

* (a) *Land Acquisition Act*, S. 23—*Reversion*.

The reversion in the case of a particular land should not be taken to be of less value than the bare land because there are buildings on it. [P 476 C 1]

(b) *Land Acquisition Act*, S. 30—*Property leased for a long term with a progressive rate of rent—Apportionment can be made only in a rough way in the absence of direct evidence.*

In the case of property leased for a long term with a progressive rate of rent it is very

difficult to come to a definite conclusion as regards the valuation to be put on the interest of the landlord so as to apportion the compensation quite equitably. In the absence of any direct evidence as to what a willing purchaser would pay for the interest of the landlord, the apportionment can be made only in a rough and ready way. [P 476 C 2]

(c) *Land Acquisition Act*, S. 18—*Trust property acquired—Question of dispute between the trustee and the beneficiaries must be left to the Court having jurisdiction to administer the estate.*

Where trust property is acquired under the Land Acquisition Act, questions which may arise between the trustee and the beneficiaries and their assignees must be left to be debated before the Court having jurisdiction to administer the trust estate: *A. I. R. 1925 Cal. 630, Expl.* [P 477 C 1]

Bepin Chandra Mullick and Susil Chandra Bose—for Appellant.

S. C. Bose, Tarakeswar Pal Chaudhury, Jhan Chandra Roy, Gunada Charan Sen and Rajendra Bhusan Bakshi—for Respondents.

Judgment.—Appeal No. 144 is on behalf of the claimant 2. His learned advocate after the arguments were heard in the other two connected appeals, did not think it proper to press this appeal. It is, therefore, dismissed but without costs.

Appeals Nos. 77 and 78 are by claimant 1. Two questions were pressed with reference to appeal No 77. The first is as to on what basis the apportionment of the compensation should be made as between claimant 1 who is the landlord, and claimant 2, the tenant. The learned President capitalized the rent payable to the landlord for the unexpired portion of the lease which had to run for about 85 years from the date of the acquisition on a 6 per cent. basis and the reversion was valued on the basis of 6½ per cent. The contention on behalf of the appellant is that the basis taken by the learned President is against the evidence given by the experts on both sides. Mr. Johnston was examined on behalf of claimant 2, the tenant, and his evidence was that if the whole of the leasehold property had to be valued with reference to the interest of claimant 1, the rent which the landlord was entitled to get for the leasehold as well as the reversion would have been valued on the 4 per cent. basis as regards the land. The real fact on the evidence may be shortly stated thus, basing it on the evidence of Mr. Johns-

ton: He said that the rent of the landlord on the 4 per cent. basis on the market value awarded for the land itself would be about Rs. 2,240. The rent allocated with regard to this price of land as payable to claimant 1 is Rs. 720. The margin of profit to the lessee would, therefore, be something like Rs. 1,500 a month. The security for the rent which claimant 1 was entitled to get under the circumstances is more than satisfactory. Therefore, the value of the lessor's interests cannot be held to be as low as the President has put it. Any purchaser, however cautious he may be, would gladly pay 25 years' purchase-money for the interest of the landlord. In addition to this our attention has been drawn by the learned advocate for the appellant to the provisions of the lease under which the lessee not only deposited with the lessor sufficient security to the extent of one lakh of rupees, for payment of the rent but kept in deposit three months rent in advance over and above the security deposit of one lakh of rupees. Under these circumstances the rent reserved is protected by unquestionably valuable security and the lessee is certainly entitled to claim that he should be paid a higher price than what has been given to him by the learned President.

The learned President has in valuing the reversion valued it at a rate less than he valued the bare land with regard to the contiguous property which was No 123/1 which was also acquired. The contention on behalf of the appellant is that the reversion in the case of the land in question No. 123 should not be taken to be of less value than the bare land because there are buildings on it. It seems to us that the proposition is quite reasonable. The value of land does not deteriorate if there is any building upon it. The buildings may no doubt deteriorate, but when the reversion of bare land is valued on the 4 per cent. basis there does not seem to be any good reason why the land with building on it should be valued at less than the value of the land. The evidence given by Mr. Johnston may again be referred to in this connexion. He says:

The ground rent of No. 123 would have been 4 per cent. The value of the structures on it was Rs. 9,000 odd as standing structures.

The value of the land itself was

Rs. 56,400 and there is no reason why the 4 per cent. basis should not be taken with regard to the land as well as with regard to the reversion on this evidence. It is, however, contended on behalf of the respondent that it would be very hard on them to take the 4 per cent. basis thereon, because there has been some misapprehension with regard to the agreement as to the rent fixed at Rs. 60 per month as well as the increase at the rate of 12½ per cent. at the end of every ten years as provided in the lease. The argument is that claimant 2 understood that he had agreed to Rs. 60 as being the rent payable for the whole period. We are, however, unable to accept this statement having regard to the clear statement of the facts in the judgment of the learned President. We think, however, that in these matters it is very difficult to come to a definite conclusion as regards the valuation to be put on the interest of the landlord so as to apportion the compensation quite equitably. The standards given in English text-books are hardly of much use with regard to the valuation of the land in Calcutta. It would have been much better if there had been any direct evidence as to what a willing purchaser would pay for the interest of the landlord in such a case as this. In the absence of such evidence the apportionment can be made only in a rough and ready way, as has been done in various reported cases. The one thing which we can say is that we are unable to agree with the manner in which the learned President has calculated the value of the reversion of the land.

We, therefore, modify the order of the learned President in this way: that the capitalization value should be calculated at Rs 60 as the basis at the rate of 5 per cent. for 85 years and for subsequent increment in the same way as the learned President has done, but 5 per cent. should be taken as the basis for calculation. The reversion should also be valued at 5 per cent. basis. We modify the order of the President accordingly.

The appellant is entitled to his costs with regard to these appeals against claimant 2. We assess the hearing-fee at ten gold mohurs consolidated for the two appeals.

With regard to claimant 4 who is the mortgagee of one of the beneficiaries of

the trust estate of which claimant 1 is the trustee, claimant 1 as appellant contends that the President was wrong in awarding to him any portion of the compensation on the basis of his mortgage. He contends that this is not a matter which can be taken into account in apportioning compensation awarded for acquisition of land which is the subject of a trust. Claimant 4 is the mortgagee from only one of the beneficiaries whose interest has been found by the President to be only 1/36th part of the premises. In dealing with the point whether a beneficiary is entitled to have any share of the compensation the learned President in deciding issues 6 and 7 held that the entire compensation which represents the value of the interest of claimant 2, the Pals, as the purchasers of the interest of some of the beneficiaries should be awarded to the trustee. Questions which may arise between the trustee and the beneficiaries and their assignees must be left to be debated before the Court having jurisdiction to administer the trust estate. This proposition appears to us to be incontestable.

But the learned President has taken a quite different view from what he has taken with regard to this question with reference to the beneficiaries and their assignees when he came to consider the matter as between the beneficiaries and their mortgagees. He ought to have according to the contention of the appellant made the same order as he has done with reference to the Pals interest as assignees of the beneficiaries. It is very difficult to understand why the learned President has made this difference in the case of the mortgagee claimant 4. He says first that the issue was not raised by claimant 1, but the learned advocate of claimant 1 points out that he made an application to raise the question before the case was taken up by addition of an issue which was rejected by the President. Next it appears that the President thought that he was bound to award a share of the compensation to the mortgagee by reason of the decision of the High Court dated 30th January 1926, in which this very mortgagee was a party, the case being with reference to another property included in the trust estate. The judgment of this Court is reported as *Surendra Nath Tagore v.*

K. S. Bonnerjee (1). What happened there was that although Surendra Nath Tagore was described as a claimant in the proceeding before the Collector he was not allowed to be heard on reference being made under S. 18, Land Acquisition Act, by the Collector. What the High Court directed was that his name being entered as one of the claimants the mortgagee was entitled to appear before the tribunal and make such representation as he might desire to make with regard to the apportionment of compensation to the beneficiaries. The High Court did not rule that either he or the beneficiary through whom he claimed was entitled to any share of the compensation. What this Court directed was that he was entitled to be heard. The President in the previous case was not justified in refusing to hear him. That case, therefore, does not in any way support the present order made by the President and the learned advocate for claimant 4 is unable to support it. The order, therefore, of allowing a share of the compensation to claimant 4 must be struck out and the whole of the money should be apportioned as between the trustee, claimant 1 and claimant 2, the lessee, leaving it to claimant 1 to make such application to the proper Court as he might be advised. We are not concerned with the other claimants in this case who are not interested in these appeals. They have got their moneys without any objection by any of the parties. In Appeal No. 78 the only question that arises is the question with regard to the compensation given to claimant 4, the mortgagee of the beneficiaries. That question has been dealt with in the previous appeal and the order will be the same, i. e., the learned President's order will be set aside. In this appeal the appellant, claimant 1, will get his costs from claimant 1/D. We assess the hearing-fee at ten gold mohurs. There will be no separate costs against claimant 4 in Appeal No. 77.

N.K.

Decrees modified.

A. I. R. 1928 Calcutta 478

MITTER, J.

Brindaban Chandra Majumdar—Principal Defendant 1—Appellant.

v.

Mt. Giribala Datta and another—Plaintiff and Co-defendant—Respondents.

Appeal No. 371 of 1927, Decided on 3rd May 1928, from appellate decree of 2nd Sub-Judge, Commilla, D/- 23-9-1926.

Bengal Tenancy Act, S. 85—A raiyat agreeing not to evict an under-raiyat except under certain contingencies contravenes the provisions of the section.

An agreement by a raiyat not to evict his under-raiyat except on a certain contingency has the effect of making him a permanent tenant and as such contravenes the provisions of S. 85. [P 478 C 2]

Jatis Chandra Guha and Sitangshu Bhusan Bose—for Appellant.

Jogesh Chandra Roy and Bepin Chandra Basu—for Respondents.

Judgment.—This is an appeal by the principal defendant 1 and arises out of a suit for ejectment of the defendant. The plaintiff, now respondent, alleged that she acquired raiyati right in the suit land under a deed of gift from her mother, pro forma defendant 2, and that defendant 1 is an *osat* raiyat under her and that notice under S. 49, Ben. Ten. Act had been served on 18th March 1923. The plaintiff also alleged that defendants had violated some of the conditions of the previous decree which was passed by consent between the plaintiff's mother and defendant and failed to pay the yearly jama within the stipulated period. The defence of the defendant in substance is that the plaintiff is a tenure holder and that the suit is barred by the law of estoppel by reason of the stipulation contained in the previous consent decree which is to the following effect,

I (plaintiff) shall not be able to evict the defendant so long as the defendant pays the yearly rental of Rs. 20 within the year in which it falls due.

The Court of first instance found that the status of the plaintiff was that of a raiyat and that of the defendant an under-raiyat. Consequently, as the solenama decree contained terms which contravened the provisions of S. 85, Ben. Ten. Act, it could not be given effect to. Reliance was placed on the Full Bench decision of this Court in the case of *Chandra Kanta Nath v. Amjad Ali Hazi* (1). The Munsif also found that the defendant had

violated one of the stipulations in the consent decree in not depositing the yearly rent. The plaintiff's suit for khas possession was accordingly decreed. An appeal was taken against this decision by the defendant to the Court of the Subordinate Judge of Tippera and the learned Subordinate Judge has affirmed the decision of the Munsif. He states that the only point urged before him was that the plaintiff was estopped from ejecting the defendant by reason of the solenama which contained the stipulation to which I have already referred. He states that no other points were placed before him. On this finding he affirmed the decree of the Court of first instance.

A second appeal has been taken to this Court and it has been argued that the findings of the lower appellate Court are insufficient to dispose of the appeal before him. It is said that as the question of plaintiff's status was drawn into controversy, the lower appellate Court and the Court of first instance should have come to the conclusion that the defendant was not a raiyat at fixed rent. The contention is that all that the lower Courts have found is that the plaintiff was a raiyat. I do not think that there is any substance in this contention. The question as to whether the plaintiff is a raiyat at a fixed rent was never raised in either of the Courts below. The question is not raised in the memorandum of appeal to this Court. All that the defendant said was that the status of the plaintiff was that of a tenure holder. He asserts that in ground 3 taken in this second appeal. Lower Courts have to proceed on the state of the pleadings and not by making a new case for any of the parties. The solenama decree shows that, on the face of it, the plaintiff's interest was described as that of a raiyat. Consequently, it was not open to the plaintiff to grant a lease of the character which in its effect was of a permanent nature as the effect of the lease is to protect the defendant from eviction except in certain contingencies. Therefore, there cannot be any estoppel on the basis of the solenama as the status of the plaintiff was found to be that of a raiyat and the defendant was liable to be ejected. I think, in this view, the decision of the Courts below are right. The appeal is accordingly dismissed with costs.

RANKIN, C. J., AND MITTER, J.

Sajjad Ahamad Choudhuri and another—Plaintiffs—Appellants.

v.

Trailakya Nath Choudhuri and others—Defendants—Respondents.

Appeal No. 306 of 1925, Decided on 13th July 1927, from appellate decree of Sub-Judge, Zillah Murshidabad, D-12th September 1924.

(a) *Bengal Tenancy Act, S. 107*—Decree in proceedings under S. 105 fixing the area and the rent of the holding—Landlord suing the tenants on that basis—The decree was held to be conclusive between the parties and the tenants were held to be bound to pay the rent fixed by the Settlement Officer.

After the final publication of the Record-of-Rights proceedings under S. 105 were started at the instance of the landlords and the Revenue Officer settled the fair rent of the land in arrears at Rs. 18-5-9. The decree in those proceedings showed that the tenants were in possession of 21 bighas 5 cottas odd land and that the fair rent assessed on the same was Rs. 18-6-9. Upon the basis of this assessment the landlord brought a suit to recover arrears of rent against the tenants. The tenants contended that there should be entire suspension of rent as the landlord dispossessed the tenants from 5 bighas 8 cottas of land and that the holding in respect of which the rent suit was brought consisted of 25 bighas odd, and was held at a rental of Rs. 15-6-11 gandas. The defence also alleged that there should, in any event, be proportionate reduction of rent. They further contended that the decree passed in proceeding under S. 105 was an ex-parte decree and the tenants did not raise the contention that they were entitled to suspension of rent by reason of dispossession by the landlord from a part of the disputed holding.

Held: that the decree under S. 105 was conclusive between the parties in suit on two questions: (1) the area of the holding, and (2) the rent of the holding. So long as the decree stood, tenants were bound to pay the rent fixed by the Settlement Officer in respect of the holding of 21 bighas found in their possession by the Settlement Officer. The fact that the decree was an ex parte one did not take away from the effect of the decree: *A. I. R. 1924 Cal. 907, Foll* [P 480 C 2]

(b) *Bengal Tenancy Act, S. 52*—The doctrine of suspension of rent depends solely upon the fact that the rent due is an entire sum in respect of the land dismissed—Landlord and tenant.

The doctrine of suspension of rent depends solely upon this: that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of the whole of the land demised, the landlord has no right to the entire rent and, unless he has a right or some equity to an apportionment

he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum: *A. I. R. 1925 P. C. 97, Foll.*

B. C. Mukherji and Purna Chandra Chatterjee for Charu Chunder Ganguli—for Appellants

Peari Mohon Chatterjee—for Respondents.

Mitter, J.—This is an appeal from a judgment and decree of the Subordinate Judge of Murshidabad dated 12th September 1924 which reversed a judgment and decree of the Munsif of Jangipur dated 29th March 1923.

The appellants brought a suit against the respondents for recovery of arrears of rent, cess and damages for the years 1325 to 1328 B. S. at the rate of Rs. 18-5-9 per year. The main defence of the respondents was that there should be entire suspension of rent as the appellants dispossessed the respondents from 5 bighas 8 cottas of land and that the holding in respect of which the rent suit was brought consisted of 25 bighas odd and was held at a rental of Rs. 15-6-11 gandas. The defence also alleged that there should, in any event, be proportionate reduction of rent.

The Munsif decreed the suit in part. He allowed the claim for 1325 B. S. at the rate of Rs. 15-6-11 gandas and that of the other years at the rate of Rs. 18-5-9 in addition to cess and damages at the rate of 12½ per cent.

Appeal was taken by the defendants-respondents to the Court of the Subordinate Judge who reversed the decision of the Munsif and dismissed the plaintiff's (now appellant's) suit with costs. The lower appellate Court came to the conclusion that the defendants were dispossessed from 4 bighas odd of land before the commencement of the settlement operations and that as the rent was a charge on every bit of the land demised the entire rent should be suspended till the defendants are restored to possession of the lands from which they have been dispossessed.

It is common ground that after the final publication of the Record-of-Rights proceedings under S. 105, Ben. Ten. Act, were started at the instance of the plaintiffs landlords and the Revenue Officer settled the fair rent of the land in arrears at Rs. 18-5-9, which was to be re-

covered from the begining of the year 1329 B. S. On the record of this suit the only part of the proceedings under S 105 which has been produced is the decree. The decree shows that the tenants-respondents were in possession of 21 bighas 5 cottas odd land and that the fair rent assessed on the same was Rs. 18 6-9.

In second appeal it has been contended on behalf of the appellants that the decree in the S. 105 proceedings has the force and effect of a decree of the civil Court and it is not open to the respondents now to contend that the holding in question originally consisted of 25 bighas and not 21 bighas as mentioned in the decree under S. 105. Reference is made in this connexion to the provision of S 107, Ben. Ten. Act.

On behalf of the respondents it has been contended that the decree in the S. 105 proceeding cannot bar the tenant from raising the contention of suspension of rent as that was not a matter which was the subject-matter of consideration in the S. 105 proceeding. It is said by the learned vakil for the respondents that the decree was an *ex parte* decree and the tenants-respondents did not raise the contention that they were entitled to suspension of rent by reason of dispossession by the plaintiffs from a part of the disputed holding.

It is consequently argued that the decree of the Revenue Officer can not operate as a bar to the raising of the issue about suspension of rent. A number of cases have been cited on both sides, but none of them, except the one to which I shall presently refer, bear directly on the question at issue.

The true rule applicable in cases of this kind seems to have been laid down in the decision in the case of *Dharani Mohon Roy v. Asutosh Mukerji* (1). The facts of that case are briefly these; The plaintiff instituted a suit for recovery of arrears of rent and relied on the fair and equitable rent fixed by consent in a S. 105 proceeding. The defendant alleged the holding was rent free. The circumstances under which the decree in the S. 105 case was passed are stated in the judgment as follows:

It appears that the Record-of-Rights in this case was finally published on 16th December 1912. The record contained an entry to the effect that the defendants held the land

without payment of rent, but that the land was liable to be assessed with rent. The landlord thereupon instituted a proceeding under S. 105, Ben. Ten Act, for assessment of fair rent. The tenants contended that they held the land rent free. Consequently the question contemplated by S. 105, Cl (a), arose, namely, whether the land was or was not liable to payment of rent. It thereupon became incumbent upon the Revenue Officer to try and decide that issue and to settle rent under S. 105 if he should hold that the land was liable to payment of rent. It is not clear what took place before the Settlement Officer. But this much becomes obvious on an examination of the Record-of-Rights, that on 15th November 1913 rent was assessed at the rate of Rs. 3-9-0 per annum. It has been stated that this order was made by consent of parties but that is immaterial for our present purpose, because under Cl. (6), S. 105, where the parties agree amongst themselves by compromise or otherwise as to the amount of the fair rent, it is incumbent upon the Revenue Officer to satisfy himself that the amount agreed upon is fair and equitable and it is only if he is so satisfied that he can record the amount agreed upon as the fair and equitable rent; if he is not so satisfied, he has to settle a fair and equitable rent as provided in sub Ss. (4) and (5).

and the effect of the decision of the Revenue Officer was stated to be as follows :

This much is incontrovertible: that under S. 107, so long as that decree remains in force, effect must be given to it, and, if effect is given to it, there is no escape from the conclusion that the claim for rent must be decreed on that basis.

It seems to me, therefore, that the decree under S. 105 was conclusive between the parties in suit on two questions: (1) the area of the holding; (2) the rent of the holding. So long as the decree stands defendants are bound to pay the rent fixed by the Settlement Officer in respect of the holding of 21 bighas found in their possession by the Settlement Officer. The fact that the decree was an *ex-parte* one does not take away from the effect of the decree. The defendants-respondents have to thank themselves if they did not choose to appear in the S. 105 proceedings and they must now take the consequences of the *ex-parte* decree. The decree of the Revenue Officer operates as a final decree and is binding between the parties. Whatever the position of the parties may have been at the time when the tenancy was created the effect of the Revenue Officer's decision is to define the present rights of the parties. In other words the effect of the decision is to determine that the defendants are tenants of the plaintiffs-appellants in respect of 21 and odd

(1) A. I. R. 1224 Cal. 907.

bighas of land for which they are liable to pay Rs. 18-5-9 pies as fair and equitable rent.

There is no question that the defence of suspension of payment of rent would have been available to the tenants respondents, for the rental as far as can be gathered was a lump rent. It has been so held in the case of *Katyayani Devi v. Uday Kumar Das* (2), at p. 166, where their Lordships of the Judicial Committee of the Privy Council observed as follows :

The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

But as I have stated above this defence is barred by S. 107, Ben. Ten. Act, by reason of the previous decree in the 1905 case. It is to be noticed also that the tenants respondents went on paying rents at the rate of Rs. 15-6-11 gandas or several years after the dispossession and as though this circumstance does not operate as an estoppel against the defendants it shows on which side the justice of the case lies. It shows at any rate that the tenants-respondents were prepared to pay amicably in full the entire rent notwithstanding the dispossession.

In this view the appeal must be allowed. The decree of the lower appellate Court is set aside and that of the first Court restored. In the circumstances of the case there will be no order as to costs.

Rankin, C. J.—I entirely agree. I would add just a few words. It was strenuously contended before us that the question of the right of suspension of rent was not a matter before the Settlement Officer who was concerned entirely with assessing a fair and equitable rent for the land and it was contended that under Ss. 105 and 107, Ben. Ten. Act, there was no estoppel or res judicata upon the question of the right of the tenant to a suspension of rent. That is quite true. But the doctrine of suspension of rent depends solely upon this that the rent due is an entire sum in respect of the land demised. If, therefore, the tenant is not given occupation of

the whole of the land demised, the landlord has no right to the entire rent and, unless he has a right or some equity to an apportionment, he can recover nothing on the contract. But the whole basis of the doctrine is that the rent due is one entire sum. In this case, the original tenancy is said to have been for 25 bighas 19½ cottas. The land of which the tenant has had actual occupation is 21 bighas 5 cottas. The decision of the Settlement Officer was that the fair rent for 21 bighas 5 cottas was Rs. 18, this being an enhancement upon the rent of Rs. 15 for the original 25 bighas. If, therefore, this question depends upon any one proposition that proposition is this : whether the tenant is able to-day and after the Settlement Officer's decision to say that he holds 25 bighas at an entire rent. It appears to me that unless we are to set aside the Settlement Officer's decision and give no effect to it at all, it must be held that in respect of the 21 bighas it has been found that the fair and equitable rent is Rs. 18 in other words, the entirety of the original rent is inconsistent with and has been destroyed by the finding of the Settlement Officer. I think, therefore, that the order proposed is a correct one.

N K.

Appeal allowed.

A. I. R. 1928 Calcutta 481

RANKIN, C. J., AND C. C. GHOSE, J.

Aroth—Applicant.

v.

Craig Jute Mills Ltd.—Opposite Party.

Civil Reference No. 8 of 1927, Decided on 7th February 1928, made by Commissioner, Workmen's Compensation, Bengal.

Workmen's Compensation Act (8 of 1923), S. 11 (6)—The phrase "that the workman has not been regularly attended by a qualified medical practitioner" should be construed as if it read "by another qualified medical practitioner."

The phrase "that the workman has not been regularly attended by a qualified medical practitioner" should be construed as if it read: "by another qualified medical practitioner." Although it is possible to suggest that the words in question were intended to apply only to a case of a refusal by the workman to be attended by the employer's doctor such a construction is not permissible as it would involve doing considerable violence to the language actually employed by the legislature. [P 483 C 1]

Atul Chandra Gupta and Satesh Chandra Sinha—for Applicant.

(2) 52 I. A. 160=A. I. R. 1925 P. C. 97=52 Cal. 417 (P. C.).

Rankin, C. J.—This is a reference under the Workmen's Compensation Act (Act 8 of 1923) made by the Commissioner, Workmen's Compensation, Bengal, under the power conferred on him by S. 27 of the Act, which is as follows :

The Commissioner may, if he thinks fit, submit any question of law for the decision of the High Court, and if he does so shall decide the question in conformity with such decision.

The question of law referred to us has reference to the true construction of sub-S. (6), S. 11 of the Act, and arises upon the following facts which have been found by the Commissioner. The applicant alleged that while joining threads in a beaming machine his right hand was caught between the drum and steam heated cylinder and was smashed. The employer contended that the hand was not smashed but only scalded and that owing to the applicant's disregard of the medical officer's instruction to keep his hand in bandages it became septic. The Commissioner has found that the employer's version is the correct one, that the applicant's disability is due to ankylosis of the joints which is the result of sepsis and that the present condition of his hand is due to his own conduct in disregarding the medical officer's instructions. In other words, that his injury has been aggravated by his disregard of those instructions. The Commissioner has accepted the evidence of the employer's doctor that the original injury was only a very slight burn.

The question is whether in these circumstances the sub-S. 6, S. 11 applies to the case. That sub-section is as follows:

Where an injured workman has refused to be attended by a qualified medical practitioner whose services have been offered to him by the employer free of charge or having accepted such offer has deliberately disregarded the instructions of such medical practitioner, then, if it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner and that such refusal, failure or disregard was unreasonable in the circumstances of the case and that the injury has been aggravated thereby, the injury and resulting disablement shall be deemed to be of the same nature and duration as they might reasonably have been expected to be if the workman had been regularly attended by a qualified medical practitioner, and compensation, if any, shall be payable accordingly.

The difficulty which presents itself to the Commissioner arises from the fact that in the present case the workman was attended, and regularly attended, by the

qualified medical practitioner whose services were offered to him by the employer free of charge and the question of law referred to us is stated as follows :

In S. 11, Sub-S. (6) do the words "If it is thereafter proved that the workman has not been regularly attended by a qualified practitioner" include attendance by the medical practitioner provided by the employer whose instructions he has disregarded, or should they be construed as if they read "by another medical practitioner?" How should these words be applied to the case before me?

It is to be observed that sub-S. (6) has been enacted in the interest of the employer. It deals with the case where an injury has been received and where the injury has afterwards been aggravated by a refusal of medical attention offered to the applicant by the employer or by disregard of the instructions of the medical practitioner whose services had been so offered to the applicant by the employer. The sub-section is very carelessly drafted, but the words with which the present case is chiefly concerned :

If it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner, have a clear and reasonable purpose. To take first the case where the workman has refused to be attended by the employer's doctor. These words operate to prevent the workman suffering prejudice from this refusal if he has been regularly attended by a qualified medical practitioner, that is, *ex hypothesi*, by some qualified medical practitioner other than the employer's doctor. Coming then to the second case, where the workman having accepted the services of the employer's doctor "had deliberately disregarded the instructions of such medical practitioner. The words in question operate to prevent any prejudice resulting under this sub-section to the workman's claim for compensation if the workman has put himself in the hands of some other doctor. In that case disregard of the instructions given by the employer's doctor will not have the result of prejudicing the workman's claim for compensation.

It seems to me to be quite impossible that these words :

If it is thereafter proved that the workman has not been regularly attended by a qualified medical practitioner

should apply to the case of regular attendance by the employer's doctor whose instructions have been disregarded. If therefore in the present case the Com-

missioner is of opinion that the workman acted unreasonably in the circumstances of the case in removing the bandages from his hand and that his injury has been aggravated thereby, then the concluding words of the sub-section must take effect and the workman's claim for compensation must be assessed upon the basis of an injury of the same nature and duration as might reasonably have been expected if the workman had been regularly attended by a qualified medical practitioner.

It is possible to suggest that the words in question were intended to apply only to the case of a refusal by the workman to be attended by the employer's doctor. The concluding words of the sub-section give some slight foundation to this contention; but I am not of opinion that such a construction is not permissible as it would involve doing considerable violence to the language actually employed by the legislature.

A case might arise in which the workman had refused to be attended by the employer's doctor acting as such, but had engaged the same doctor on his own account. This case may be unlikely, but in view of possibilities of this character I hesitate to go beyond the necessities of the present case to say that for all purposes the phrase "that the workman has not been regularly attended by a qualified medical practitioner" should be construed as if it read "by another qualified medical practitioner." For the purposes, however, of the present case, and cases of the same character, that is necessarily the meaning of the phrase. The question referred to us for our decision is thus answered. There will be no order as to costs.

C. C. Ghose, J.—I agree.

N K *Reference answered*

A. I. R. 1928 Calcutta 483

C. C. GHOSE AND GREGORY, JJ.

Ambica Prosad Das—Accused—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 401 of 1928. Decided on 16th May 1928, from order of Municipal Magistrate, Calcutta.

Calcutta Municipal Act (3 of 1923), S. 533—S. 533 must be taken to be subject to the pro-

visions of S. 200 (b), Criminal P. C.—Criminal P. C., S. 200 (b).

Provisions of S. 533, Calcutta Municipal Act, must be taken to be subject to the provisions of S. 200 (b), Criminal P. C., and a Municipal Magistrate is bound to examine the complainant before recording conviction of a person under S. 291 (2), Calcutta Municipal Act.

[P 484 C 1]

Sures Chandra Taluqdar and Keshab Lal Roy—for Petitioner.

Probodh Chandra Chatterjee and Sachindra Nath Banerjee—for Opposite Party.

C. C. Ghose, J.—The facts involved in this case are as follows: In this case a Water-works Sub-Inspector of the Corporation of Calcutta complained on 5th December 1927 before the Municipal Magistrate of Calcutta against the petitioner for having executed certain works in connexion with filtered water supply in his premises with extension and addition of fittings and pipes by a person other than a licensed plumber from premises No. 1/1A, Puddopukur Square in Kinderpore. The complainant stated in his petition of complaint that notice had been served on 22nd September 1927, but that the said notice had not been complied with by the accused. On that petition of complaint being filed, summons was issued under the provisions of S. 271 (2) read with S. 488, Calcutta Municipal Act of 1923. The summons was served on 2nd February 1928, on one Purna Chandra Das, who, we are informed, is a son of the accused. It appears that the case itself was fixed for hearing on 2nd February. One Jatindra Nath Das, agent of the accused, appeared in Court on that date, but the opposite party, namely, the prosecuting officer, was absent. The case was then adjourned on 9th February 1928. What happened on 9th February appears from the endorsement on the form used for making complaints which is as follows: "Jatindra Nath Das, agent, admits. Accused fined Rs. 20 under S. 291 (2)."

On behalf of the petitioner it has been argued before us that there could not have been any conviction upon the admission of the agent of the accused. Now, prosecutions under the Municipal Act are of a quasi criminal nature and it is unnecessary for the purposes of this case, as will appear later on, to decide whether the conviction of an accused under the Municipal Act can or cannot be legally based upon the admission of the agent of the accused. We are satisfied

however, that beyond the written complaint of the Water-works Sub-Inspector (leaving aside for the moment the question of the admission of the agent of the accused) there was nothing else before the learned Municipal Magistrate which would have justified him in convicting the accused under S. 291 (2). The Municipal Magistrate of Calcutta is a Presidency Magistrate and in cases of complaints to him, he is as Presidency Magistrate required to examine the complainant subject to the provisions of S. 200 (b), Criminal P. C. It does not appear from the record whether the complainant was ever examined by the Magistrate. It is true that under the Calcutta Municipal Act (See S. 533) if the accused had not appeared in person and had not sent an authorized agent, it would have been open to the Magistrate to decide the case ex-parte, but that provision must be taken to be subject to the provisions of S. 200 (b), Criminal P. C. As indicated above, the last mentioned section has not been complied with and in the circumstances of this case we think it would be safer, having regard to what has happened, to set aside the conviction and sentence and direct that the complaint of the Water-works Sub-Inspector against the accused be enquired into afresh in accordance with law.

The record will be sent down immediately and the Magistrate is requested to see that the case against the accused is disposed of as quickly as possible. It must be clearly understood that it is not necessary for the Water-works Sub-Inspector to institute a fresh complaint. But what is necessary to be done is that the complaint of the Water-works Sub-Inspector, which is already on the record, should be enquired into afresh in accordance with law. The fine, if paid, will be refunded.

N.K.

Conviction set aside.

A. I. R. 1928 Calcutta 484

CHOTZNER AND GREGORY, JJ.

S. Mukherjee—Petitioner.

v

Manager, Harun Tar Mohammed & Co.
—Opposite Party.

Criminal Revn. No. 1121 of 1927, Decided on 31st January 1928, from order of acquittal of Dy. Magistrate, Howrah, D/- 27th August 1927.

Bengal General Clauses Act (1 of 1899), S. 25—Prosecution of a person within the Howrah Municipal area under Ss. 466 and 574, Calcutta Municipal Act of 1899, which had been extended to Howrah under a Government notification—Acquittal on the ground that the Act was repealed and no notification had been issued extending any part of the new Act to Howrah—Acquittal opposed on the ground that prosecution was competent under S. 25, General Clauses Act—Acquittal was held to be proper as any prosecution founded upon the notification must be under the new Act.

A person, who was charged in respect of an offence under Ss. 466 (d) and 574, Calcutta Municipal Act (Act 3 of 1899), was acquitted on a preliminary objection that the prosecution did not lie, inasmuch as, though the provisions of Ss. 466 and 574 of the Act in question had been extended to Howrah by a notification under Act 3 of 1899, that Act had been repealed and re-enacted by the Calcutta Municipal Act (Act 3 of 1923), and no fresh notification had been issued extending any part of the new Act to Howrah. It was contended on behalf of the opposite party that though the Act of 1899 had been repealed, a prosecution under it was competent by virtue of provisions of S. 25, Bengal General Clauses Act (1 of 1899).

Held: that the provisions of S. 25, Bengal General Clauses Act indicated that the notification is attracted to the provisions so re-enacted, and that any prosecution founded upon it must be under the new Act. Therefore prosecution under the old Act was not competent.

[P 485 C 1.]

B. L. Mitter, Narendra Kumar Basu and Haradhan Chatterji—for Petitioner.

B. C. Mitter, Bepin Chunder Mullick and Probodh Chunder Chatterji—for Opposite Party.

Judgment.—This rule was granted against the order of acquittal under S. 245, Criminal P. C., passed by the Deputy Magistrate of Howrah. On 27th August 1927, a complaint was made under the orders of the Chairman of the Howrah Municipality against the Manager of Messrs. Tar Mahomed and Company for using, or permitting to be used, certain premises for the purpose of storing molasses without obtaining a license. The charge was in respect of an offence under Ss. 466 (d), 574, Municipal Act (Act 3 of 1899), and the prosecution was under that Act. The order of acquittal was made on a preliminary objection taken and upheld, that the prosecution did not lie, inasmuch as, though the provisions of Ss. 466, and 574 of the Act in question had been extended to Howrah by a notification under Act 3 of 1899, that Act had been repealed and re-enacted by the Calcutta Municipal Act (Act 3 of 1923), and no fresh notification had been issued ex-

tending any part of the new Act to Howrah.

It is contended on behalf of the petitioner that though the Act of 1899 has been repealed, a prosecution under it is competent by virtue of the provisions of S. 25, Bengal General Clauses Act (1 of 1899). S. 25 runs as follows:

When any enactment is, after the commencement of this Act, repealed and re-enacted by a Bengal Act with or without modification, then, unless it is otherwise expressly provided, any order, scheme, rule, bye-law, notification, or form issued under the repealed enactment, shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been issued under the provisions so re-enacted, unless and until it is superseded by any order, scheme, rule, bye-law, notification, or form issued under the provisions so re-enacted.

The question, therefore, is whether this section in the notification can serve to support the prosecution under the repealed Act.

It is not contended for the opposite party that a prosecution does not lie, but a prosecution—it is said, must be under the new Act. In support of this view it is urged that the provisions of S. 466 of the repealed Act, and those of S. 386 of the new Act, are not consistent; also that the punishments provided by the two Acts are not the same.

Under the repealed Act a trading license had to be obtained from the Chairman who had vested in him the sole right to grant it, but a reference to the two Acts will show that the constitution of the Corporation has been entirely altered by the Act of 1923. The Chairman is not now vested with any power to grant the licenses. This right devolves now upon the Corporation, so that, as a matter of fact, at the present time, a literal compliance with old S. 466 would not be possible. But apart from this particular difference in the two Acts, the provisions of S. 25, Bengal General Clauses Act, that a notification which is consistent with the re-enacted provisions, and which has not been superseded, shall continue in force, and be deemed to have been issued under the re-enacted provisions, indicate that the notification is attracted to the provisions so re-enacted, and that any prosecution founded upon it must be under the new Act. This is the finding of the learned Magistrate and in our opinion it is correct.

In this view of the matter we think

the prosecution in this case under the repealed Act was misconceived, and the rule must accordingly be discharged.

N K.

Rule discharged.

* A I. R. 1928 Calcutta 485

SUHRAWARDY AND GRAHAM, JJ.

Anukul Chandra Chakravarti and others—Defendants—Appellants.

V.

Chairman of the Dacca Dist. Board—Plaintiff—Respondent.

Appeals Nos. 767 to 770 of 1924, Decided on 13th July 1926, from appellate decrees of 5th Sub-Judge, Dacca, D/- 21st November 1923.

(a) *Limitation Act, Art. 146-A—“Road” used in Art. 146-A includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purpose of the road.*

The expression “road” or “highway” has been considered in many cases in England and it seems that the interpretation put there is not confined to the portion actually used by the public but it extends also to side lands. A too narrow meaning cannot be put on the expression “public street” or “road” in Art. 146-A, as it is intended to safeguard the interest of public bodies which are not expected to be as vigilant over their rights as private individuals. “Road” in that article includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purposes of the road: *Rea v. Robert Wright*, (1832) 3 B. & A. 681 and *Turner v. Ringwood Highway Board*, (1870) 9 Eq. Cas. 418, Ref. [P 487 C 1]

(b) *Limitation Act, S. 22—S. 22 applies to cases where a new plaintiff has been introduced and not to cases where there is only an amendment with regard to the description of the plaintiff.*

Section 22 has been held to apply to cases where new plaintiff has been introduced and is not applicable to cases where there is only an amendment with regard to the description of the plaintiff. [P 487 C 1]

* (c) *Evidence Act, S. 114—Failure of a District Board to prove the actual acquisition and possession and the actual delivery of certain land to it by the Government—Intention of the Government to acquire the land and its taking some necessary steps in pursuance thereof proved—It was held to be not wrong to presume that necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken.*

On 10th February 1879 a declaration was made by the Government (Ex. 19) proposing the acquisition of lands including the lands in suit under the law. A chitta was prepared and a map was also prepared. The District Board's case was that the Government acquired the land about which the declaration was made

and made it over to the District Board for the purpose of making the road. The Board failed to prove the actual acquisition and delivery of possession by the Government to it. The facts proved were that the Government expressed its intention to acquire the land, that some necessary steps were taken in pursuance of that resolution and years after, that land was found in the possession of a public body.

Held: that in these circumstances a Court of fact could not be said to be wrong in presuming that all the necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken. [P 497 C 2]

Prakash Ch. Pakrashi and Satindra Nath Khasnobis for Nil Kanta Ghose—for Appellants.

Nares Ch. Sen Gupta and Asita Ranjan Ghose—for Respondent.

Suhrawardy, J.—The suits out of which these appeals have been brought were instituted by the District Board of Dacca to eject the defendant-appellants from the lands in suit on the ground that the lands belonged to the District Board as part of a public road from Danga to Kaliganj and that the defendants had trespassed into and encroached upon them. Both the Courts below decreed the plaintiff's suits. Out of the five suits instituted which were heard together, one was partially decreed and there is no appeal before us arising from it.

The first question that has been argued on behalf of the appellants is whether Art. 146-A, Lim Act, applies to these cases. The defendants claimed title to these lands, firstly, on the ground that they belonged to their taluks and tenancies. It has been found by both the Courts that the defendants have failed to prove this. In the alternative they claimed title to the lands on the ground of adverse possession against the plaintiff. With regard to three out of the four suits from which these appeals arise the finding of the learned Subordinate Judge in the lower appellate Court is that no question of adverse possession arises, the huts having been built or other acts of possession exercised over those lands within 12 years of the institution of the suits. In Suit No 1074, it was tried to prove that formerly there were houses of prostitutes by the side of the road including the disputed lands. One of the defence witnesses said that the tatties were put up about 30 years ago. He was examined two years after the institution of the suit. The learned Subordi-

nate Judge accordingly observes that even if this evidence be true, the defendant's adverse possession would extend only to 28 years. He has accordingly applied Art. 146-A and held that as the defendants have failed to prove possession for 30 years the plaintiff's right in the land has not been extinguished. The learned Subordinate Judge does not accept the witness's statement to be true, but for the purpose of the application of the law he assumes it to be so. If the appellants succeed in showing that Art. 146-A does not apply, it should necessitate a remand for the determination of the question of limitation in Suit No. 1074. The plaintiff's case is that the lands in suit together with the lands forming the actual pathway were acquired for the purpose of building a road. That road was built; but the side lands which are the lands in suit were kept fallow for the purpose of mending the road by taking earth from them to make necessary repairs. It is accordingly argued on behalf of the appellants that the lands in suit cannot be said to be

"public street or road or any part thereof" within the meaning of Art. 146-A. On the other hand it is argued on behalf of the respondent that "road" is not limited to the portion actually used by passers by, but includes such land as might be necessary to make a public thoroughfare and so is a part of the street in actual use. The word "road" has not been defined in any of the Acts. The definition of "street" in the Calcutta Municipal Act, 1923, is extremely meagre and does not help us one way or the other. The term, however, has been defined in S. 4, Bengal Village Self-Government Act of 1919, where it is said to mean any road, street or passage, whether a thoroughfare or not, over which the public have a right of way.

The evidence in the case which has been accepted by both the Courts below is that the lands in suit together with the land over which the main thoroughfare runs were acquired by the Government sometime ago and made over to the District Board for making the road. The District Board made the road leaving portions of the land on both sides of the road for the purpose of repairing it. It can, therefore, be said that the lands in suit were lands used for the purposes of the road; and it may further be assumed that if necessity arises in future these lands may be utilized for the purpose of widening the road. The expression "road" or "highway" has been considered in many cases in England and it seems that the

interpretation put there is not confined to the portion actually used by the public but it extends also to the side lands. See the cases of *Rez v. Robert Wright* (1) and *Turner v. Ringwood Highway Board* (2). I am not prepared to put a too narrow meaning on the expression "public street" or "road" in Art. 146-A, as it is intended to safeguard the interest of public bodies which are not expected to be as vigilant over their rights as private individuals. I am of opinion that "road" in that article includes the portion which is used as road as also the lands kept on two sides as parts of the road for the purposes of the road. I accordingly hold that Art. 146-A applies and on the finding of the learned Judge Suit No. 1074 is not barred by limitation.

In connexion with this matter an objection is taken with regard to the amendment of the plaint. It appears that the plaint was filed on 15th September 1921. At the time of the hearing of the argument by the first Court objection was taken that the plaintiff was wrongly described, the plaintiff in the plaint having been described as Chairman of the District Board of Dacca, whereas under S. 20, Bengal Local Self-Government Act (3 of 1885), the District Board is a corporate body and is entitled to sue in its own name. The Munsif disallowed the objection at that late stage but the Subordinate Judge on the objection of the appellants allowed the amendment of the plaint in the appellate Court. It is argued that limitation should be counted from the date of the amendment and not from the date of the institution of the suit. I do not think that this objection ought to prevail. The amendment was made under O. 1, R. 10 subject to the law of limitation as contained in S. 22, Lim. Act. S. 22 has been held to apply to cases where a new plaintiff has been introduced and is not applicable in cases where there is only an amendment with regard to the description of the plaintiff. In the present case the real plaintiff has all along been the District Board. The amendment, therefore, does not introduce a new plaintiff. This objection is raised in Suit No. 1074 where, it may be said, that the time of the amendment accord-

ing to the evidence of the defence witness referred to above, the defendants were in possession for 30 years. It is also argued that some schedules were also amended by changing the boundaries. What happened was that after the institution of the suit, a Commissioner was appointed by Court to hold a local inspection and prepare a map. In the plaint lands were not properly described and after the submission of the report by the Commissioner the plaintiff applied for certain alteration in the description of the lands. This, in my opinion, does not mean an inclusion of land which was not the subject-matter of the suits instituted. These and a few other objections were also taken which were not raised in the lower appellate Court and we are not, therefore, inclined to hear them; but as they have been pressed on our attention we have given our opinion with regard to some of them.

The last and the most important question is with regard to the title of the plaintiff. It is argued that there was no sufficient evidence of plaintiff's title as has been admitted by the Court below and therefore the plaintiff's suit must be dismissed. The facts proved and the findings come to are these: On 10th February 1879, a declaration was made by the Government (Ex. 19) proposing the acquisition of lands including the lands in suit under the law. A chitta was prepared dated 22nd January 1880, and a map was also prepared on 5th April 1880. It is the plaintiff's case that the Government acquired the land about which the declaration was made and made it over to the District Board for the purpose of making the road. The plaintiff has failed to prove the actual acquisition and possession by the Government. It has also failed to prove the actual delivery of the land by the Government to it. The facts proved are that the Government expressed its intention to acquire the land, that some necessary steps were taken in pursuance of that resolution and that years after that land was found in the possession of a public body (the plaintiff). In these circumstances a Court of fact cannot be said to be wrong in presuming that all the necessary steps for the acquisition of the land and for the transfer of the same to the public body were taken. The learned Subordinate Judge has relieved

(1) [1892] 3 B. & A. 681.

(2) [1870] 9 Eq. Cas. 418=18 W. R. 424=21 L. T. 745.

upon these facts as well as upon the evidence of some witnesses for the defendants about the Government paying compensation for the lands acquired. He also relied upon the evidence of one Madhu Saha who admitted that the Government had acquired the lands; and we cannot say that he was wrong in relying upon the evidence of that witness though he was a witness in the case from which there is no appeal taken before us but was tried along with the present suits. It is also to be noted, as has been observed by the lower appellate Court, that the appellants in the present cases did not question the fact of the acquisition of the land by the Government; but their main objection was that the lands in suit were not the acquired lands. With reference to this question, the learned Subordinate Judge held that in the absence of anything to the contrary the lands in suit were the acquired lands. The position was that the defendants claimed the lands to be parts of their taluks and tenancies and failed to prove it. The plaintiff claimed the lands as acquired by the Government under the declaration of 1879. The Court Commissioner relaid the map prepared in 1880 and found that the lands in suit were included with the land to which the declaration related. On these facts the Court below has held that the plaintiff has succeeded in proving title to the lands in suit, and we cannot say that his conclusion is wrong.

The result is that all the grounds taken by the appellants fail and the appeals are dismissed with costs.

Graham, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 488

S. C. MALLIK, J.

Manab Shaikh—Defendant—Appellant.

v.

Mahammad Golam Nabi and others—Plaintiffs—Respondents.

Appeal No. 1239 of 1926, Decided on 9th March 1928, from appellate decree of Sub-Judge, Zillah Murshidabad, D/- 12th January 1926.

Civil P. C., O. 41, R. 33—Power under, is limited to cases, where as the result of the appellate Court's interference in favour of the

appellants, further interference is required to adjust the rights of the parties.

Although the language of R. 33, O. 41, is widely expressed, ordinarily the exercise of the power conferred thereby should be limited to cases where, as the result of the appellate Court's interference in favour of the appellants, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. 22 C. L. J. 390, *Rel. on.* [P 489 C 1]

Gopendra Krishna Banerji—for Appellant.

Amarendra Nath Bose and Satindra Nath Mukharjee—for Respondents.

Judgment.—The suit out of which this appeal arises was one for a declaration that defendant 1 had no right of easement to draw water from the plaintiffs' tank Kalipuskarini by excavating any irrigation pit either on the bank or in the bed of that tank for the purpose of irrigating his land and also for a declaration that the solenama filed in a criminal Court between defendant 1 and the plaintiffs' cosharer, defendant 2 was not binding on the plaintiffs. The first Court decreed the suit in part. It declared that defendant 1 had no right to irrigate his land with the water of Kalipuskarini by digging any pit in the bed or on the banks of the tank. The first Court declared also that defendant 1 had a right to irrigate his land with the water that accumulates upon the southern bank of the tank and which water is drawn through the pahura lying partly in the defendant's land and partly in the southern bank of the tank. The trial Court also held that the solenama was not binding on the plaintiffs. On appeal by defendant 1 the lower appellate Court affirmed the decision of the trial Judge so far as it related to the solenama and the right of defendant 1 to irrigate his land by digging pits in the bed and on the banks of the tank. But the lower appellate Court expunged the order of the trial Judge so far as it related to the right of defendant 1 to irrigate his land with the water that accumulates on the southern bank of the tank and which is drawn through the pahura mentioned above. Defendant 1 has appealed to this Court.

The principal point taken before me on behalf of the appellant is that the lower appellate Court was not justified in expunging the order of the trial Court so far as it related to the right of defen-

dant 1 to irrigate his land with the water drawn through the pahura, because the learned vakil contended that amounted to taking away from the appellant something which the appellant had got in the first Court although there was no cross-objection filed in the lower appellate Court. It was urged that this was not proper and in support of this argument the learned vakil placed reliance on the case of *Gangadhar Muradi v. Barabashi Palihari* (1). In answer to this contention the learned advocate for the respondent has drawn my attention to the provisions of O. 41, R. 33, Civil P. C. as also to the observation made by their Lordships in *Gangadhar Muradi v. Barabashi* (1) where it has been laid down that although the language of R. 33, O. 41, Civil P. C. is widely expressed, ordinarily the exercise of the power conferred thereby should be limited to cases where, as the result of the appellate Court's interference in favour of the appellants, further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. The contention of the learned advocate for the respondent was that having regard to the circumstances of the case the lower appellate Court was justified in expunging the order of the first Court on principles of justice equity and good conscience. This contention seems to me to be reasonable. The first Court's order on the point was that defenant 1 would have a right to irrigate his land with the water that accumulates on the southern bank of the tank and which is drawn through the pahura lying partly in the defendant's land and partly on the southern bank of the tank. But this point had never been specifically raised in the plaint in the case. It was not one of the points that were given to the commissioner for a local investigation and it was not one of the points on which any distinct issue was joined. This point which involved investigation of facts appears to have been raised only at the time of the trial, and that being so, I am of opinion that on the principles of justice, equity and good conscience the lower appellate Court was justified in expunging the order of the trial Judge on a point that had never been specifically raised for determination.

Another point that was taken before me on behalf of the appellant was that the lower appellate Court was wrong in law in reversing the finding of the first Court without consideration of all the facts and circumstances of the case. The only point on which the lower appellate Court seems to have come to a different conclusion is as to whether the solenama in question had been extorted by undue influence. The finding of the trial Judge on this point was that no undue influence had been exercised which the lower appellate Court found that it was a result of undue influence. But whether there was undue influence or not was not very material in the determination of the question which the Courts below had before them in connexion with the solenama. The point that was before them for determination in connexion with the solenama was whether the document was binding on the plaintiffs and both the Courts below concurrently found that it was not binding inasmuch as the plaintiffs were not a party to it. Then even if it be held that the existence or otherwise of undue influence was material in the case it cannot be said that the lower appellate Court came to a different conclusion on the point without consideration of all the facts and circumstances of the case. As the perusal of the judgment of the lower appellate Court will show the learned Subordinate Judge before he came to his conclusion that the solenama had been extorted by undue influence had taken into his consideration not only the facts but also the evidence and the probabilities of the case.

I see no sufficient reason for interfering with the decree made by the lower appellate Court. The appeal is, accordingly, dismissed with costs. I do not consider the case a fit one for a Letters Patent Appeal. The application for a certificate for such an appeal is refused.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 490

MUKERJI, J.

Mangal Chand Bagmall—Plaintiffs—
Petitioners.

v.

River Steam Navigation Co Ltd. and
another—Defendants—Opposite Parties.

Civil Rule No. 1096 of 1927, Decided on 5th December 1927, against order of Munsif, Dibrugarh, (Assam) D/- 22nd June 1927, in Small Cause Suit No. 138 of 1927.

Civil P. C., O. 1, R. 6—Parallel contract for the carriage of the same goods and for the same journey with different carriers—All should be made parties to the suit for the recovery of compensation—Contract Act, S. 91.

Where there are two parallel contracts for the carriage of the same goods and for the same journey with different carriers, a suit for recovery of compensation for the shortage of delivery cannot be proceeded with unless all the carriers are made parties and the plaintiff cannot recover from one carrier when he has been able to produce a clear receipt of the goods from the other. 47 Cal. 6; A.I.R. 1927 Cal. 394; Ref. [P 491 C 1]

Hemendra Kumar Das—for Petitioners.

Amulya Charan Chatterjee and Prokas Chandra Pakrasi—for Opposite Parties.

Judgment.—This rule relates to a suit for recovery of Rs. 78-1 on account of compensation. The plaintiffs' case was that a consignment of 10 bags of T. B. Nuts was dispatched to them from the Hajigungeghat Steamer Station to Dibrugarh Bazar Station on the Dibru Sadia Railway, that of this consignment only nine bags were delivered to them, and that one bag containing one maund 22½ seers was not delivered and 27 seers out of five amongst the nine bags that were delivered were short. The suit was tried by the Court of Small Causes at Dibrugarh and the Munsif dismissed it. The plaintiffs then moved this Court and obtained the present rule.

The defendants in the suit are the River Steam Navigation Co Ltd. and the Indian General Navigation and Railway Co., Ltd., carrying on the joint steamer service through which the goods were dispatched. In carrying the goods to their destination the last part of the journey had to be made by rail, the place of destination being a station on the Dibru Sadia Railway. The defendants produced a "clear receipt" from the Railway Company which was marked Ex. B. The Munsif dismissed the suit holding that

the defendant companies are protected from liability by reason of this receipt, and as the Railway Company had not been impleaded in the suit the plaintiffs can have no remedy.

The Forwarding Note and the Bill of Lading show but one contract to carry the goods from Hajigungeghat to Dibrugarh Bazar. If this was the only contract between the parties it is clear that the learned Munsif's decision is wrong in view of the decisions in the cases of *Dekhan Tea Co. v. Assam, Bengal Railway Co.* (1), and *India General Navigation Railway Co. v. Giridharilal Gobardhone Das* (2).

The opposite party while conceding that this must be so have endeavoured to support the dismissal of the suit upon other grounds which are many and varied. The whole of the arguments addressed to me on both sides, which I may say in passing extended over several hours, proceeded upon an assumption that a risk-note in form A, which is on the record has not been proved in the case. On behalf of the opposite party it was argued that though the risk-note is not in evidence the reference to it in the Bill of Lading and the Forwarding Note which are in evidence, coupled with the conduct of the plaintiffs in demanding of the Railway Company compensation for the loss, is sufficient to lead to an inference that the plaintiffs were aware that a part of the journey was to be performed by rail: and so the defendants' liability was at an end when they have proved the "clear receipt" Ex. B. Reliance was also placed on their behalf on condition No. II on the back of the Forwarding Note. It is much to be regretted that the learned advocates for the parties laboured under such a gross misapprehension though it must be said in fairness to them that it is the arrangement of the papers on the record that is to a certain extent responsible for this misapprehension. On a perusal of the records after the arguments were over I find that in point of fact the risk-note in question has been duly proved in the case by certain witnesses examined on commission. It has been proved to refer to this particular consignment and to have been executed by the senders Bansidhar Bajranglal in favour of the Eastern Ben-

(1) [1920] 47 Cal. 6=57 I. C. 408=23 C. W.N. 998.

(2) A. I. R. 1927 Cal. 394=54 Cal. 430.

gal Railway in respect of the carriage of the goods from Hajigungeghat Station to the Dibrugarh Bazar Station. This risk-note suggests that the Steamer Companies were acting as agents for the Eastern Bengal Railway; in any event there were two parallel contracts for the carriage of the same goods and for the same journey. Whether the risk-note is sufficient in the present case to absolve the Railway Company or not is a question that need not be enquired into. It is sufficient to say that the suit could not under such circumstances be proceeded with in the absence of the Railway Company and that the plaintiffs cannot possibly recover from the Steamer Companies when they have been able to produce a clear receipt of the goods from the other.

The Rule is discharged with costs one gold mohur.

N.K.

Rule discharged.

* A. I. R. 1928 Calcutta 491

CUMING AND MUKERJI, JJ.

E. I. Ry. Co. and another—Defendants
—Appellants.

v.

Shewbux Roy Ghanshyamdas—Plaintiff—Respondent.

Appeal No 1339 of 1925, Decided on 24th February 1928, from appellate decree of Offg Sub-Judge, Asansole, D/- 6th March 1925.

* (a) *Master and Servant—Contract of service*—The mere proclamation of strike does not terminate the relationship of master and servant.

The mere proclamation of a strike does not terminate the relationship of master and servant and make the servant lose his character as a servant. There may of course be additional circumstances consequent on a strike which may determine that relationship. Cessation of work does not necessarily mean termination of the relationship as master and servant: *Lyons and sons v. Wilkins*, (1896) 1 Ch. 811, Foll.: A. I. R. 1927 Pat. 377, Dist. [P 492 C 2]

(b) *Words*—The word "strike" does not represent any legal definition or description.

"Strike" is a word of an artificial character and does not represent any legal definition or description. It is an agreement between persons who are working for a particular employer not to continue working for him. *Denaby and Cadeby Main Collieries Ltd. v. Yorkshire Miners Association*, (1908) A. C. 384, Foll. [P 492 C 2]

* (c) *Master and Servant*—The master is not liable for a criminal act of his servant deli-

berately done of his own choice and done to effect a purpose of his own unless it is facilitated by Master's negligence.

Where the true character of the criminal act of a servant is that it is an act of his own, deliberately done of his own choice and done to effect a purpose of his own the master is not liable. If, however, the criminal act is facilitated by the negligence of the master, the master is liable and the liability in such cases rests on the master not really because his servant had committed the criminal act, but because he himself has been negligent. *Joseph Rank Ltd. v. Craig*, (1919) 88 L. J. Ch. 45, Foll.: (Case-law discussed.) [P 494 C 2]

* (d) *Railways Act, S. 72—Risk-note—Loss of consignment due to looting by railway servants on strike*—To absolve the Railway Company from liability, it must be proved that the Railway Administration took as much care of the lost consignment as a man of ordinary prudence would under similar circumstances take.

To absolve a railway company from liability for loss of a consignment due to the looting by the railway servants on strike, it must be proved whether, the strike being regarded as an unforeseen event, the Railway Administration took as much care of the consignment or rather the lost part of the consignment as a man of ordinary prudence would, under similar circumstances, take of it. [P 495 C 1]

Amarendra Nath Bose and Ambikapada Choudhuri—for Appellants.

Herambar Chandra Guha and Kiran Mohan Sircar—for Respondent.

Mukerji, J—This appeal has arisen out of a suit in which the plaintiffs Shew Bux Roy Ghaneshyamdas claimed damages for non-delivery of 17 tins of ghee out of a consignment of 104 tins dispatched from Daltongunge by Luchmi Narain Mahadeo Lal on 4th February 1922 to be delivered to the plaintiffs at Barakar. The consignment was covered by a risk-note in Form B. The trial Court dismissed the suit. That decision was reversed and the suit was decreed in favour of the plaintiffs by the Subordinate Judge on appeal. The defendant the E. I. Ry. Co. and the Secretary of State for India in Council have preferred this appeal.

The facts as found by the trial Court and as far as they are necessary to be stated are these: A general strike of the railway servants, mostly menials, commenced on 15th February and work on the line was at a dead-stop. The van containing the consignment arrived at Dhanbad on 12th February and was left in charge of a choukidar at the goods yard to be taken along with other vans to the goods shed. The goods yard

is about three miles off the goods shed. The van was next noticed at the goods shed on 16th February the door being ajar and the seal broken. The contents being examined 11 tins were found missing. The door was then sealed, but on 18th February the door was again found open and 6 more tins were found short. During all this time the work of the railway was in a paralyzed state on account of the general strike. These findings of fact have not been reversed by the Subordinate Judge. The Subordinate Judge, however, has recorded two findings on which he has rested his decision. They are that the 17 tins of ghee were looted by the strikers at Dhanbad partly on 16th and partly on 18th February, that the strike was an unforeseen event and, therefore, by reason of the proviso mentioned in the risk-note was not within the meaning of the words "wilful neglect," as mentioned in the exception provided by the risk-note. I confess I find it somewhat difficult to follow what the learned Subordinate Judge meant when from these two findings he concluded as follows: "So the defendants are liable, if there has been theft by railway servants." Reading his judgment as a whole, however, it seems to me fairly plain that he has proceeded on the view that the defendants are not protected by the risk-note as the case comes within the exception mentioned in it, and because the tins were stolen or looted by the servants of the railway, the defendants are liable.

The decision of the learned Subordinate Judge has been challenged before us upon several grounds, some of which may be disposed of quite soon. It has been argued that his finding that the tins were looted by railway servants is unsupportable as an inference deducible from the materials that are on the record or the facts that have been found. This argument I may say is not altogether without substance, and were I asked to come to my own conclusion on the point I would perhaps find it extremely difficult to arrive at the same conclusion as the learned Subordinate Judge. On a second appeal, however, we are in quite a different position, as it is not possible for us to say that the finding is based on no materials. It has also been argued that the strikers cannot be regarded as servants of the rail-

way and in support of this position reliance has been placed upon the case of *G. I. P. Ry. Co. v. Gurdayal Badaridas* (1). With all respect to the learned Judges of the Patna High Court who decided that case I am unable to agree in all that has been said therein. I am of opinion that the mere proclamation of a strike does not terminate the relationship of master and servant and make the servant lose his character as a servant. There may of course be additional circumstances consequent on a strike which may determine that relationship "Strike" as pointed out by Lord James of Hereford in *Denaby and Cadeby Main Collieries Ltd. v. Yorkshire Miners Association* (2), is a word of an artificial character, and does not represent any legal definition or description. It is an agreement between persons who are working for a particular employer not to continue working for him (*per Kay, Lord Justice, in Lyons and Sons v. Wilkins* (3)). Cessation of work does not necessarily mean termination of the relationship as master and servant, but other circumstances attendant or concomitant are necessary to put an end to that relationship. When we come to examine the circumstances we see that the findings of the Subordinate Judge are that the strikers were living in the railway quarters, they had not given up their appointments, but were pressing for higher wages and that they had not in fact been discharged, but notices had been served on them to resume work failing which they were to be discharged. Between strikers such as these and the Railway Administration the relationship had not terminated, though after one has struck work, it may be important to consider, whether one can be regarded as acting in the course or within the scope of his employment a question which might arise in cases of this description.

The more important argument of the appellants relate to the nature of the contract embodied in the risk-note and the view of the defendants' liability that has been taken by the Subordinate Judge. The appellants contend that the Subordinate Judge, while he is right in

(1) A. I. R. 1927 Pat. 337=6 Pat. 369.

(2) [1906] A. C. 384=75 L. J. K. B. 961=22 T. L. R. 543=95 L. T. 561.

(3) [1898] 1 Ch. 811=65 L. J. Ch. 601=45 W. R. 19=74 L. T. 358.

holding that the defendants are not protected by the risk-note, as the case comes within the exception mentioned therein, was in error in supposing that the railway servants looted the goods is sufficient to charge the defendants with liability. The respondents on the other hand contend that the risk-note embodies a special contract which must be taken as entirely regulating the transaction and solely determining the rights and liabilities of the parties and that once the case is found to come within the exception, by the terms of this special contract itself the plaintiffs are entitled to recover. These rival contentions will now have to be considered.

In view of the facts found the risk-note would read thus :

Whereas the consignment is charged at a special reduced rate we in consideration of such lower charge agree and undertake to hold the Railway Administration harmless and free from all responsibility for any loss, etc., from any cause whatsoever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due to theft by its servants.

Reading the risk-note as carefully as one would, one will find nothing in it beyond a contract absolving the Railway Administration in all cases excepting a few cases specified. There are no words indicating that with regard to the cases so excepted the risk-note itself, apart from the general law, creates a liability or that when a case comes within the exception the rights and liabilities of the parties such as they are under the general law are to be regarded as in any way limited, extended or qualified by the risk-note. In support of the position that the respondents contend for reliance is placed upon a series of cases, to wit : *Sheotarai Ram v. B. N. W. Ry. Co.* (4), *E. I. Ry. Co. v. Nil Kanta Roy* (5), *E. I. Ry. Co. v. Kanak Behari Halder* (6) ; *E. I. Ry. Co. v. Nathmal Behari Lal* (7) ; *E. I. Ry. Co. v. Sriram* (8). All these cases deal with the question of onus which arises in matters of this description ; but the use that the respondents desire to make of them is that the decisions suggest that once a case

comes within the exception nothing else need be investigated and by the terms of the risk-note itself the Railway Administration becomes liable. I am unable to agree with this contention and I do not see that these decisions lay down any such proposition. In only one amongst these decisions namely the case of *Sheobarat Ram v. B. N. W. Ry. Co.* (4), there is a passage which may perhaps be read as suggesting what the respondents contend for, but I have no doubt that that suggestion was never intended. To agree with the respondents' contention would be to hold that while the risk-note in consideration of a lower charge limits the liability of the Railway Administration to only those cases which may come within the exception in the risk-note, it again extends or enhances the liability of the Railway Administration in respect of those cases by taking them out of the general law.

This view would militate against the provision of S. 72, sub-S. (2), Railways Act 9 of 1890 to which statutory provision risk-notes owe their origin and in which it is said " An agreement purporting to limit that responsibility " etc, etc. Moreover it is exceedingly doubtful whether it is permissible for a Railway Administration to extend or enhance their liability under the general law as embodied in S. 72 of the Act by means of a special contract. That question, however, need not be discussed as no such enhancement or extension was, in my opinion, ever intended by the risk-note. The respondents' contention in this respect, as far as I am aware, is an unusual one, and while there are numerous authorities which have laid down that the special contract is a limitation of the liability of the Railway Administration there is scarcely any in which it has been held that such a contract in respect of the excepted cases enhances their liability. A contention somewhat though not quite similar appears to have been advanced before the Madras High Court in the case of *M. & S. M. Ry. Co. v. Subba Rao* (9) and dealing with it Oldfield, J., observed :

It is next material that in the present case the contract embodied in the risk-note (it was risk-note in Form B in that case) was made

(4) [1912] 16 C. W. N. 766=15 I. C. 56.

(5) [1914] 41 Cal. 576=22 I. C. 679=19 C. W. N. 95=19 C. L. J. 142.

(6) [1918] 22 C. W. N. 622=44 I. C. 691.

(7) [1917] 39 All. 418=39 I. C. 130=15 A. L. J. 321.

(8) A. I. R. 1924 All. 177=46 All. 125.

(9) [1920] 43 Mad. 617=11 M. L. W. 358=38 M. L. J. 360=55 I. C. 754=(1920) M. W. N. 198.

in consideration of the railway's acceptance of a reduced charge, and it therefore cannot be regarded as intended to increase its responsibility.

The intention to increase the responsibility of the Railway Administration is in my opinion one not only not consistent with but repugnant to the terms of the risk-note. The respondent then contends that the railway servants having committed theft in respect of the goods, nothing else need be considered but that the Railway Administration are liable. I am unable to agree with this contention also. Once the risk-note is out of the way as a contract by which they were absolved their liabilities will have to be determined by the provisions of the Act, S. 72 of which lays down the measure of the general responsibility of a Railway Administration as a carrier of animals or goods. Sub-S. (3), S. 72, bars the application of the common law of England or the Carriers Act of 1865, and under sub-S. (1) the measure of the responsibility is the criterion laid down in Ss. 151, 152 and 162, Contract Act, subject to the other provisions of the Railways Act itself. Under the common law of England if goods are lost by reason of the criminal act of a servant, it being impossible to regard the criminal act to have been done within the scope of the servants' employment, the bailee is not responsible. In *Sanderson v. Collins* (10), which was the case of an accident due to negligence on the part of a servant who was driving for his own purposes a carriage sent by its owner to a coach-repairer it was held that where it is found that servant was not acting in the course of his employment the master was not liable, and Collins, M. R., in expounding the law on the point, observed :

Burglary is perhaps an extreme instance of something not done under any mandate from the master, but any other act outside the scope of the authority given by him would equally relieve the master. If the servant in doing any act breaks the connexion of service between himself and his master the act done under those circumstances is not that of the master.

In the case of *Cheshire v. Bailey* (11), the Master of the Rolls said :

He, the bailee, may perform that duty by servants or personally, and if he employs servants,

(10) [1904] 1 K. B. 628=73 L. J. K. B. 358=20 T. L. R. 249=52 W. R. 354=90 L. T. 243.

(11) [1905] 1 K. B. 237 (241)=74 L. J. K. B. 176=21 T. L. R. 130=53 W. R. 322=92 L. T. 142.

he is as much responsible for all acts done by them within the scope of their employment as he is for his own. But he is not an insurer, and is not answerable for acts done by his servants outside the scope of their employment. He is not responsible for the consequences of the crime committed by the driver in this case, which was clearly outside the scope of his employment, unless it can be shown that the happening of the crime was due to the defendants' negligence. It is a crime committed by a person who in committing it severed his connexion with his master and became a stranger ; and, as the circumstances under which it was committed are known, it raises no presumption of negligence in the defendant. He took reasonable care to perform his duty in that he sent out a servant whom he reasonably supposed to be trustworthy to drive the brougham and watch its contents in the traveller's absence and he was not bound to do more. That an ordinary contract of bailment of this class does not involve a warranty that the servant shall not turn thief and so cease to exhibit reasonable care, where the master has devolved the duty of custody on the servant is clear from the fact that no class of bailees except common carriers and innkeepers are now at common law deemed responsible for the theft of their servants, unless such theft was attributable to the negligence of the master.

This immunity rests on the combination of two well-established factors. (a) that such bailees are only bound to ordinary care ; (b) that *qua*-masters they are not responsible for acts done by their servants outside the scope of their employment. It is not necessary to refer to the authorities in detail in support of these propositions. They will be found collected in *Coggs v. Bernard* (12), and the notes thereto in Smith's Leading Cases. In the case of *Joseph Rank, Ltd. v. Craig* (13) Swinfen Eady, Master of the Rolls, clearly explained that where the true character of the act of a servant is that it is an act of his own, deliberately done of his own choice and done to effect a purpose of his own the master is not liable. This view as regards the liability of a master for criminal acts done by his servants is well settled. If, however, the criminal act is facilitated by the negligence of the master the master is liable. The liability in such cases rests on the master not really because his servant had committed the criminal act but because he himself has been negligent.

In respect of goods entrusted to a railway for carriage the question necessarily has to be determined upon the express terms of S. 72, Railways Act. The Sub-

(12) [1703] 1 Sm. L. C., 11th edn., 173.

(13) [1919] 88 L. J. Ch. 45.

ordinate Judge does not appear to have dealt with the matter from this point of view. The finding that the servants of the railway looted the tins is a finding of fact which should not be allowed to be re-opened; but it will have to be considered whether the Railway Administration was guilty of such negligence as facilitated the looting by its servants. There are findings in the judgment of the Munsif which might enable a Court to pronounce a judgment on this point, but the Subordinate Judge has not considered it necessary, erroneously as I hold, to go into this matter.

To be more precise and using the words of S. 151, Contract Act, he will have to find, whether the strike being regarded as an unforeseen event, the Railway Administration took as much care of the consignment or rather the lost part of the consignment as a man of ordinary prudence would, under similar circumstances, take of it. On the answer he finds himself able to give to this question will depend his ultimate decision of the case.

The appeal is allowed, the decree complained of set aside and the case remanded to the Court of the Subordinate Judge to rehear and dispose of it in the light of the observations made above.

Costs of this appeal will abide the result of the remand.

Cuming, J.—I agree.

N.K.

Case remanded.

A. I. R. 1928 Calcutta 495

CHOTZNER AND GREGORY, JJ.

Akhoy Kumar Dey and others—Accused
1 to 3—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revs. Nos. 1160 and 1208 of 1927, Decided on 6th February 1928.

Merchandise Marks Act, S. 15 — "*Offence*" means the offence charged—*Time of the original infringement is immaterial.*

The offence specified in S. 15 is the particular offence charged and it makes no difference whether the original infringement took place two or five or ten years ago. The words "*first discovery*" mean when the complainant first discovered the offence and he is to take action within one year from that time. [P 496 C 1]

Binod Mitter, Narendra Kumar Basu and Satindra Nath Mukherji—for Petitioners.

A. K. Basu—for the Crown.

Judgment.—There is no dispute about the facts of these cases which are that the National Bank of India sells gold bars in the Calcutta markets bearing a stamp showing the name of the bank in English and Guzrati with the words "100 touch" in Guzrati and the names of the bullion brokers, whoever they may be, in English. On 10th and 19th March 1926, certain men employed by the bank bought on each occasion one gold bar from the shop of the petitioner Akshoy Kumar De and these bars bore the counterfeit mark of the National Bank upon them. Further, the police searched the petitioners' shop on 22nd March and found several other gold bars bearing this mark and some dies for stamping the mark upon them. The defence taken was that the gold bars sold are composed of what is known in the market as bator gold and that the petitioners had sold bars of this make under this particular mark in the open market for years past. The learned Chief Presidency Magistrate found that, though it was true that the firm had been using the counterfeit mark for some time, they had not succeeded in establishing this defence or their further defence that other gold bars bore the same mark as the English gold bars of the National Bank, and he further found that, by their use of the counterfeit mark, the accused firm had the opportunity of deceiving others and that it was no answer to the charge to say that the counterfeit would not deceive an expert. He, therefore, held that the mark in question was the property of the National Bank used by them to distinguish their English gold and that the mark used by the accused firm was counterfeit. These findings have not been challenged before us.

It has, however, been argued before us, as it was argued in the Court below, that the prosecution is barred by S. 15, Merchandise Marks Act (4 of 1889).

This section is in the following terms :

No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

Sir Benod Mitter who has appeared for the petitioners contends that, as the Magistrate has found that the sale of gold bars under the counterfeit mark has continued for many years, the offence must have been known to the bank and, there-

fore, as the bank took no action within the statutory period a prosecution will not lie. He has relied upon the case of *Ruppell v. Ponnusami Tevan* (1), and the two cases decided by the lower Burma Chief Court, namely, the cases of *Abdul Majid v. Emperor* (2) and *Mahomed Jawa v. H. S. Wilson* (3). Mr. Basu for the Crown argues, on the other hand, that the offence specified in S. 15, Merchandise Marks Act, is the particular offence charged and that it makes no difference whether the original infringement took place two or five or ten years ago. He also says that the words "first discovery" mean when the complainant first discovered the offence and that he was to take action within one year from that time. The point is by no means free from difficulty; but we are on the whole satisfied that Mr. Basu's contention is correct. We think that the word "offence" means "the offence charged." If it had meant only the infringement of the trade-mark, we think that the section would have said so. The charge here is under S. 486, I. P. C., that is, for selling goods marked with a counterfeit trade-mark. The complainant first discovered that this offence took place on 10th March 1926 and he lodged his complaint within a month of that date. It has been contended that the bank must have known of the use of this counterfeit trade-mark long ago. But apart from the suggestion that their broker Jagannath must have known of it there is no evidence as neither he nor Krishna Lal of the other firm of brokers have been called as witnesses by the defence. On the other hand we have the definite denial by Mr. Collier the Accountant, that the bank knew anything about it. We think, therefore, that the first discovery, to use the words of the section, on the part of the bank did not take place before 10th March 1926 when Aratoon purchased a gold bar from the petitioners' shop.

Sir Binod Mitter has next contended that the petitioner Akhoy Kumar De personally has no connexion with the firm. We think it sufficient to say that when the firm bears his name and the books show payments of many sums to him and when moreover in his petition he des-

cribes himself as the proprietor of the firm, we consider that his connexion with the firm is well established.

Sir Benod next contends that the petitioner Nirode Baran Dutt cannot be held liable under this prosecution as all that he is said to have done was to have handed over one of the bars to the petitioner Gokul Chunder Sil and nothing more. But the evidence shows that he actively promoted the sale and was, in fact, as the learned Magistrate has found, the broker.

Sir Benod has finally urged that the order made by the learned Magistrate for the forfeiture of the gold bars found by the police in the shop which are stated to be worth about Rs. 4,000 is too severe. The learned Magistrate was no doubt competent under S. 9, Merchandise Marks Act, to make the order. But we do not think that, in the circumstances of this case, it was a necessary order. We think it will be sufficient, therefore, while setting aside the order of forfeiture, to direct that the bars be restored to the petitioners, subject to their satisfying the Magistrate that the offending marks have been obliterated. With this modification, R. 1160 is discharged.

With regard to the petition for enhancement of sentence on the above-mentioned petitioners (Revision Case No. 1208 of 1927) we are of opinion that no action is necessary. That application is accordingly rejected.

N K.

Rule discharged.

A. I. R. 1928 Calcutta 496

B. B. GHOSH AND ROY, JJ.

Nafar Chandra Pal Choudhury—Appellant.

v.

Murali Mondal and another—Respondents.

Appeals Nos. 1223 and 1224 of 1925, Decided on 20th July 1927, from appellate decrees of Spl. Judge.

Bengal Tenancy Act, S. 109-A—Rent suit—No second appeal lies from the decision of a Special Judge, which settles a fair and equitable rent.

The settlement of rent was asked for lands which the tenant had encroached upon beyond the original area let out to him. The Assistant Settlement Officer fixed the rent on the basis of a certain area which, according to his view, was the excess land. On appeal, the Special

(1) [1899] 22 Maj. 488=1 Weir 821.

(2) [1919] 9 L.B.R. 31=36 I.C. 168=10 Bur. L.T. 19.

(3) [1911] 4 Bur. L.T. 83=10 I.C. 787=12 Cr. L.J. 246.

Judge thought that the measurement of the area given in the kabuliyat was not at all accurate and he held that since the landlord had allowed a lax measurement by his own officers, it was not fair that the tenant should be compelled to pay at the kabuliyat rate for the area found by the scientific measurement of the cadastral survey. He, therefore, held that it would be just and proper to enhance the rent of the holding by three annas in the rupee. It was contended that the decision fell within the provisions of S. 105 and, therefore, a second appeal lay from it.

Held: that no appeal lay as the decision only settled a fair and equitable rent: 43 Cal. 603 (F. B.), Dist. [P 497 C 2]

Amarendra Nath Bose and Radhica Ranjan Guha—for Appellant.

Khitish Chandra Chakravarti, Panchanon Ghosal, Saroj Kumar Banerji and Satindra Nath Roy Chowdhury—for Respondents.

Ramendra Mohun Majumdar for *Biraj Mohun Majumdar*—for Deputy Registrar.

Judgment—Second Appeal No. 1223 is by the landlord against the decision of the Special Judge modifying the decision of the Assistant Settlement Officer allowing an increase of rent to the appellant, but reducing the rate of increase allowed by the Assistant Settlement Officer. A preliminary objection has been taken by the defendants that no second appeal lies against the decision under S. 109-A, Cl. 3, Ben. Ten. Act. The learned advocate for the appellant contends that as it is a decision not falling within the provisions of S. 105, Ben. Ten. Act, there is a second appeal or, in other words, his argument amounts to this that where various questions are raised in the Court below, namely, whether the tenancy is a permanent mokarari one or not, and whether the landlord is entitled to an increase of rent for an increase of area under S. 52, Ben. Ten. Act, there is a second appeal although the decision of the Special Judge professes to settle a fair and equitable rent. In support of this contention, reliance is placed on the Full Bench case of *Jnanada Sundari Choudhurani v. Abdur Rahman* (1), where it was held by the Court that when in a proceeding under S. 105, Ben. Ten. Act, the Settlement Officer is asked to increase the rent under sub-S. 4 in accordance with the rule laid down in S. 52, Ben. Ten. Act, and the claim is refused on appeal to the Special Judge on the ground that the land of the tenant is not proved

to be in excess of the area for which the rent has been previously paid, a second appeal is not barred by S. 109-A of that Act.

The learned advocate for the appellant asks for an extension of the rule laid down in that case. But when the facts and circumstances of the present case are looked into, the Full Bench case has no bearing upon the question in the present case. Here the settlement of rent was asked for lands which the tenants had encroached upon beyond the original area let out to him. The Assistant Settlement Officer fixed the rent on the basis of a certain area which, according to his view, was the excess land. On appeal, the Special Judge thought that the measurement of the area given in the kabuliyat was not at all accurate and he held that since the landlord has allowed a lax measurement by his own officers, it is not fair that the tenant should be compelled to pay at the kabuliyat rate for the area found by the scientific measurement of the cadastral survey. He, therefore, held that it would be just and proper to enhance the rent of the holding by three annas in the rupee. Although S. 52 is mentioned, this is not really, as the learned advocate for the appellant has conceded, a case falling within S. 52, Ben. Ten. Act, but an increase of rent according to the terms of the kabuliyat. The area has been estimated by the learned Judge and he has settled a fair rent. There is no question which can be raised in second appeal.

The appeal, therefore, fails and is dismissed with costs two gold mohurs.

With regard to second appeal No. 1224, the learned advocate for the appellant has very fairly conceded that he cannot urge anything against the preliminary objection taken on behalf of the respondent.

This appeal also is, therefore, dismissed with costs two gold mohurs

N.K.

Appeals dismissed.

(4) [1916] 43 Cal 603=23 C. L. J. 281=33 I. C. 148=20 C. W. N. 428 (F. B.),

A. I. R. 1928 Calcutta 498

CUMING AND MUKERJI, JJ.

Karali Prosad Dutta and another—
Plaintiffs—Appellants.

v.

E. I. Ry. Co. — Defendants — Respondents.

Appeal No. 2188 of 1925, Decided on 24th February 1928, from appellate decree of Dist., Judge, Burdwan, D/- 29th July 1925.

(a) *Evidence Act, Ss. 60 and 67—Under S. 67 direct evidence of handwriting is not always necessary—S. 60 does not exclude circumstantial evidence of a thing which could be seen, heard and felt.*

Sections 60 and 67 are somewhat ambiguous, but it was never intended by S. 67 that direct evidence of handwriting was always necessary. The section merely stated with reference to deeds what was the universal rule in all cases, that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given. It was never intended by S. 60 to exclude circumstantial evidence of a thing which could be seen, heard and felt, though at first sight the section might appear to have that meaning: 12 B. L. R. App. 18, Foll. [P 498 C 2, P 499 C 1]

(b) *Railways Act, S. 72—Risk-note — Terms “theft” and “robbery” are not synonymous.*

The terms “robbery” and “theft” are not synonymous. “Robbery” has been used in the sense in which that word has been used in the Penal Code: (Case law considered). [P 499 C 2]

(c) *Railways Act, S. 72—Loss of goods due to not padlocking a van carrying the goods—Omission deliberate and intentional—Railway Company is liable for wilful neglect—Contract Act, S. 151.*

Plaintiff who signed the risk-note Form B sued a Railway Company for the loss of a consignment. It was proved that the consignment was loaded in a van which was not padlocked and there was no seal, and it was also proved that it was the practice not to padlock the doors.

Held: that the company was liable as omission to padlock was intentional and deliberate and the loss was due to the wilful neglect of the Railway Company. The company was also liable under S. 151, Contract Act, as it is inconceivable that a man of ordinary prudence would let similar goods of his own to be carried in an unlocked van under similar circumstances: A. I. R. 1928 P. C. 24, *Rel. on.*

[P 500 C 1]

Sarat Chandra Bose and Panchanan Chowdhury—for Appellants.

Amarendra Nath Bose and Ambikapada Chowdhury—for Respondents.

Mukerji, J.—The plaintiffs sued to recover from the defendants, the East Indian Railway Co., the price with interest of a bale of cloth, which formed part of a consignment dispatched from Howrah to the plaintiffs at Durgapur. The consignment was covered by a risk-note in form B. The Subordinate Judge decreed the suit, but on appeal taken from that decision the District Judge reversed the same and dismissed the suit. The plaintiffs have preferred this second appeal.

The District Judge held that the risk-note was signed by one Basudev who delivered the goods to the Railway Company for carriage, and the Railway Company absolved by reason of the risk-note.

It is contended on behalf of the appellants, in the first place, that it has not been legally proved that Basudev signed the risk-note. This fact was sought to be proved in this way: Basudev who is said to be alive was not called, obviously for the reason that it was either not possible for the defendants to find him out or to rely on him. D. W. 1, a freight calculator of the East Indian Railway at Howrah, who calculated the freight for the consignment, was called and he said that he attested the signature of Basudev on the risk-note, on Basudev having told him in answer to his enquiry that he had signed the note. It has been argued that this does not amount to legal proof of the fact that Basudev signed the note and reliance has been placed in this connexion on Ss. 60 and 67 Evidence Act. It is said that as it was alleged that Basudev had signed the risk-note, under S. 67 it was necessary to prove that the signature on the risk-note was in Basudev's handwriting; and as the signing of the risk-note by Basudev was a fact which could be seen under S. 60, only such oral evidence of the fact could be given as was of a person who had seen Basudev signing the document. This precise contention was dealt with and overruled by Markby, J., in the case of *Neelkanto Pandit v. Jagqobandhu Ghosh* (1). He held that Ss. 60 and 67 were somewhat ambiguous, but that it was never intended by S. 67 that direct evidence of handwriting was always necessary, but the section merely stated with

(1) 12 B. L. R. App. 18.

reference to deeds what was the universal rule in all cases, that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given; and that it was never intended by S. 60 to exclude circumstantial evidence of a thing which could be seen, heard and felt, though at first sight the section might appear to have that meaning. If circumstantial evidence is allowable, then to prove that Basudev signed the note it is relevant to establish that Basudev admitted that he has signed it. This admission has been proved, and if believed it is a legal mode of proof of the fact in issue, namely, the fact of Basudev having signed the note. Whether it should be considered sufficient or not is a matter which we can go into on second appeal. This contention of the appellants, therefore, must fail.

The appellants' next contention relates to the finding of the District Judge that risk-note protects the Railway Company. The reasoning of the learned District Judge is this: The loss was due to theft from the train when she was running, that the word "robbery" used in the risk-note being synonymous with "theft", there was no "wilful neglect" and so it was not a case of theft due to wilful neglect and consequently the case does not come within the exception mentioned in the risk-note. To appreciate the bearing of this reasoning the relevant portion of the risk-note is here given:

We agree and undertake to hold the Railway Administration harmless and free from all responsibility for any loss, etc., from any cause whatever except for a loss due either to the wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident.

It is clear from the risk-note that if robbery is synonymous with theft, then loss caused by theft from a running train is not loss due to wilful neglect of the administration or of its servants, and the case not coming within the exception, the Railway Company are absolved, and the Judge's reasoning is perfectly sound. For the proposition that robbery as used in the risk-note is synonymous with theft there is a divergence of judicial opinion. The Allahabad High Court by a Full Bench has now held that it is not:

Bindraban v. G. I. P. Ry. Co., (2) and the Patna High Court has taken the same view: *Kashi Ram Karoo Ram v. E. I. Ry. Co.* (3). The Bombay and the Lahore High Courts appear to be of a contrary opinion: *B. B. & C. I. Ry. v. Sankar Chand* (4) and *Gulab Rai Lahri Mal v. E. I. Ry. Co.* (5). We have not been referred to any decision of our Court on the point, and being free to decide the question *res integra* I find it exceedingly difficult to regard the terms "robbery" and "theft" as synonymous. My reasons are mainly two: first because the two words have been used within a few lines of one another in the same document and, therefore, should be presumed to have been used in different senses; and second because the word "robbery" is preceded and followed by words implying situations over which the Railway Company themselves or their servants can have no control. For these reasons I am of opinion that the view taken by the learned District Judge that the words "theft" and "robbery" mean one and the same thing is not right. The word "robbery", in my opinion, has been intended to convey the sense in which the word is used in the Indian Penal Code, that is to say, a felonious taking from the person of another or in his presence against his will, by violence or putting him in fear. His finding that there was no wilful neglect merely because there was theft from a running train in my opinion is not right.

This finding being vitiated by the error that I have noticed, it is necessary to consider whether the case should not be sent back to the Court of appeal below to be dealt with again. Giving the matter the consideration that it deserves I am of opinion that it is not necessary to do so and that this is a proper case in which we may well exercise our powers under S. 103, Civil P. C., as recently amended. The District Judge has referred in his judgment to the evidence of one single witness, namely D. W. 3, in support of his finding that the consignment in question was put in a sealed wagon the doors of which were closed. He, however, failed to appreciate that the witness was a loading clerk at

(2) A. I. R. 1926 All. 394=48 All. 766.

(3) A. I. R. 1927 Pat. 9=6 Pat. 168.

(4) A. I. R. 1922 Bom. 256.

(5) A. I. R. 1925 Lah. 515=6 Lah. 305.

Howrah who could only speak to the state of things as they were before the wagon left Howrah. The evidence of this witness was disbelieved by the trial Judge; but however that may be it is clear upon his evidence that the door of the van was not padlocked as it was not the practice to padlock the doors of such vans in those days. The positive evidence on the point is afforded by the statement of the guard in charge of the train, Ex. C, a document on which the Railway Company themselves have relied which is to the effect that there was no seal as it was a road van. Whether mere sealing is at all effective it is unnecessary to enquire, it is sufficient that that there was no seal, and what is more important is that the system of putting padlocks on was not insisted on in those days. Wilful neglect for the purposes of a risk-note has not been explained by their Lordships of the Judicial Committee in the case of *Ardeshir Bhicaji Tamboli v. Agent, G. I. P. Ry. Co.*, (6) in accordance with the meaning given to the expression by Lord Russell in *R. v. Senior* (7),

as meaning that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it.

It was not an accidental omission that the door of the van was not padlocked; it was the practice not to do so, and so it was a deliberate and intentional omission. That the loss was due to this omission is pretty certain, for it was a factor that facilitated the theft which otherwise it would have been infinitely more difficult to perpetrate. The case therefore does come within the exception mentioned in the risk-note.

To such a case then the statutory responsibility of a Railway Company under S. 72, Railways Act, would attach. The question that next needs investigation, therefore, is whether the administration as bailee has fulfilled the standard of care laid down in S. 151, Contract Act. The finding of wilful neglect covers much the same ground as S. 151, Contract Act, in view of the circumstances of the case for it is inconceivable that a man of

ordinary prudence would let similar goods of his own to be carried in an unlocked van in similar circumstances.

The result is that in my judgment, the plaintiffs have made out a case fully entitling them to recover. The appeal is accordingly allowed and the decree of the lower appellate Court being reversed, that of the trial Court is restored with costs in this Court and the lower appellate Court.

Cuming, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 500

CHOTZNER AND GREGORY, JJ.

Samiuddin and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 509, 550 and 621 of 1927, Decided on 7th February 1928, from judgment of Addl. Sess. Judge, Chittagong.

(a) *Criminal P. C., S. 164—Any Magistrate is competent to hold the test of identification—Magistrate not empowered to deal with the matter under inquiry may prove the statement made before him under S. 157, Evidence Act—Evidence Act, S. 157.*

Any Magistrate is competent to hold a test identification and if he is not empowered to deal with the matter under enquiry he can prove the statement made before him under the provisions of S. 157, Evidence Act. S. 164 Criminal P. C., covers the case where a Magistrate acts under this section and records a statement made to him. [P 502 C 1]

(b) *Criminal P. C., S. 297—Charge to jury—Judge's duty is to place the evidence before the jury as he found it.*

It is no business of the Judge in charging the jury to assume the part of the defence counsel. It is his duty to place the evidence before the jury as he finds it and though the inference left to be drawn by the jury reasonably is that it would be unsafe to accept that evidence of a particular witness it is certainly open to the jury to believe what the witness said and to accept it if they chose to do so. [P 502 C 2]

(c) *Evidence Act, S. 24—Confession—Statement of accused before a Magistrate: "I want to make a clean breast of everything for the reason that if I serve the Government in any way, the Government may take pity on me" was held not in itself inadmissible.*

In order to make a confession inadmissible there must be something from which it should be inferred that the inducement or promise was given to the accused by some person who had authority to give it. It is not enough for the accused to entertain a hope, which may

(6) A. I. R. 1928 P. C. 24=52 Bom. 169 = 55 I. A. 67 (P. C.).

(7) [1899] 1 Q. B. 283 = 68 L. J. Q. B. 175 = 63 J. P. 8=47 W. R. 367 = 79 L. T. 562 = 19 Cox. C. C. 219=15 T. L. R. 102.

turn out to be an idle hope, that in consequence of his giving certain information, he would be rewarded by the Government. It must be shown that the hope was directly inspired by some one who had authority to make the promise.

[P 503 C 1]

Where an accused in making a confession to a Magistrate said: "I want to make a clean breast of everything for the reason that, if I serve the Government in any way, the Government may take pity on me."

Held: that this was not in itself sufficient to render the confession inadmissible having regard to the provisions of S. 24. [P 503 C 1]

Debendra Narain Bhattacharjee for A. K. Fazlul Huq, M. Mahomed Nurul Huq Chowdhury and Janhabi Churn Das Gupta—for Appellants.

Khundkar and Sachindra Nath Banerji—for the Crown.

Judgment.—These three appeals arise out of the same trial and are now disposed of together. Appeal No. 509 is by the three accused persons Samiuddin, Bakshu Mia and Eunoch Mia; Appeal No. 550 is by the accused Nezamat Ali and Appeal No. 621 by the accused Naju Mia. The trial was held by the learned Additional Sessions Judge of Chittagong with the aid of a jury. The jury unanimously found the accused Samiuddin, Bakshu Mia, Eunoch Mia and Naju Mia guilty of an offence under S. 395, I.P.C. and they by a majority of 4 to 1 found the accused Nizam Ali guilty of the same offence. As against Naju Mia, there was an additional charge under S. 75, I. P. C. The learned Additional Sessions Judge agreeing with and accepting the verdict of the jury as aforesaid convicted all these accused under S. 395, I. P. C., and sentenced Naju Mia to undergo rigorous imprisonment for six years and the remainder to undergo rigorous imprisonment for five years. At the hearing before us, Naju Mia and Nizam Ali were represented by learned vakils while Samiuddin, Bakshu Mia and Eunoch Mia were unrepresented, they having preferred their appeal from jail.

As regards the facts, there is no dispute, and they may briefly be stated thus: A dacoity was committed in the house of one Jiban Kristo Chowdhury, a zamindar who had also a large money-lending business and his practice was to lend money taking ornaments by way of security. These ornaments were all kept in his house together with a considerable amount of money in cash. On the night

of 14th January 1926, a large number of dacoits broke into his house armed with revolvers and swords and, by the light of electric torches broke open the chests and almirahs and took away a sum of Rs. 8,000 in cash and a large quantity of gold and silver jewellery. The first information was recorded at 3-30 p. m. on 15th January by the witness Saroda Charan Chowdhury 14 men were arrested on suspicion on 16th and two test identifications were held on 7th and 9th February respectively in which no witness was able to identify any of the accused persons. The trial continued for over two months and the result was that on 6th April 1926 the accused were all discharged. Nothing more happened until 28th July when the appellant Naju Mia was arrested and, on the following day, his house was searched and a certain number of ornaments some of which are said to have been identified subsequently as part of the proceeds of the dacoity were found. On 30th he was remanded to police custody and, on 2nd August he made a confession before a Magistrate which he afterwards retracted. On 4th October, a chargesheet was sent in which the names of certain of the appellants appeared and it was stated there that the accused Nizam Ali had absconded, and it was not until 15th February 1927 that he was arrested. A test identification was held on 25th February and there the witness Saroda Charan Chowdhury for the first time identified Nezamat as one of the dacoits.

Thereafter the trial proceeded with the result which has already been stated. Mr. Bhattacharji who has appeared for the appellant Nizam Ali has raised certain objections to the learned Judge's charge to the jury. He says, in the first place, that the test identification which was conducted by a Magistrate of the 2nd Class who was not empowered under the law to hold an enquiry was bad and that, therefore, no evidence with regard to what happened in that test identification was admissible in evidence. He contends that though any Magistrate is competent to hold a test identification, yet if he is not empowered to deal with the matter under enquiry he cannot prove the statements which were made before him under the provisions of S. 157, Evidence Act. This contention does not seem to us to be well founded. It is plain that

no test identification could be held before Nizam Ali was arrested and, as that did not occur until 15th February 1927 the test identification could not take place before that date, though, in point of fact, the enquiry with regard to the other appellants had already begun. S. 164, Criminal P. C. covers the case where a Magistrate acts under this section and records a statement made to him.

Mr. Bhattacharji next contends that the learned Judge has not charged the jury sufficiently in regard to the fact that the witness Saroda did not identify the appellant Nizam Ali at the two earlier test identifications and that, in the first information which he lodged, he did not say that he had identified the man. We have examined the charge with great care and we are of opinion that there is no substance in this contention. We find, first of all, that the learned Judge told the jury in dealing with the evidence of Saroda that he (Saroda) noted the features of one of the dacoits. That man is Nizam Ali. He had his face painted black with some white marks on it. He was taken inside the jail two or three times. He identified Nizam Ali on the last occasion.

Then, a note was made by the learned Judge in brackets as follows:

He "that is, Saroda," did not say in the lower Court the first time he was examined there that he had noted the features of one of the dacoits.

The reference to the statement made by this witness in the lower Court is clear that, in fact, the witness did not say that he recognized Nizam Ali. Then again the learned Judge says that, according to the witness Upendra Lal Chowdhury, Saroda was in his (Upendra Lal's) shop on the night of the dacoity and did not come out till the dacoits had left the house of Jiban Kristo. This evidence, it appears, is in direct conflict with what Saroda says that he was sleeping in his own house; and the learned Judge says:

You should bear in mind that Saroda is the first informant in this case. He says that he was in their cutchery ghur on the night of the dacoity and has identified one of the accused as being among the dacoits. If you believe this witness, Saroda could not see the occurrence nor was it probable for him to identify any of the dacoits; you should also bear in mind that the witness did not say in the lower Court that Saroda was in his shop that night. He says that he did not say so as nobody had asked him.

Later on, in summing up the evidence against each of the accused, the learned Judge says with regard to Nizam Ali: Saroda identified him as being among the dacoits.

Then, in brackets, he says:

You should in this connexion consider the evidence of Upendra Chowdhury that Saroda was in his shop on the night of the dacoity, and should also bear in mind that there were three test identifications in jail and Saroda could not identify anyone on the first two occasions;

and, later on, when dealing with the case of the appellant Enoch, the learned Judge says:

You should bear in mind that Exs. F and G show that Saroda could not identify anyone on a previous test identification.

It appears, therefore, that at least on four occasions in the course of his charge, the learned Judge put it to the jury that it was only on the third attempt that the witness Saroda succeeded in identifying this appellant Nizam Ali. The question evidently that he left to the jury to decide was whether in these circumstances it was safe to accept the evidence given by this witness in Court and he told the jury moreover that, in the first information, Saroda did not say that he had recognized anybody. So, there can be no room for doubt that the learned Judge put everything in favour of this accused before the jury and we do not consider that he could have done anything more. It was not his business to assume the part of the defence counsel. It was his duty to place the evidence before the jury as he found it and, though the inference left to be drawn reasonably was that it would be unsafe to accept this evidence, it was certainly open to the jury to believe what the witness said and to accept it, if they chose to do so. We think, therefore, that there is no substance in the argument that there has not been sufficient direction on behalf of the learned Judge.

We now proceed to deal with the case of the appellant Naju Mia. He has been represented at the hearing before us by Mr. Das Gupta who has raised two points in the course of his argument. The first is that the confession made by Naju was made under such circumstances as to leave little doubt that it was not a voluntary confession and the second is that the learned Judge omitted to charge the jury that the articles found in the house of this appellant were not mentioned in the first list given by Jiban

Kristo, on the day following the dacoity. Now with regard to the first point, the confession was recorded by the Sub-Deputy Magistrate Babu Upendra Narain Chowdhury who stated that he had recorded the confession after giving the accused the necessary warning before recording it and also after saying that there was no police officer present and giving him sufficient time—an hour or so—to reflect before committing himself. Now, the confession itself ran like this. The learned Magistrate said :

I am a Magistrate. There is no policeman here. If you want to make any statement of your own free will, you may do so. Don't say anything you are tutored to say. Don't say anything even under threat from anyone. You may say anything or not as you please. There is no obligation of any sort. If you admit anything, it will be recorded as evidence and will, if necessary, be used as evidence against you. Do you want to make any confession?

Naju Mia replied:

I want to make a clean breast of everything for the reason that, if I serve the Government in any way, the Government may take pity on me.

It is contended by Mr. Das Gupta that this statement of the appellant, Naju Mia is in itself sufficient to render this confession inadmissible. But having regard to the provisions of S. 24, Evidence Act, it seems to us that there must be something from which we are to infer that the inducement or promise was given to the accused by some person who had authority to give it. It is not enough for the accused to entertain a hope, which may turn out to be an idle hope, that in consequence of his giving certain information, he would be rewarded by the Government. It must be shown that the hope was directly inspired by some one who had authority to make the promise. There is nothing of the kind here. In fact, the opening words of his statements are:

No one has pinned me nor asked under menaces to say anything. I want to unburden myself of all that has happened.

Now, with regard to this, the learned Magistrate said that he believed that the confession was a voluntary confession and he gave a certificate to that effect. In dealing with it, the learned Judge says:

Although I have admitted the retracted confession of the accused Naju Mia, it is for you to appraise the value of that confession. The weight to be given to such confession depends upon the circumstances under which it was given and the circumstances under which it was retracted. It will, in short, be unsafe for you to rely upon the retracted confession of

Naju Mia, unless, after consideration of the whole evidence in this case, you are in a position to come to the unhesitating conclusion that the confession is true. Even in that case it is evidence against Naju Mia but not against others.

We are of opinion that it is a perfectly correct statement of what the law governing a retracted confession is. The learned Judge then proceeds to put the dates of his arrest, of the search of his house and of his confession and he says that it is after all for the jury to consider whether the confession was a voluntary one and whether there is evidence strong enough to corroborate the finding of certain articles which were stolen in the house of this accused.

In regard to the second point raised by the learned vakil, the learned Judge has dealt with all the articles discovered in the house of Naju after the search. *Prima facie*, the place where they were discovered and the cautious concealment of all these articles would lead to the inference that they were stolen property and evidence was led by the prosecution to show that the articles so discovered were, in fact, articles stolen from the house of Jiban Krishna. The learned Judge has told the jury that some of these articles were mentioned in the list filed by Ram Krista and that the others were not in that list and he has said:

You should bear in mind that except the Baju and earring no other ornament is mentioned in the list submitted by Jiban Kristo on 16th January 1926. Even with regard to these two items, there is discrepancy regarding weight. In considering the evidence you should in the first place bear in mind the discrepancies and contradictions which I have pointed out to you and to which your attention has been drawn by the defence pleader and you should consider how far those discrepancies and contradictions are due to faulty memory.

There was, therefore, a clear direction to the jury that they would have to make up their minds, whether, in spite of these contradictions, omissions and discrepancies, there was evidence on which they felt that they could safely rely. The verdict shows that they considered the evidence satisfactory. We think, therefore, that there is no substance in this point.

We have still to deal with the case of the remaining three appellants—Samiuddin, Bakshu Mia and Eunoch Mia. The evidence against these three persons is very much of the same character, and it is of persons who saw them on the day of the occurrence in two sampans and land-

ing at Chowdhury's Ghat and of witnesses who say that they saw them again boarding the sampans at the Chowdhury's Ghat on the day after the dacoity. The prosecution case evidently was that these men were associated together in these sampans both prior to and after the dacoity. Though it cannot be said that that evidence is conclusive, it was no doubt open to the jury, if they thought so, to hold that these facts showed that these appellants had actually taken part in the dacoity and we cannot say that their decision is wrong. This appeal, in our opinion, has no substance in it.

On these considerations, we are of opinion that the appellants have been justly convicted. We accordingly affirm the conviction and sentence and dismiss all the three appeals.

N.K.

Appeals dismissed.

* A. I. R. 1928 Calcutta 504

MUKERJI, J.

B. N. Ry. Co. Ltd.—Defendant—Petitioner.

v.

Tara Prosad Maity—Plaintiff—Opposite Party.

Civil Rule No. 1057 of 1927, Decided on 5th December 1927, against order of Munsif, Dauton (Midnapur), D/- 21st June 1927, in Small Cause Suit No. 58 of 1927.

**(a) Provincial Small Cause Courts Act, Art. 35 (ii)—Suit for damages for loss of animal on the ground that the animal was killed due to negligence of the Railway Company in not fencing the line, in driving too fast and not taking precautions in frightening away the animal—Allegations do not constitute mischief and the Article has no application.*

In a suit for damages against the Railway Company for damages for loss of an animal the allegations were that due to the negligence of the defendant company in not fencing the railway line, and in driving the locomotive to the utter disregard of public safety, life and property, and the company's servants in charge of the engine not taking proper precautions in frightening away the animal, the plaintiff was put to the unnecessary loss of the animal which was thrown down the embankment, sustaining injuries which resulted in its death.

Held: that the said allegations in the plaint constituted a case of negligence which even, if wilful, fell far short of those requisites which would go to make out any such intent or knowledge as is necessary to satisfy the definition of

"mischief" as given in S. 425, and Art. 35 (ii) would not apply. [P 505 C 2]

**(b) Railways Act, S. 16—No restriction imposed upon the company as regards their right to use locomotives only at scheduled times or at a speed less than scheduled speed—Inconvenience to public is not a ground of action.*

Where there is no restriction imposed on the Railway Company as regards their right to use locomotives only at scheduled times or at a particular speed, whatever nuisance or inconvenience may be caused to the public in general it cannot be regarded as a violation of any duty which the company owe to them or as amounting to any negligence which may form a ground of action so far as they are concerned: *R. v. Pease, (1832) 4 B & Ad. 30, Ref.* [P 506 C 1]

**(c) Tort—Negligence—A driver of a Railway Company is not bound to be on the look out to see if any trespassers are on the line—Driver's failure to whistle in consequence of which any loss is sustained is no negligence on the part of the driver.*

There is no principle or authority which demand that a driver running an engine on the open lines at places where there are no level-crossings or which are not known to be ordinarily used for purposes of crossing the rails is bound to be on the look out to see if any trespassers are on the lines. A Railway Company allowing persons to cross the line otherwise than by a level crossing is not in duty bound to use care to protect such persons. Omission to notice and the failure to blow a whistle in consequence of which any loss is sustained does not amount to negligence: *Cases Referred.* [P 507 C 1]

**(d) Tort—Negligence—No statutory provision to fence a railway line—Animal straying and killed on the railway line—No evidence that accident was caused by any negligence on the part of the driver—The Company is not liable.*

The company is under no obligation, statutory or otherwise, to fence the line and if an animal strays and grazes on to the railway line and in consequence is killed and there is no evidence that the accident is caused by any negligence on the part of the driver of the train, the company is not liable: *Henry Conder v. Ballaprosad Bhagwandin (1895), Un. P. J. of Bom. H. C. 91, Foll.; (Case law discussed).*

[P 508 C 2]

Probodh Chandra Chatterjee—for Petitioner.

Satcowripati Roy—for Opposite Party.

Judgment.—This Rule relates to a decree for damages which the plaintiff has obtained against the defendant company for having knocked down and killed a bullock belonging to the plaintiff. The incident happened on the 3rd February 1911, at about 11 a. m., when a light engine belonging to the defendant company and run by one of the company's drivers was proceeding up the railway line from Danton to Lakhannath Road, bumped against the bullock which at

that particular moment happened to be on the railway line, and as a result the bullock was thrown down the embankment, sustaining injuries which resulted in its death.

The negligence upon which the action was founded in the plaint was set out in para. 5 thereof which ran in these words :

That due to the negligence of the defendant company in not fencing the railway line, and in driving the locomotive to the utter disregard of public safety, life and property, and the company's servants in charge of the aforesaid engine not taking proper precautions in frightening away the unfortunate animal the plaintiff was put to the unnecessary loss of Rs. 49 which the defendant company is bound to pay. Rs. 49, thus claimed, it should be mentioned, was the price of the bullock.

By a petition subsequently filed by the plaintiff the following words were added to the said paragraph :

That the defendant company is bound in law and equity to erect and maintain sufficient fences on both sides of the railway line to prevent the cattle of the owners and occupiers of the adjoining lands from straying on the railway lines, and the plaintiff being the owners of such adjoining lands is entitled to protection against the straying of plaintiff's cattle from the plaintiff's lands where such cattle are lawfully kept by the plaintiff, etc.

In giving his reason for holding the defendant company liable the learned Munsif has said in his judgment :

To my mind these three factors, viz. (1) the running of the engine at the unscheduled time, (2) the terrific and unwarranted speed at which it was proceeding, and (3) the failure to blow the whistle to avert the accident, combine to fasten the liability for the loss of the bullocks on to the defendant company.

There was a plea of contributory negligence set up on behalf of the defendant company. It has been overruled. The learned Munsif has found that in the cultivated lands which lie on both sides of the railway line the villagers enjoy a customary right of grazing their cattle during this particular season and that as no fencing subway or level-crossing has been provided by the defendant company for going from one side of the railway line to the other, cattle cross the line at any point they choose. He appears to have been of opinion that the bullock had apparently gone over to the west of the embankment to graze and was coming back to its shed on the east of it, when it was knocked over.

In the aforesaid view of the matter the learned Munsif has decreed the suit.

The defendant company have obtained the present rule.

It will be convenient at the outset to dispose of the objection that has been raised as to the jurisdiction of the trial Court to deal with the suit as one cognizable by the Court of Small Causes, it being urged that the suit is excepted by Art. 35 (ii), Sch. 2 to the Act inasmuch as the allegations upon which the suit is found constitute the offence of mischief as defined in the Indian Penal Code. In my opinion the said allegations in the plaint constitute a case of negligence, which even, if wilful, falls far short of those requisites which would go to make out any such intent or knowledge as is necessary to satisfy the definition of mischief as given in S. 425, I P. C. The action, as I understand it, is founded upon negligence—negligence of the defendant company themselves as regards certain matters and negligence of their servants as regards others for which the defendant company as masters are sought to be made liable. To such an action the article in question, in my judgment, has no application.

The other objections that have been urged as to the validity of the decree need not be set out in detail as they cover the whole range of the reasoning of the learned Munsif and it would be more convenient to deal with the reasons themselves rather than the contentions that have been put forward against those reasons.

As regards the facts : it is fairly clear upon the evidence of plaintiff's witness 1 and plaintiff's witness 2 that the bullock had been taken to the west of the railway line to graze and was left there, that before the impact it had got on to the embankment, that, at the time of the impact, it was grazing on the line, and that it was caught in the cowcatcher and was thrown over to the west receiving the injuries which resulted in its death. The finding of the Munsif that it was apparently coming back to its shed on the east may or may not be correct.

Of the three factors to which the learned Munsif has referred in his judgment as constituting the ground of the defendants' liability, two viz., "the running of the engine at an unscheduled time" and "the terrific and unwarranted speed at which it was proceeding," are matters

which hardly come into the question. The legislature having in Ch. 4, Railways Act (9 of 1890), made provisions for the opening, closing and use of railways and it not being suggested that there was any restriction imposed on the defendants as regards their right to use locomotives only at scheduled times or at a speed less than the speed at which the engine was travelling, whatever nuisance or inconvenience may be caused to the public in general cannot be regarded as a violation of any duty which the defendants owe to them or as amounting to any negligence which may form a ground of action, so far as they are concerned. *King v. Pease* (1) has made it perfectly plain that where the legislature has authorized the formation of a railway, the circumstance of the use made by the company of their railway involving more than ordinary risk cannot justify the imposition on the company of a larger degree of responsibility than the Act of Parliament prescribes.

In considering the third ground, namely, "the failure of the defendant company to blow the whistle," I think it must be held on the facts that the whistle was not blown. The driver says that he does not recollect having knocked over anything on the day in question. He says that when cattle obstruct the way drivers always sound whistles, but he does not remember whether he did so on the day in question. He says that when whistles are sounded cattle get scared and get away. Whether the evidence of the driver is true or false it is not possible to say, but it is difficult to believe that it is wholly true. Now to render the company liable for the omission on the part of the driver to whistle it is necessary to prove that the driver has been guilty of a breach of duty or an error of judgment or that he saw the danger and failed to give warning. Failure to whistle is not the omission of any statutory precaution not only here but also under the English law, *Newman v. L. & S. W. Ry* (2); but in certain circumstances it may be reasonable to whistle and failure to do so may be evidence of negligence, e. g., *James v. N. E. Ry. Co.* (3), *Gray v. N. E. Ry. Co.* (4), *Coburn v. G. N. Ry.*

Co. (5), *Davey v. L. & S. W. Ry.* (6), and *Dublin Wiclow and Wexford Ry. v. Stattery* (7). No abstract rule can be laid down as to the circumstances under which the driver would be bound to whistle notwithstanding that it is not a statutory duty to do so, but on the whole it seems that the duty arises only when the circumstances call for a warning to be given. If the duty did arise, it would not be an absolute defence to say that the whistle if blown might or might not have scared away the bullock and it would always be a matter for the jury the Court not being bound to presume as a matter of law that the whistle would have been useless: *Barker v. L. & S. W. Ry. Co.* (8). In the present case nothing has been proved to indicate that the driver had in point of fact noticed the bullock and still did not whistle. It is unnecessary, therefore, to discuss the liability of the defendant company on the footing of such a state of things. If the driver did not notice the bullock can it be said that he was guilty of negligence; "Negligence," as Alderson, B., said in *Blyth v. Birmingham Waterworks Co.* (9)

is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do or doing something which a prudent man would not do.

The standard of care ordinarily required in each particular case has to be determined and the question to be considered is whether such a standard has been attained; the standard being founded upon a consideration of the ease which would be observed by a prudent and reasonable man: *Metropolitan Ry. v. Jackson* (10). A driver who is running an engine on the lines of a railway is expected not to disregard any signals or disobey any rules. He is expected also to be cautious as regards the safety of the locomotive and the rolling stock, and of passengers, invitees, licensees and the like. Even as regards trespassers it may be conceded, though there seems to be some divergences of opinion in this res-

(5) [1891] 8 T. L. R. 31n.

(6) [1884] 12 Q. B. D. 70=48 J. P. 279=53 L. J. Q. B. 58=49 L. T. 789.

(7) [1879] 3 A. C. 1155=27 W. R. 191=39 L. T. 365.

(8) [1891] 8 T. L. R. 30.

(9) [1856] 11 Ex. 781=4 W. R. 294=2 Jur. (N. S.) 333=25 L. J. Ex. 212.

(10) [1878] 3 A. C. 193=47 L. J. C. P. 303=26 W. R. 175=37 L. T. 679.

(1) [1892] 4 B. & Ad. 30=2 L. J. M. C. 26=1 N. & M. 690.

(2) [1891] 55 J. P. 375.

(3) [1867] 2 C. P. 634n=36 L. J. C. P. 255n.

(4) [1883] 48 L. T. 904.

pect, that extra care should be taken not to injure the public if they are known to frequent or cross at a particular point though without any right. Omission to take such extra care under the last-mentioned circumstances has sometimes been held to afford a ground of action while at others not, e. g., such cases as *Bilbee v. L. B. & S. C. Ry.* (11), *Lowery v. Walker* (12) and *Murley v. Grove* (13). There is, however, no principle or authority which demand that a driver running an engine on the open lines at places where there are no level crossings or which are not known to be ordinarily used for purposes of crossing the rails is bound to be on the look out to see if any trespassers are on the lines. A railway company allowing persons to cross the line otherwise than by a level crossing is not in duty bound to use care to protect such persons : *Harrison v. N. E. Ry. Co.* (14), but if it is such a place where persons are in the habit of crossing, the Company has to take reasonable precautions in the use of the spot, even though there is no right of way there : *Barrell v. Midland Ry. Co.* (15). The evidence such as it is in the present case, shows that there is no bend at or near the spot and the lines run straight. There is ample authority for the view that if the driver was unaware of the danger and had no reason to anticipate it the liability would not arise : *Simon v. London General Omnibus Co.* (16). *Hase v. London General Omnibus Co.* (17). I am unable to hold on a consideration of all the surrounding circumstances that the omission to notice the bullock and failure to blow the whistle amounted to negligence on the part of the driver.

The question whether the Railway Company are bound to provide level-crossings or subways does not really arise in the present case, as it is not the plaintiff's case that any public road was being used by the bullock that was killed. The law relating to the obligation of the Railway Company to provide for the

safety of the public crossing the line at level-crossings will have no bearing on the present case.

It is not alleged that the defendants have failed to comply with any statutory provision or carry out a requisition in this respect made by a competent authority or even by the public or any particular individual. The omission to provide them, if they are necessary, may have caused inconvenience to the public and may be taken to have formed a legitimate ground of complaint; but for the purposes of the present suit the matter is irrelevant. On this head the more important question is whether the defendants knowing as they must have, that men and cattle are likely to cross the lines were not bound to make and maintain proper fences to prevent the cattle from straying on to the lines. Under the English law the Railways Clauses Consolidation Act, 1845 (8 & 9 Vic. c. 20), has imposed a statutory duty on a Railway Company to make and at all times to maintain proper fences between the railway and adjoining land, and, as pointed out by Lush, J., in *Buxton v. N. E. Ry. Co.* (18) :

If the fence is not sufficient and in consequence the cattle in the adjoining field stray on to the line and are killed, the company are answerable to the owners whether they are guilty of negligence or not.

There is no duty in a Railway Company to fence their line of railway as towards passengers or persons already on the line; the duty in them is towards persons off the line to prevent the latter from getting or straying upon it per Bramwell, B., in *Harrold v. G. W. Ry. Co.* (19). The duty thus cast upon the Railway Company by the statute is the shifting but not varying of the obligation, that is imposed on ordinary tenants by the common law and is co-extensive with that obligation and does not go further than the prescriptive liability of a servient tenement. Such fences separate the land taken for the use of the railway from the adjoining land not taken and protect such lands from trespass or the cattle of the owners or occupiers thereof from straying thereon by reason of the railway. It is a duty which they owe only to the owners and occupiers of the adjoining lands or persons claiming

(11) [1865] 34 L. J. C. P. 182=18 C. B. (N. S.) 584=13 W. R. 779=13 L. T. 146=144 E. R. 571=11 Jur. (N. S.) 745.

(12) [1910] 1 K. B. 173=79 L. J. K. B. 297=54 S. J. 93=26 T. L. R. 103=101 L. T. 873.

(13) [1882] 46 J. P. 360.

(14) [1874] 29 L. T. 844=22 W. R. 335.

(15) [1888] 1 F. & F. 361=115 R. R. 925.

(16) [1907] 23 T. L. R. 463.

(17) [1907] 23 T. L. R. 616.

(18) [1868] 3 Q. B. 549=9 B & S 824=16 W. R. 1124=37 L. J. Q. B. 258=18 L. T. 795.

(19) [1866] 14 L. T. 440.

through them and not the world in general. So where the plaintiff's sheep escaped from his close through his own defect of fences and escaping thence on the defendants' railway were killed, it was held that the defendants were not liable : *Ricketts v. East and West India Docks* (20). In that case Jervis, C. J., speaking of the old prescriptive common law obligation said :

The rule upon the subject is well laid down in notes to *Promfrat v. Ricraft* (21) : The general rule of law is, that I am bound to take care that my beasts do not trespass on the land of my neighbour, and he is only bound to take care that his cattle do not wander from his land, and trespass on mine, *Tenant v. Goldwin* (22), *Churchill v. Evans* (23) and *Boyle v. Tamlyn* (24) ; and, therefore, this kind of action will only lie against a person who can be shown to be bound by prescription or special obligation to repair the fences in question for the benefit of the owner or occupier of the adjoining land. And no man can be bound to repair for the benefit of those who have no right. Therefore, the plaintiff cannot recover for the damage occasioned to his cattle by their escape from the adjoining close through the defect of the defendant's fences, unless the plaintiff had an interest in that close, or a license from the owner to put them there,

so also would no action lie even where the cattle had escaped from an adjoining highway unless they were lawfully using the highway that is passing and re-passing there : *Dovaston v. Payne* (25). A customary right of grazing on the lands adjoining the railway lines has been proved in this case, but there is no statutory liability here in this respect. In England, apart from statute, there is no common law liability to put up a fencing enclosing the lines where there is no highway adjoining, and on the facts disclosed in the present case an action for trespass would have been maintainable by the Railway Company against the owner of the cattle if the cattle strayed on the line and committed damages. Ridley, J., in *Holgate v. Bleazard* (26) in stating the law on the subject said :

In Bullen and Leake on Pleading, Edn. 3, p. 329 . . . it is laid down that the " general rule

of law is that the owner of cattle is bound to take care that they do not trespass on the land of others." In other words that it is his duty as a general rule of law to keep his fences in such a condition as will prevent them from trespassing. The passage continues : " But the owner of the land " that is, the other owner upon whose land the trespass is committed " may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land who may have a corresponding right to have the fence so maintained and repaired.

The present case is similar in all cardinal respects to the case of *Henry Conder v. Ballaprosad Bhagwandin* (27) in which Sir Charles Sargent, C. J., and Fulton J., dealing with a claim for compensation for the loss of a buffalo which strayed, while grazing, on to the railway line and was killed said :

The obligation imposed on railway companies of fencing their railway by S. 21, Act 18, 1854 was repealed by Act 25 of 1871, and in lieu thereof there was substituted the power to the Governor-General or Local Government to make rules for fencing as provided by S. 21 of the Act . . . Nor have any rules been issued to the company under the Acts 4 of 1879 or 9 of 1890,

and on the finding that the company was under no obligation statutory or otherwise, to fence the line and there being no evidence that the accident was caused by any negligence on the part of the driver of the train the company was held not liable.

The view of the defendant's liability taken by the learned Munsif, in my opinion, is not correct. The rule must be made absolute and the plaintiffs' suit dismissed with costs in the trial Court as well as in this Court. Hearing-fee in this rule is assessed at one gold mohur.

N.K.

Rule made absolute.

(27) [1895] Un. P. J. of Bom. H. C. 91.

A. I. R. 1928 Calcutta 508

RANKIN, C. J., AND C. C. GHOSE, J.

Sarat Chandra Deb and others—Defendants—Appellants.

v.

Dharani Mohan Roy—Plaintiff—Respondent.

Appeal No. 2343 of 1925, Decided on 16th February 1928, from appellate decree of 1st Sub-Judge, Zillah 24 Parganas, D/- 19th June 1925.

(20) [1852] 12 C. B. 160=21 L. J. C. P. 201=7 Railw. Cas. 295=16 Jur. 1072.

(21) [1666] 1 Wmo. Sound 321.

(22) [1700] 6 Mod. 311.

(23) [1809] 1 Taunt. 529=10 R. R. 600.

(24) [1827] 6 B & C 329=5 L. J. K. B. (O. S.) 184=30 R. R. 343=9 D & R 430.

(25) [1795] 2 H. Bl. 527=3 R. R. 497.

(26) [1917] 1 K. B. 443=86 L. J. K. B. 270=33 T. L. R. 116=115 L. T. 788.

(a) *Bengal Cess Act* (9 of 1880), S. 4—*Cultivating raiyat*.

The rent of Rs. 100 must be taken as applied to the whole of the land which is cultivated by the person in question. [P 510 C 1]

(b) *Bengal Cess Act* (9 of 1880), S. 41 (3)—*A cultivating raiyat only can be assessed in a less onerous manner as regards rate than a holder of a tenure*.

A person who is a cultivating raiyat only can be assessed in a less onerous manner as regards rate than if he were a holder of a tenure as defined by S. 41 (3). [P 509 C 2]

Pyari Mohan Chatterji and Gurudas Mukherji—for Appellants.

Mritunjoy Chatterji and Biraj Mohan Roy—for Respondents.

Rankin, C. J.—In this case the appellants are interested in each of the 29 tenancies under the plaintiff. The plaintiff brought his suit for extra cesses due to him from the defendants in the following circumstances: It appears that the plaintiff made a return as required under S. 17, Cess Act, and in that return he described the defendants on the footing that they were cultivating raiyats within the meaning of the Cess Act. Thereupon that return having been scrutinized by the Collector, the Collector issued a notice under S. 24 upon the defendants requiring them to make a return. They said that they made a return and I am satisfied that thereupon action was taken by the Collector to put the defendants' names on the Cess Valuation Roll in part 3. It appears that they were described as tenure-holder 84 and to that number the names of the defendants were supplemented. On that basis the plaintiff brought his suit, because the plaintiff having hitherto got cesses from the defendants on the footing that they were cultivating raiyats properly entered in part 2, Cess Valuation Roll, now claims that as he has to pay Government cesses on the basis that these defendants were not cultivating raiyats he was entitled to the balance from the defendants. These facts are not disputed and the only question which is raised in this appeal is the important question whether or not the defendants come within the definition of a cultivating raiyat as used in S. 4, Cess Act—Act 9 of 1880.

Now if one looked at the scheme of that Act one would find in S. 41 that the amount of the cesses payable in respect of lands depends upon certain things. One particular rate is payable by every

holder of an estate. Then every holder of a tenure has to pay to the holder of the estate or tenure within which the land held by him is included the entire amount of the road cess and public works cess calculated in a certain way. Every cultivating raiyat has to pay to the person to whom his rent is payable one-half of the road cess and public work cess calculated in a certain way. There can be no doubt that a person who is a cultivating raiyat can only be assessed in a less onerous manner as regards rate than if he were a holder of a tenure as defined by the section. The question is whether the defendants come under the definition of "cultivating raiyats" and are entitled to the privilege of coming under Cl. 3 of the section.

Now the point is this: that these defendants are interested in 29 different jamas the total rent of which amounts to more than Rs 100. They say that they themselves cultivate lands of each of those 29 holdings. They say that as in respect of none of the holdings which they cultivate they pay a rent exceeding Rs. 100, they are cultivating raiyats and therefore, although the total rent of the 29 such holdings exceeds Rs. 100, they are entitled to the privilege of paying road cess in the manner prescribed in Cl. 3, S. 41. Now to my mind that is not so. One has to remember first of all that while these defendants may be raiyats and may actually do cultivation, that does not make them cultivating raiyats for the purpose of the Cess Act. A cultivating raiyat, according to the definition in the Act, means a person cultivating lands and paying rent therefor not exceeding Rs. 100 per annum. There is therefore no argument to be based upon the fact that these peoples' holdings are raiyati holdings or upon the fact that they themselves are cultivators. One has to see whether they come within the definition of a "cultivating raiyat." If they do not themselves cultivate, it is clear from the definition of a tenure-holder that they are treated by the Act as tenure-holders. For that purpose one has to make up one's mind whether or not persons may cultivate lands to a large extent and remain cultivating raiyats provided they hold the lands in separate holdings. The intention of the Act is to look at all the lands the person in question cultivates and if he is a cultivator, a

small cultivator, in the sense that his rent does not exceed Rs. 100 then he is given the privilege of a cultivating raiyat. Looking at the way in which the Act is framed it seems to me that it would be unworkable unless this Act intended to have regard to the total land which is cultivated by the individual claiming those privileges. It seems to me idle to make a maximum of Rs. 100 if that is to apply to an individual holding. It makes no difference to the policy of this Act whether a man has ten holdings or one holding. The object of the Act is not to compel people to sub-divide holdings unnecessarily. The Act intended to treat leniently a person who is an actual cultivator of the soil provided he is not paying a rent of more than Rs. 100, that being the limit within which that privilege can safely be granted. In my judgment the rent of Rs. 100 must be taken as applied to the whole of the land which is cultivated by the person in question. In this case we know that the defendants cultivate lands, but for the lands they cultivate they pay altogether a rent exceeding Rs. 100. I think, therefore, that the reasoning of the Subordinate Judge is in accordance with the intention of the statute. He says :

No doubt cesses are assessed on lands, but in the case of persons paying more than Rs. 100 as annual rent, the assessment is on the basis applicable to tenures.

When a person holds two jamas paying a total rent of more than Rs. 100 he is for the purposes of assessment, a holder of a tenure. That seems to me to be the correct determination of the point in dispute in this case. The point is not particularly clear and speaking for myself I am much obliged to the learned vakils for their arguments. In my opinion the intention of the statute is the intention which the learned Subordinate Judge imputes to the statute. In my opinion this appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 510

SUHWARWADY AND JACKSON, JJ.

Becharam Chatterjee and another—
Plaintiffs—Appellants.

v.

Benode Behari Chatterjee and others—
Defendants—Respondents.

Appeal No. 1914 of 1925, Decided on 16th May 1928, from appellate decree of Addl Sub-Judge, Howrah, D/-11th June 1925.

Specific Relief Act, S. 56 (j)—Plaintiff must show diligence and must not be guilty of laches.

Mandatory injunction is an equitable relief and one of the principles on which such relief is granted is that the plaintiff must show diligence and must not be guilty of laches. An injunction cannot be granted when the conduct of the plaintiff or his agent is such as to disentitle him to any assistance from Court.

[P 511 C 2]

An encroachment by defendants began in 1920 and there was a verbal protest but no further action was taken. In 1922 plaintiffs sued for removal of the encroachment. They failed to prove that they were injured by the defendants.

Held, that under the circumstances plaintiffs were not entitled to get the relief they sought 16 Cal. 252, Ref.

[P 511 C 2]

Gunoda Charan Sen and Urukramdas Chakrabarti—for Appellants.

Sarat Chandra Basak and Haradhone Chatterjee—for Respondents.

Judgment.—This appeal is directed against the decree of the lower appellate Court dismissing the plaintiffs' suit which was one for declaration of title and for a mandatory injunction against the defendants directing them to remove a portion of their privy which they have built upon the ejmali drain. The first Court decreed the plaintiffs' suit on the finding that there was an encroachment by the defendants on the ejmali drain. The lower appellate Court is of opinion that the plaintiffs have failed to prove that there was any encroachment by the defendants upon the ejmali drain, and this view it has been induced to hold by the fact that the present position of the drain was not demarcated in any of the maps prepared in the case. It appears that in 1904 a partition of the joint properties was made through Court between the ancestors of the parties. The disputed drain was left ejmali and it has been remarked by the lower appellate Court that it is difficult to determine for

what purpose. This ejmali drain runs along the eastern side of the defendants' premises. The maps prepared in the case do not show that it in any way touches the plaintiffs' premises. In 1909 the mother of the present plaintiffs instituted a suit against defendants 1 and 2 and another for a declaration that the disputed drain was the joint property of the parties and for a permanent injunction restraining the defendants from including the drain in their homestead. That suit was decreed on 11th November 1909, but the mandatory injunction prayed therein was disallowed. It is not necessary to go further into the details of the litigation between the parties. It appears that in 1920 the defendants began to erect a privy encroaching upon the drain as alleged by the plaintiffs. In 1921 the decree in the plaintiffs' mother's suit was executed. No attempt was made to remove the encroachment by the defendants which, according to the evidence in the case as found by the learned Subordinate Judge began sometime in 1920. The present suit was instituted in 1922. On these facts the learned Subordinate Judge has held that the present suit was barred under O. 21, R. 32, Civil P. C. In my judgment the view taken by the learned Judge of the application of O. 21, R. 32, is not correct and that the suit does not necessarily fail because in the previous execution proceedings the decree-holder did not complain against the encroachment made by the defendants.

The next question in the case is whether under the circumstances of the case the plaintiffs are entitled to the relief claimed by them in the suit. The learned Subordinate Judge has held that the local investigation by the commissioners has not been satisfactory as they have not depicted on their maps the location of the drain as it stands at present. He, therefore, finds himself unable to say that there has been any actual encroachment by the defendants on the ejmali drain. If the matter had rested here we would have felt inclined to ask the Judge to reconsider his decision and, if necessary, after a fresh investigation. But the real relief which the plaintiffs claim in this case is mandatory injunction, namely, an order upon the defendants to demolish the portion of the privy which they have

erected upon the ejmali drain. This relief, in the circumstances of the present case, they are not entitled to get. The encroachment according to the evidence of the plaintiffs themselves began in 1920. There was a verbal protest, but no further action was taken in the matter. Long after the completion of the structure the plaintiffs have brought this suit and claim that it should be removed. This is a relief which they are not entitled to as a matter of right. It is an equitable relief and one of the principles on which such relief is granted is that the plaintiffs must show diligence and should not be guilty of laches. Under S.56 (j), Specific Relief Act an injunction cannot be granted when the conduct of the plaintiff or his agent is such as to disentitle him to any assistance from Court. It is a settled principle of law upon which mandatory injunctions are granted that the party who claims relief must be active and prompt. He must when the injury begins protest against it, and if his protests are not listened to he should follow it up by a suit in Court praying for an injunction against the defendant so that further injury may not be done. *Benode Kumari Dassi v. Soudaminy Dassi* (1); Woodroffe on Injunction, 4th edn 113.

In our opinion the conduct of the plaintiffs has been such as to disentitle them to any relief. They have further failed to prove that they have in any way been injured by the act of the defendants except that it is an encroachment upon the ejmali drain. They may have other remedies open to them which we need not suggest; but they are not, in the circumstances of this case entitled to claim that the privy put up by the defendants should be demolished. That is the principal relief which they claim and since in our opinion they are not entitled to any such relief it is not necessary that any investigation should be made as to the nature of the encroachment alleged to have been made by the defendants on the ejmali drain.

The learned Subordinate Judge had dismissed the plaintiffs' suit. But it appears that one of the claims in the suit was for declaration of the plaintiffs' ejmali title to the drain. This was not denied by the defendants and the plaintiffs at any rate are entitled to get a declaration to that effect

(1) [1889] 16 Cal. 252.

The result is that this appeal is allowed and the decree of the lower appellate Court confirmed with the modification as stated above. But in the circumstances of the case we do not allow any costs.

D.R./R.K.

Decree modified.

A. I. R. 1928 Calcutta 512

MALLIK, J.

Kanteswar Sarkar and another—Plaintiffs—Appellants.

v.

Indramani Dashya—Defendant—Respondent.

Appeal No. 2213 of 1925, Decided on 24th January 1928, from decree of Sub-Judge, Rangpur, D/- 9th July 1925.

(a) *Bengal Tenancy Act, S. 153—Rent.*

When a decree is given at the rate of rent admitted by the defendants it is not a case of determination of the annual rent payable as mentioned in S. 153: 1 C. W. N. 711, *Foll.*

[P 512 C 2]

(b) *Civil P. C., O. 41, R. 24—Question of relevancy of a document, though not raised in trial Court, can be considered by first appellate Court.*

The first appellate Court which is a Court of fact as well as of law can consider the question of the relevancy of a document which is only a piece of evidence, though this question was not raised in the trial Court. [P 512 C 2]

Atul Chandra Gupta and Radhikaranjan Guho—for Appellants.

Mohini Mohan Bhattacharya and Nil Moni Goswami—for Respondent.

Judgment.—This appeal arises out of a suit for recovery of arrears of rent. The plaintiffs claimed rent at the rate of Rs. 10 per year. Whereas the case of the defence was that the rent annually payable by the defendants was Rs. 2-8-0 only. The trial Judge accepted the figure as given by the plaintiffs and on that basis gave a decree to the plaintiffs for rent at the rate of Rs 10 per year. On appeal the lower appellate Court did not consider the plaintiffs' evidence on the question of the rate of rent sufficient, and holding that the kabuliyat which had been filed by the plaintiffs in support of their case did not relate to the land in suit allowed the appeal and gave the plaintiffs a decree only at the admitted rate, namely Rs. 2-8-0 per year. The plaintiffs have come up to this Court on second appeal.

A preliminary objection was taken on

behalf of the respondent that no second appeal lay in the present case under S. 153, Ben. Ten. Act. I think this objection is sound and should prevail. The amount that was claimed in the case was less than Rs. 100 and the second appeal comes against a decree passed by a Subordinate Judge. The suit has been decreed by the learned Subordinate Judge at the rate of rent admitted by the defendants and it has been held in *Nekejaie v. Nanda Dulal Bankeja* (1) when a decree is given at the rate admitted by the defendants it is not a case of determination of the annual rent payable as mentioned in S. 153, Ben. Ten. Act.

On the merits also I do not think that this appeal can succeed. As I have said before the learned Subordinate Judge found the evidence, which the plaintiffs adduced to substantiate their case, unsatisfactory. One of the documents which the plaintiffs filed was a kabuliyat. This kabuliyat mentions the rate of rent to be Rs. 10, but the learned Subordinate Judge although he found that there was nothing suspicious about the genuineness of this document, came to the conclusion that the kabuliyat did not refer to the land in suit. It was contended on behalf of the appellants that the learned Subordinate Judge was not justified in raising this point in appeal as the point had been never raised before in the trial Court. But the lower appellate Court was a Court of fact as well as of law, and remembering that the kabuliyat was only a piece of evidence I do not think that it was beyond the scope of the learned Subordinate Judge, in considering the question of the relevancy of that document and in holding that that document which was nothing but an item of evidence, was irrelevant for the purposes of the case.

The only point that was taken before me on the merits of the case, therefore, fails. The appeal is accordingly dismissed with costs.

D.R./R.K.

Appeal dismissed.

(1) [1897] 1 C. W. N. 711.

A. I. R. 1928 Calcutta 513

COSTELLO, J.

Pauline White—Applicant.

v.

S. W. White—Opposite Party.

Application No. 6 of 1927, Decided on 14th July 1927, for ordering the opposite party to comply with an order of Gregory, J., D/- 7th April 1927.

Divorce Act, Ss. 55 and 7—Provisions for the enforcement of orders under this Act are to be followed as provided in the Civil Procedure Code.

All decrees and orders made by a Court in any suit or proceedings under the Divorce Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction and not by contempt proceedings even though it were the intent of S. 7 to bring into India all the rules of procedure in the Divorce Act in England. [P 514 C 1]

Judgment.—This is an application on behalf of the petitioner in a suit for judicial separation who had obtained an order for alimony pendente lite. The application is made on behalf of the petitioner for an order that the respondent should carry out the terms of an order made by Gregory, J., dated 7th April 1927 whereby he was ordered to pay certain sums to the petitioner by way of alimony pendente lite, and the application further asks that in default of compliance with the order to pay the respondent be committed to jail as for a contempt of Court.

On the previous occasion when the matter came up before me, by consent of counsel for the respective parties it was agreed that the order made by Gregory, J., should be varied and that in future the respondent should pay to the petitioner's solicitors the sum of Rs. 400 or rather the equivalent of it in English money, that is to say, £30, by delivering to them a cheque upon an English bank on the 7th of each month. That agreement will be embodied in an order of this Court. The question then remains as to whether or not any order should be made with regard to the costs of the proceedings. It is said on behalf of the respondent that the procedure adopted for the enforcement of the order of Gregory, J., will not lie and in fact it is incompetent for the Court to enforce an order of this character as for contempt.

It was very ably argued by Mr. Barwell that proceedings by way of contempt will still lie in this country for the enforcement of an order of this kind, and he bases his argument upon this footing that in England until the passing of the Debtor's Act in the year 1869 it was the practice to enforce orders for the payment of alimony pendente lite by means of proceeding in contempt, and that it was only by reason of S. 4 Debtors Act, that such procedure was abolished.

That would indeed appear to be the case and indeed Hill, J., so held in the case of *Leavis v. Leavis* which was decided in the year 1921 and is reported in 21, Pro. Div. It also appears from that case and from other authorities that although noncompliance with an order for payment of alimony cannot be enforced by attachment by reason of S. 4, Debtor's Act, it nevertheless remains a contempt and has certain effects as a contempt, as for example in preventing a contumacious respondent himself from obtaining relief. It is clear from the English authorities, which I need not go into in any detail, that other orders made by the Divorce Court in England, as for example, an order requiring a respondent to furnish security for his wife's costs, may still be enforced by proceedings for contempt of Court. From all the authorities it indeed appears that noncompliance with any order made by the Divorce Court in England is a contempt of Court, but so far as an order which directs the payment of money is concerned, although it is a contempt, it cannot be enforced by attachment.

Mr. Barwell argued that as there is no counterpart in this country of S. 4, Debtors Act of 1869, the English procedure not only survives but is imported into the machinery of the Courts of India, and that partly, if not wholly, by the operation of S. 7, Indian Divorce Act of 1879.

It is perhaps a little difficult to follow the reasoning of that argument, because Mr. Barwell admitted quite frankly and indeed there are plenty of authorities to show that S. 7 is concerned not with adjective law but with substantive law, and it applies to matters which are not specifically otherwise dealt with in the Divorce Act.

However, be that as it may, even if it were the intent of S. 7 to bring into this country all the rules of procedure in the Divorce Court in England, it would not avail the petitioner in the present instance, not only because it is no longer the practice in England to enforce orders for payment of money made by the Divorce Court by means of contempt, but because there is in the Indian Divorce Act itself an express direction as to the method by which orders of this kind are to be dealt with. S. 55, Divorce Act, provides that all decrees and orders made by the Court in any suit or proceeding's under this Act shall be enforced and may be appealed from in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction. They may be appealed from under the laws, rules and orders for the time being in force.

Therefore, in order to ascertain how orders made by the Court in any suit or proceeding under the Divorce Act should be enforced, it is necessary to turn to the provisions of the Code of Civil Procedure and to see how orders of the Court made in the exercise of its original civil jurisdiction are to be enforced, and upon turning to the Code we find that by S. 36 it is laid down that the provisions of this Code relating to the execution of decrees, shall so far as they are applicable, be deemed to apply to execution of orders; and by S. 2, Cl. 14, "order" is defined as meaning a formal expression of any decision of the civil Court which is not a decree. There can be no doubt, in my opinion, that the order made by Mr. Justice Gregory on the 7th July was an "order" within the definition of S. 2, Cl. 14, and reading that in conjunction with S. 36 that order has to be enforced in accordance with the provisions of the Code relating to the execution of decrees, and there is an appropriate part of the Code dealing with the matter into which I need not go at the moment. Suffice it to say that the provisions relating to the execution of decrees for the enforcement of orders do not contemplate the Court dealing with the matter purely as one of contempt. On the contrary, there are various specific provisions laying down how the matter should be dealt with and how the debtor in default should be brought before the Court.

In these circumstances it seems to me

that it is not competent for a Court to send a defaulting respondent to jail straightaway. The machinery dealing with the execution of orders must be complied with and then ultimately, if there is a failure to pay, the respondent may be committed to jail.

From what I have said the consequence is that these proceedings are in a sense misconceived. In so far as they purport to be an application to commit the respondent to jail they are not in order. I will also observe that the petition itself prays that there shall be an order directing payment, which is inconsistent with a proper application for commitment into prison as for a contempt. Having regard to all the circumstances I think the proper method of dealing with this question of costs is to say that there shall be no order as to costs.

A.L./R.K.

Order accordingly.

A I. R. 1928 Calcutta 514

B. B. GHOSH AND GARLICK, JJ.

Suniti Sundari Devi—Plaintiff—Appellant.

v.

Srikrishna Chakravarti and others—Defendants—Respondents.

Appeal No 146 of 1926, Decided on 23rd April 1928, from original decree of Sub-Judge, Murshidabad, D/- 20th February 1926.

(a) *Civil P. C., O. 2, R. 6—Plaintiff suing several defendants—Defendant 1 sued for removal from office of shebait—Suit against others for possession of debutter property separately purchased—Plaintiff should not be compelled to bring separate suits.*

Where plaintiff brought a suit against several defendants, that against defendant 1 being for removal from the office of shebait and against the other defendants, who were separate purchasers of the debutter property alleged to be wrongfully alienated by defendant 1, for possession of those properties,

Held: that it would not lead to a proper administration of justice to compel plaintiff to bring separate suits since these separate suits would have to be consolidated afterwards.

[P 516 C 1]

(b) *Civil P. C., O. 21, R. 63—Order against idols represented by shebait—Prospective representative suing after a year—Suit would be barred.*

Where an order is made under O. 21, R. 63, Civil P. C., against idols represented by a shebait, dismissing claim to certain property, a suit even by the prospective representative of

the idols would be barred if brought after a year. [P 516 C 1]

Urukramdas Chakravarti—for Appellant.

Rishindra Nath Sarkar, Kali Sankar Sarkar, Panchanan Ghose, Durgadas Roy, Batuk Nath Bhattacharjee and Sishir Kumar Banerjee—for Respondents.

Judgment.—This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge dismissing the suit. The suit was brought by the plaintiff against several defendants. Her allegation against defendant 1 was that defendant 1 was the shebait of three idols, Krishna Jiu, Krishna Ray Jiu and Gopal Deb Thakur and the properties in suit were the debutter properties of these three idols. Allegations were made against defendant 1 for misconduct and plaintiff brings this suit, the first prayer of which was that defendant 1 be removed from his office of shebait. The second prayer is that she being in the line of shebait be appointed shebait of these three Thakurs. There are various sets of other defendants in the suit. They are purchasers of various properties in private sales, sales in execution of decrees and otherwise of different portions of the properties in suit. These defendants have no connexion with each other. The prayer is that the properties have been wrongfully alienated by defendant 1 and that the plaintiff who asks herself to be appointed shebait of these three idols may be allowed a decree on behalf of the idols to recover possession of those properties. A large number of issues were framed which would be found at p. 29 of the paper book. Defendants 2, 3, 4, 5, 6 and 7 contested the suit. At their request certain preliminary issues, that is, 1, 2, 3, 4 and 13 were taken up by the learned Subordinate Judge for decision first. Issue 1 whether the plaintiff had any cause of action, was decided in her favour. Issues 2 and 3 related particularly to the question whether the suit was bad for multifariousness. Issue 4 was whether the suit as against defendant 3 was barred by limitation. The last issue was with regard to the question of *res judicata* which also was decided in favour of the plaintiff. No question arises before us with regard to the plaintiff's right to sue and with regard to the question of *res judicata*.

The appeal before us refers to the ques-

tion of multifariousness and the point of limitation. The Subordinate Judge decided those two questions against the plaintiff. He held that the suit as framed was multifarious and he asked the plaintiff to elect within a certain date as to which of the defendants she wanted to proceed against and to amend her plaint accordingly. The plaintiff did not do that within the time allowed and therefore the Subordinate Judge dismissed the suit.

The plaintiff appeals to this Court and on her behalf the principal argument is that her suit ought not to have been dismissed but the issues which affect the different defendants differently might have been separately tried. The argument of the learned vakil for the appellant shortly stated amounts to this, that if she brought a separate suit against defendant 1 for his removal from the office of shebait and obtained a decree, that decree would be of no use as against the defendants who are alienees of the properties which she alleges to be debutter. Therefore in their presence the questions whether defendant 1 was the shebait, whether the properties are debutter properties, whether he is liable to be removed and whether the plaintiff should be appointed the succeeding shebait on removal of defendant 1 are questions in which each set of defendants is interested, and if she brought separate suits alleging the same fact making these defendants separately parties in those suits then obviously the Court in the exercise of its discretion would have consolidated all these suits for trial of these common issues of fact and law; therefore it is not expedient that she should be compelled to bring the present suit against one set of defendants alone and bring other suits against the other different sets of defendants, as in that case those suits would again be consolidated and practically become one suit for the trial of the common issues. Her prayer therefore is that let the issues of fact and law which are common to all the defendants be tried together, and these are, as I have already said, whether the properties are valid debutter, whether defendant 1 was really the shebait and whether the plaintiff is entitled to have defendant 1 removed and next to have herself appointed as shebait. These questions should be tried. If the defendants have got separate defences, and it does not appear from the issues that any de-

fence was raised that assuming that the properties were debutter the sale to any of the defendants was for legal necessity of the Thakurs—if, as I say, there are any questions special to be tried with reference to any particular set of defendants that question may be separately tried by the learned Judge in such a way as not to cause inconvenience to the other defendants. It seems to me that, having regard to the circumstances of this case, that is the proper procedure to be adopted. No doubt the suit can very well be described as multifarious as these defendants claim different properties under different sales, but there are these common questions of fact and law. Therefore it seems to us that it would not lead to a proper administration of justice to compel the plaintiff to bring separate suits in such a case as this, seeing that these separate suits would have to be consolidated afterwards.

The next question is with regard to the point of limitation and that arises in this way. The properties which defendant 3 purchased were attached in Money Execution Case No. 113 of 1921 in execution of a decree obtained against defendant 1. Defendant 1 as shebait of the idols put forward a claim to those properties. The claim was disallowed on 14th January 1922. The thakur was bound to bring a suit within one year under Art. 2, First Schedule to the Limitation Act. That has not been done, and defendant 3 purchased the property in execution of the decree for which the attachment was made. Therefore the Subordinate Judge held that the suit with regard to the properties in the possession of defendant 3 is barred by limitation. The argument on behalf of the appellant is that following the principle of the case of *Vidya Varathi Thirtha v. Balusami Ayyar*: 43 *Indian Appeals* 302 the succeeding shebait may bring a suit for recovery of the property as the cause of action would accrue to that shebait after the death of the present shebait. Whether that may be so or not it is unnecessary to discuss now. The point which now arises is that there is the order made under O 21, R. 63, Civil P. C., against the idols dismissing the claim case. The idols have not sued within one year for establishing title to the property. Therefore under the Limitation Act the idols' suit would be barred and consequently the plaintiff

cannot as the prospective representative of the idols maintain the suit. The decision therefore of the Subordinate Judge on that issue appears to be right.

The result, therefore, is that the appeal is dismissed as against defendant 3 with costs. But the judgment of the Subordinate Judge dismissing the entire suit is set aside and the case sent back to the Subordinate Judge for decision of all the other issues of fact and law common to all the defendants in their presence and if there be any particular question of fact or law which would affect only one set of defendants to fix a different time for deciding this separate point without requiring the attendance of the other defendants. That may be done without any difficulty. We are not expressing any opinion with regard to the merits of the case which the Subordinate Judge himself has refrained from doing. It will be open to the Subordinate Judge to take such steps to ensure the recovery of costs of the defendants in case they are successful in this suit.

Having regard to the nature of the claim made in this case defendant 3 who is respondent 3 here is entitled to his costs of this appeal as well as his costs in the lower Court from the appellant. We assess the hearing fee of defendant 3 in this Court at five gold mohurs. The costs of this appeal as regards the other parties will abide the final result.

D R /R.K.

Case remanded.

A. I. R. 1928 Calcutta 516

C. C. GHOSE AND GREGORY, JJ.

Ram Narayan Sarora and others—
Complainants—Petitioners.

v.

*Parswanath Sen and others—*Accused
— Opposite Parties.

Criminal Revns. Nos. 170 to 177 of 1928, Decided on 28th May 1928, from order of Dy. Magistrate, Serajgunge, D/- 11th November 1927.

Criminal P. C., S. 197—An elected Chairman of a Municipality under the Bengal Municipal Act is a public servant within the meaning of S. 197.

An elected Chairman of a Municipality under the Bengal Municipal Act is a public servant within the meaning of S. 197, Criminal P. C., who is not removable from his office save by or with

the sanction of the Local Government: *A. I. R.*
1925 Cal. 782, *Dist.* [F 518 C 1]

N N. Sircar, Mritunjoy Chatterjee, Sachindra Nath Banerjee and Mohindra Nath Banerjee—for Petitioners.

Girija Prosanna Sanyal, Syed Nasim Ali and Anil Chandra Roy Chowdhury—for Opposite Parties

Judgment.—These are eight rules issued by this Court calling on the District Magistrate and also on the opposite parties to show cause why the order complained of, namely, that of the Deputy Magistrate of Serajgunge, dated 11th November 1927, discharging the accused under S. 253, Criminal P. C., should not be set aside or such other order made as to this Court might seem fit and proper.

The facts involved in these eight rules are the same and they may be conveniently disposed of by one judgment.

The petitioners are eight different taxpayers within the Serajgunge Municipality. The opposite party No. 1 is the Chairman of the Municipality, the opposite party No. 2 is the Warrant Bailiff and the opposite party No. 3 is the Tax Collector. They are the accused in these cases. The case for the prosecution is that the Chairman of the Municipality in direct contravention of the provisions of the Bengal Municipal Act realized certain arrears of taxes and costs by the issue of distress warrants and thereby committed an offence punishable under S. 384, I. P. C. The learned trying Magistrate was of opinion that under the provisions of S. 197, Criminal P. C. the sanction of the Local Government was necessary before any proceedings against the Chairman of the Serajgunge Municipality could be maintained. He thereupon dismissed the case against the Chairman. As regards the other two accused, the Magistrate was of opinion that they were only acting under the orders of the Chairman and there was no case against them. Against the orders of the trying Magistrate applications were made to the Sessions Judge of Pabna-Bogra under S. 436, Criminal P. C. but those applications were dismissed, as the learned Sessions Judge was of opinion that the orders of the trying Magistrate in these cases were correct.

The ground upon which the present rules have been issued by this Court is as follows, viz., that the Courts below were

in error in holding that the Chairman of the Municipality was not removable from his office without the sanction of the Local Government. This ground does not obviously apply to the opposite parties Nos. 2 and 3. The record before us does not show that these accused, namely, opposite parties Nos. 2 and 3, were acting mala fide in the matter of the realization of the arrears of rates and taxes and in our opinion these rules must be discharged so far as opposite parties Nos. 2 and 3 are concerned.

The argument against the opposite party No. 1, namely, the Chairman of the Serajgunge Municipality, depends upon the answer to the question whether the Chairman of the Serajgunge Municipality is a public servant who is not removable from his office save by or with the sanction of the Local Government within the meaning of S. 197, Criminal P. C. There is no question that the acts alleged to have been committed by the Chairman were so done while acting or purporting to act in the discharge of his official duties. Now under S. 19, Bengal Municipal Act (Bengal Act 3 of 1884), the Local Government may remove a Commissioner appointed or elected under the Act if such Commissioner has been guilty of misconduct in the discharge of his duties or of any disgraceful conduct. Under S. 20, the Commissioner of the Division may remove any Commissioner in the circumstances referred to in the sub-clauses to the section. Under S. 23, sub-Cl. 2, the Commissioners of certain Municipalities not included in Sch. 2 of the Act are entitled to elect one of their number to be Chairman or may, whenever a vacancy occurs, at a meeting attended by not less than two-thirds of the Commissioners request the Local Government to appoint a Chairman and such Chairman shall be appointed by name. Under S. 23, sub-S. 3, the Local Government may at any time remove a Chairman appointed by it. Now it appears that the name of the Serajgunge Municipality is not included in Sch. 2 of the Act and therefore it is apparent that the Commissioners of the Serajgunge Municipality are entitled to elect one of their number to be their Chairman. The opposite party No. 1 is an elected Chairman of the Serajgunge Municipality. Under S. 24, an elected Chairman may be removed from his office

by a resolution of the Commissioners in favour of which not less than two-thirds of the whole number of the Commissioners have given their vote at a meeting specially convened for the purpose; but the removal under this section of a Chairman from office is by S. 59 of the Act subject to the approval of the Local Government. It is argued that in certain circumstances the elected Chairman *qua* a Commissioner of the Municipality can be removed by the Commissioner of the Division under S. 20 of the Act, and if that is so the elected Chairman of the Serajunge Municipality can hardly be described as a public servant who is not removable from his office save by or with the sanction of the Local Government. In support of this contention reliance is placed on the case reported in *Mahomed Yasin v. Emperor* (1) where it was held that no sanction was necessary under S. 197, Criminal P. C., to prosecute the Chairman of a Union Committee who is removable from office in certain circumstances under S. 18, Bengal Act 3, 1885 by the Commissioner, though he is also removable in other circumstances under S. 18-A of the Act by the Lieutenant Governor. In our opinion the case last mentioned is easily distinguishable from the present case. The question in this case is whether the Chairman of the Serajunge Municipality as Chairman can be removed by the Commissioner of the Division. He is clearly not so removable. If he is to be removed the procedure indicated in S. 24 of the Act must be resorted to. The question really is not of the removal of the Chairman *qua* Commissioner of the Municipality concerned and it would appear from a consideration of the sections referred to above that the Commissioner of the Division is not the proper authority to take action for his removal. It follows from what has been stated above that in our opinion the opposite party No. 1 is a public servant within the meaning of S. 197, Criminal P. C., who is not removable from his office save by or with the sanction of the Local Government. No such sanction was obtained in these cases and the result is that the ground upon which these rules were issued fails and the same must accordingly be discharged.

N.K.

Rules discharged

(1) A. I. R. 1925 Cal. 782=52 Cal. 431.

A. I. R. 1928 Calcutta 518

RANKIN, C. J., AND C. C. GHOSE, J.

Krishna Lal Sadhu and another—
Defendants—Appellants.

v.

Mt. Promila Bala Dasi—Plaintiff—
Respondent.

Appeal No. 2052 of 1925, Decided on 22nd February 1928, from appellate decree of Addl. Dist. Judge, Jessore, D/- 29th April 1925.

(a) *Life Insurance—A mere nominee in a life insurance policy cannot enforce his claim against the company, he being no party to the contract and no interest is created in his favour.*

A person who is nominated by an assured in his policy of life assurance for receiving money due under it upon his death is not entitled to enforce his claim against the company as he, though a nominee, is no party to the contract and no interest passes to him merely by reason of his being named in the policy and the money forms part of the assets of the deceased and is liable for his debts: *Cleaver v. Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147, *Foll.*, (Case-law discussed.) [P 521 C 2]

(b) *Civil P. C., S. 60—Scope—Creditors of the sons of a deceased assured can attach money payable under the policy*

There is nothing in S. 60, Civil P. C., preventing the creditors of the sons of the deceased assured from attaching money payable under it. [P 521 C 2; P 522 C 1]

(c) *Married Women's Property Act, S. 6—Policy effected in 1910—Hindu widow claiming assured's money as a nominee—Widow was held not entitled to money as the Act did not apply (see Act 13 of 1923).*

A Hindu assured directed an insurance Company to pay money due under his policy effected in 1910 to his wife as the nominee of the assured. The wife claimed the amount on the death of the assured contending that Women's Property Act applied and under S. 6 of the Act trust had been created in her favour.

Held: that the wife was not entitled to the money as the Women's Property Act did not apply and there was no trust in her favour by virtue of S. 6. [P 521 C 2]

*Rupendra Kumar Mitter—*for Appellants.

*Karunamoy Ghose—*for Respondent.

C. C. Ghose, J.—In this case the main contention that has been urged on behalf of the two defendants who are appellants before us is that the money payable under a policy of insurance, being policy No. 4667, issued by the Hindusthan Co-operative Insurance Society Limited, did form part of the assets of the estate of one Behary Lal Sircar deceased and that his widow Pramila

Bala Dassi had no rights therein. In order to understand the precise significance of this contention it is necessary to set out the facts giving rise to the litigation out of which the present appeal has arisen. It appears that one Behari Lal Sircar insured his life on 29th March 1910 for a sum of Rs. 500. The material words of the policy, with which we are concerned are as follows :

The Society hereby guarantees to insure that if the insured pays to the society at their office in Calcutta on the 5th day of March 1910 each succeeding year up to and including the year of his death the sum of Rs. 21 and 11 annas only or in lieu of any such annual premium the full number of instalments thereof as may be agreed upon (of which agreement the receipt granted by the Society shall be full and sufficient evidence) then upon proof to the satisfaction of the office committee of the Society of the death of the insured and the title to the policy, the Society will pay to Srimati Pramila Bala Dassi, wife of the insured (hereinafter called the nominee) at the head office of the Society, in Calcutta or at the permanent residence of the nominee whichever may be preferred the sum, of Rs. 500 only together with such additional sum or sums by way of profits as, according to the Society's regulations may accrue and become payable in respect of the policy, after deducting therefrom. (1) the balance of the premium, if any, payable in respect of the year of the insured's death; and (2) also other sum or sums, if any, due from him to the Society.

The assured paid all the premiums due on the policy till his death which took place some time in 1324 B. S. He died leaving him surviving the plaintiff, Pramila Bala Dassi, his widow, and three sons. The sons were his heirs under the Hindu law. On the death of the assured the plaintiff claimed the amount of the said policy and it appears that the Insurance Society were about to make payment to the plaintiff. Defendants 1 and 2 who had obtained a decree against the sons of the deceased and defendant 3 who had also obtained another decree against them attached the amount payable under the policy in execution of their two decrees. The plaintiff thereupon preferred a claim under the provisions of the Civil Procedure Code, but her claim was disallowed and the money due under the policy was rateably distributed among the three execution creditors. Thereafter the present suit was brought by the plaintiff for declaration of her title to the amount payable under the said policy and for recovery of the money from the creditors.

In the Court of first instance the plaintiff's suit was contested only on behalf of defendants 1 and 2 and it was held that the money due under the policy became the property of the plaintiff on the death of the deceased and did not form part of the assets of the estate left by him. The decree of the first Court ran as follows :

Plaintiff to get a decree for the sum of Rs. 173-0-9 with proportionate costs for plaint and pleader's fees, whole cost of the suit necessitated by the contest from defendants 1 and 2; and Rs. 326-15-3 with proportionate costs for the plaint and pleader's fee from defendant 3.

The lower appellate Court affirmed the decree of the first Court. Defendant 3 does not challenge the decree of the lower appellate Court and, as stated above, defendants 1 and 2 are the appellants before us. On their behalf it is contended that having regard to the authorities, viz., the cases reported in *Jiban Krishna Mullick v. Nirupama Gupta* (1), *Shankar Visvanath v. Umabai Sadashiv* (2), and *Ishani Dasi v. Gopal Chandra* (3), it ought to be held that, having regard to the words used in the policy, there was no trust created in favour of the plaintiff and that she was not entitled to realize the money in question from the Insurance Society and that the said money formed part of the assets of the estate of the deceased. On the other hand, it has been contended on behalf of the plaintiff respondent that she was beneficially interested on the said policy and that she alone was entitled to enforce the claim arising thereunder. It has further been argued that the Married Women's Property Act of 1874 applies to this case and that therefore it cannot be questioned that there was a trust in favour of the plaintiff and that the latter was entitled to realize the money in question from the Insurance Society. It has also been contended that under the Civil Procedure Code the execution creditors were not entitled to attach the amount of the policy in execution of their decrees.

The question depends on whether the plaintiff was entitled to enforce her claim against the Insurance Society. If she was, then there could be no question that the money due under the policy be-

(1) A. I. R. 1926 Cal. 1009=53 Cal. 922.

(2) [1913] 37 Bom 471=19 I. C. 736=15 Bom. L. R. 320.

(3) [1914] 20 C. L. 7. 44=25 I. C. 236=18 C. W. N. 1335.

longed to her and did not form part of the assets of the estate of the deceased. The plaintiff was no doubt the nominee of the deceased; but she was no party to the contract between the deceased and Insurance Society. Under the English law if *A* contracts with *B* for a benefit to be given to *C*, although that was the object and purpose of the contract, *C* may not sue on that contract unless in certain excepted cases. The excepted cases are these: where you can read on the whole of the deed or contract that the contracting party really was a trustee for a third person, then the third person may sue. An illustrative case of this description is the case of *Fletcher v. Fletcher* (4). In that case a man covenanted with the trustee or a person whose name was introduced as trustee that after his death £60,000 of his property should be handed to that trustee in trust for the natural children of the covenanting party. It was held by Wigram, V. C., that, looking at the whole scope and purpose of the deed, it amounted to a declaration of trust by the covenanting party for his natural children and that the latter had a perfect right to sue to enforce the trust, although it was a voluntary trust. The second exception in the case of children under a marriage settlement where persons in contemplation of marriage make a settlement by way of contract only for the benefit of, amongst others, the children of the marriage.

In English law the children of the marriage are said to be within the marriage consideration; everybody who is considered to be within the immediate purpose and intent of a marriage settlement is treated as a person from whom consideration moves to the contracting party and therefore the children of the marriage are treated as if they themselves although, of course, they are not then in existence, had given valuable consideration for the contract in the marriage settlement. This last second exception is referred to by Cotton, L. J., in the case of *Andrews v. Andrews* (5), where his Lordship observed as follows:

As a rule, the Court will not enforce a contract as distinguished from a trust at the instance of persons not parties to the contract.

Collier v. Countess of Mulgrave (6) is an example of this. The Court would probably enforce a contract in marriage settlement at the instance of the children of the marriage; but if so, this is an exception from the general rule in favour of those who are specially the objects of a marriage settlement.

In the case of *Orr v. Union Bank of Scotland* (7) it was held that the mere payment of money by *A* to *B* who is not *C*'s agent with a direction to pay it to *C* is revocable and 'confers no right of action upon *C*': see *Moore v. Bushell* (8); and for the application of the same doctrine in equity see *Hill v. Royds* (9). It is unnecessary for me to multiply cases, but the law on the subject will be found in 7, Halsbury 342, and the illustrative cases collected in 12, English and Empire Digest, p. 44, et. seq.

It is said, however, that in India the law is somewhat different and in support of this contention the case of *Deb Narain Dutt v. Chuni Lal Ghose* (10), is referred to. That case was decided after the decision of the Privy Council in the case of *Khwaja Mahommed Khan v. Husaini Begum* (11). As I read this last case, it was a case of a contract between *A* and *B* whereby it was intended to secure a benefit to *C* as a cestui que trust and the question arose whether *C* was entitled to sue in his own right to enforce the trust. Their Lordships of the Judicial Committee held that under the agreement executed by *A* certain immovable property was specifically charged for the payment of allowance which *A* bound himself to pay to the plaintiff and that the plaintiff was the only person beneficially entitled under it. The plaintiff was *C*. Their Lordships observed as follows:

First, it is contended on the authority of *Tweddle v. Atkinson* (12) that as the plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this, it is enough to say that the case relied upon was an action of assumpsit, and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges

(6) [1836] 2 Keen 81.

(7) 1 Macq. 513=2 C. L. R. 1566.

(8) [1837] 27 L. J. Ex. 3.

(9) [1869] 8 Eq. 290=20 L. T. (N. S.) 842=38 L. J. Ch. 538.

(10) [1914] 41 Cal. 137=18 C. L. J. 603=20 I. C. 630=17 C. W. N. 1143.

(11) [1910] 32 All. 410=7 I. C. 237=37 I. A. 152 (P. C.).

(12) [1861] 1 B & S 393.

(4) [1814] 4 Hare 67=3 Jur. 1040=14 L. J. Ch. 66.

(5) [1881] 15 Ch. D. 228=43 L. T. (N. S.) 135.

immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim.

In the case of *Deb Narain Dutt v. Chuni Lal* (10) the transferee of a debtor's liability had acknowledged his obligation to the creditor for the debt to be paid by him under the provisions of a registered instrument conveying to him all the moveable and immovable properties of the original debtor and the acknowledgment had been communicated to the creditor and accepted by him. In these circumstances it was held that the obligation undertaken by the transferee was for and intended to be for the benefit of the creditor and the creditor was entitled to sue the transferee on the registered instrument. The facts in *Deb Narain Dutt's* case (10) were somewhat peculiar and at first sight it may seem that the decision proceeded on the difference between 'consideration' as defined in English law and as defined in the Contract Act. But a closer examination of the case justifies, in my opinion, the criticism passed on it by Page, J., in the case of *Jiban Krishna v. Nirupama* (11) and the judgment, when properly analysed, does not really go beyond the terms of the actual decision of their Lordships of the Judicial Committee in the case of *Khwaja Mahomad Khan v. Husaini Begum* (11). The same remarks apply to the case of *Dwarika Nath v. Priyanath* (13). In this connexion reference may be made to an English case where the facts were as follows: A tradesman made a will bequeathing an interest to M, his wife's sister. M married. Her husband and the testator entered into partnership articles with a proviso that, if the testator should die during the partnership, his widow should be entitled to his interest. It was held by Turner, V. C. [*Page v. Cox* (14)] that the effect of the agreement between M's husband and the testator was to create an obligation in equity upon the surviving partner and in that respect it did not differ from a trust, i. e., that the partnership articles created a trust in favour of the widow. He further held that a trust could not be the less capable of being enforced because it was founded on contract

The point now before us for determination is, in my opinion, covered by authority [see *Cleaver v. Mutual Reserve Fund Life Association* (15)]. There the money due under a life assurance policy was payable to a wife, if living, otherwise to the legal personal representative of the assured. Lord Esher, M. R., observed as follows:

The contract is with the husband and with nobody else. The wife is no party to it. The promise is one which could only take effect upon the husband's death and therefore it must be meant to be enforced then. Apart from any statute the right to sue on a contract would clearly pass to the legal personal representatives of the deceased. It does not seem to me that apart from any statute such a policy would create any trust in favour of the wife. The husband might have altered the destination of the money at any time and might have dealt with it by will or settlement. I think that, apart from any statute, no interest would have passed to the wife by reason merely of her being named in the policy.

This case has been followed in Bombay in the case of *Shankar v. Uma Bai* (2) and in Calcutta in the case of *Eshani Dasi v. Gopal Chandra Dey* (3). In my opinion I can see nothing in the present case which would justify me to distinguish it from the cases referred to above. The result is that the first contention on behalf of the respondent must be negatived.

The second contention is that the Married Women's Property Act of 1874 is applicable to this case and that by virtue of S. 6 of the Act a trust has been created in favour of the plaintiff. Of course, if this contention is well founded, the plaintiff is entitled to succeed. In my opinion, the correct rule has been laid down by Fletcher and Richardson, JJ., in the case of *Eshani Dasi v. Gopal Chandra Dey* (3) and for the reasons given by them I am of opinion that the Married Women's Property Act does not apply to this case and that the plaintiff cannot invoke in aid the provisions of S. 6 thereof. In other words, we ought not to follow the decision reported in *Balamba v. Krishnayya* (16). The second contention urged on behalf of the respondent must also be negatived.

The third contention is absolutely devoid of substance and there is nothing in S. 60, Civil P. C., which could prevent the creditors of the son of the deceased

(15) [1892] 1 Q. B. 147=61 L. J. Q. B. 128=56 J. P. 180=40 W. R. 230=66 L. T. 220

(16) [1914] 37 Mad. 483=25 M. L. J. 65=20 I. C. 934=(1913) M. W. N. 697.

(13) [1918] 22 C. W. N. 279=36 I. C. 792=27 C. L. J. 483.

(14) 10 Harb 153=33 E. R. 832.

from attaching the money payable under the policy.

In my opinion, this appeal succeeds and must be allowed with costs. Defendants 1 and 2 will also be entitled to the costs in the Courts below.

Raukin, C. J. — I agree. Cl. (d), S. 2, Contract Act, widens the definition of "consideration" so as to enable a party to a contract to enforce the same in India in certain cases in which the English law would regard that party as the recipient of a purely voluntary promise and would refuse to him a right of action on the ground of nudum pactum. Not only, however, is there nothing in S. 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract but this notion is rigidly excluded by the definition of "promisor" and "promisee." The decision of *Tweddle v. Atkinson* (12) was a decision at law and was unaffected by the rules of equity. For this reason the Judicial Committee in *Khwaja Muhammad Khan v. Husaini Begum* (11) regarded it as inapplicable to the facts of the case before them where the agreement included a specific charge on immovable property. In my judgment it is erroneous on the basis of that case or on the observations of Jenkins, C. J., in *Deb Narain Dutt v. Chuni Lal Ghose*, 41 Calcutta 137, to suppose that in India persons who are not parties to a contract can be admitted to sue thereon, except where there is an obligation in equity amounting to a trust arising out of the contract. I say nothing as to whether special rules of law may be applicable to communities among whom marriages are contracted for minors by parents and guardians, but, putting aside such cases, I see no reason to think that the law in India contains a series of exceptions to the principle that a contract can only be sued upon as such by a party thereto. A trust may be founded on a contract and is capable of being enforced by a party to the trust in appropriate proceedings as was pointed out in *Page v Cox* (14). It is another matter altogether to say that a person not a party to a contract may bring a suit upon the contract by reason of near relationship to the promisee. Nearness of relationship is a fact which, like many other facts, cannot be disregarded in determining the question whether or not a trust arises out of or is founded on a

contract, but it has no other importance. Cases such as the present can be decided, and ought to be decided, on the settled principles of equity. In *Cleaver's case* (15) the Court considered whether the policy amounted to a trust for the widow and having found that it did not, determined the matter by the ordinary law of contract. This in my judgment is the only method which can be justified in principle. To hark back to such cases as *Dutton v. Poole* (17) and *Browne v. Mason* (18) is in my judgment a clear mistake and the mistake is not cured by the circumstance that under the Contract Act the definition of "consideration" is wider than in English law.

N.K.

Appeal allowed.

(17) [1688] Lev. 210.

(18) [1680] 1 Ven. 6.

A I. R. 1928 Calcutta 522

B. B. GHOSH AND CAMMIADÉ, JJ.

Swarnamanjuri Dassi — Claimant—Appellant.

v.

Secy. of State—Opposite Party—Respondent.

Appeal No. 24 of 1926, Decided on 22nd December 1927, from original decree of President, Calcutta Improvement Tribunal, D/- 17th November 1925.

(a) *Land Acquisition Act, S. 23*—In calculating the price of a property which is subject to a lease, rent ought to be taken into consideration.

It is an absurd thing to say that the lease should not be taken into consideration at all and in calculating the price of a property which is subject to a lease, the rent derived by the landlord should be taken into consideration in arriving at the value of the property.

[P 524 C 1]

(b) *Land Acquisition Act, S. 23*—Market value is one which a willing purchaser will pay to a willing seller.

The market value of the land acquired is the price that the owner willing, and not obliged to sell, might reasonably expect from a willing purchaser with whom he was bargaining for the sale of the property: (*Case-law discussed*).

[P 524 C 2]

(c) *Land Acquisition Act, S. 23*—Market value—Land to be acquired likely to continue to produce rent—Rent is basis on which the value will be calculated.

If the land which has been taken is likely to continue to produce rent which is being paid for it, the rent does offer the basis on which

the value will be calculated : *Earl of Eldon v. N. E. Ry. Co.* (1899) 80 L. T. (N. S.) 723, *Foll.* [P 525 C 2]

Benode Chunder Mitter, Bipin Ch. Mallik, Robindra Nath Banerji, Sachin Banerji, Probodh Krishna Some and Kushi Prasun Chatterji—for Appellant.

Langford James and Surendra Nath Guha—for Respondent.

B. B. Ghosh, J.—This is an appeal on behalf of claimant 1 under the Calcutta Improvement (appeal) Act, against the judgment of the Calcutta Improvement Tribunal modifying to some extent the award made by the Collector for the acquisition of certain premises in Lower Chitpore Road and Chhatawalla Gallee in this town under the Calcutta Improvement Act. The appellant was the owner of the premises. She as administratrix of the estate granted a lease for 99 years to one Elias of these premises under an Indenture dated 1st March 1920. The lessee paid a selami of Rs. 5,000 for the lease on 22nd September 1919. The rent reserved was the net amount of Rs. 2000 per month. There was a stipulation in the lease that the lessee was to build structures on the demised premises at a cost of one lac of rupees within a certain period, and as security for the performance of that agreement he had to deposit Rs. 50,000 with some bank. Apparently this was done. Subsequently under the Calcutta Improvement Act, a scheme for acquisition of the lands was sanctioned on 20th January 1922 and a declaration for the acquisition was made on 10th January 1923. The Collector made an award in favour of the appellant to the extent of Rs. 3,14,000 odd plus the statutory allowance. The claimant asked for a reference, and on the reference the Tribunal varied the award of the Collector by adding to the award Rs. 19,000 odd with the usual interest and statutory allowance. The Collector made a separate award of Rs. 18,500 in favour of the lessee, claimant 2 who had also asked for a reference to the Tribunal and whose claim for the excess amount was rejected in its entirety. Claimant 2 has also appealed against that judgment and his appeal which is No. 32 of 1926 will be dealt with separately.

It is argued on behalf of the appellant that in determining the market value under S. 23, Land Acquisition Act, the

learned President of the Tribunal in his judgment has not taken into consideration the lease in favour of claimant 2 under which the appellant was entitled to the net income of Rs. 2,000 per month; and it is urged that the President has not acted according to the correct principle of valuation of the property acquired under the Land Acquisition Act. What the learned President has done is, according to this contention, to ignore the lease altogether; and it is submitted for the appellant that the President has entirely gone wrong in doing so. The President has stated in the greater portion of his judgment that this lease with reference to which claimant 1 pressed him to arrive at the valuation of the property should not be taken into consideration. In enunciating the mode in which the valuation should be made, the learned President has made certain observations to which no exception can possibly be taken and to which no exception was taken in the course of the argument. What was objected to was that the learned President had, in certain other portions, misstated the principles, which should guide him in arriving at the valuation: For example, when he states at p 68 that in deciding what price a purchaser will pay for a property which is under a lease, the purchaser will not be guided by the terms of the lease, because the President assumes that when the purchaser desires to purchase, the lease should be surrendered to the lessor for no considerations whatsoever. Again in another portion of his judgment, he observes that in the case of a perpetual lease at a fixed rent the lease should not be taken into account, because if that is done, it would lead to the absurd result that the value would be the same for all time to come unless something happened to alter the security.

It is contended that the President has gone wholly wrong in his view. If the property acquired is subject to a perpetual lease bringing a fixed income and the security is not impaired, the value must be calculated upon the basis of the income derived and the fluctuation can only be with regard to the number of years' purchase that the property would fetch at the time of acquisition; that is, if money is plentiful the property may be sold at 20, 30 or even 40 years' purchase, if money is scarce the property

may be sold at 10 or 15 years' purchase; but at all times the basis of the calculation must be the income derived from the lease. It seems to me that the President is wrong in his view that in calculating the price of a property which is subject to a lease, the rent derived by the landlord should not be taken into consideration in arriving at the value of the property. Take for instance a property which has been leased out at a very profitable rent permanently. The rent is well secured, may be as a charge upon some other property of the lessee, then the leasehold falls into decay and the income derived by the lessee amounts to nothing. If this property is sold, would it be right to say that this property should be sold for nothing and the lease should not be taken into consideration at all? If that were so, I think that would lead to an absurd result. Take another instance, if the Secretary of State happens to take a lease of a house as is often done in this city, for a particular purpose, and if the lease is taken at a time when rent rules high and the lease is taken for a period of 99 years and subsequent to that, rent falls and the value of landed properties falls consequently, can it be said that at that time if the Secretary of State seeks to acquire that property under the Land Acquisition Act, his liability to pay rent at the high rate contracted for in the lease should be ignored altogether and he can get the property at a low valuation which may be fixed at the time when it is acquired? I think that it also would be an absurd thing to say that the lease should not be taken into consideration at all.

It is further contended on behalf of the appellant that the learned President has fallen into another error in arriving at the valuation, as he has taken into account only the fact as to what a purchaser would pay for the property at the time of the acquisition and not what the loss to the seller would be at that point of time. Mr. Langford James who appears for the Secretary of State has conceded and very rightly that the President is wrong so far as he states that the lease should not be taken into consideration; but he contends that the lease is not the only factor which should be taken into consideration. There cannot be any dispute as regards that proposition. Mr. Langford James further contends that

although the President has gone wrong in his view that the lease should not be taken into consideration at all and also that he has gone wrong in his reading of the result of the cases cited by the President in his judgment, he has as a matter of fact taken the lease into consideration while dealing with some of the arguments addressed to him on behalf of the appellant and, therefore, his judgment cannot be assailed as on a question of law. I shall consider that point presently. But before I do so, I would like to point out the principle of valuation of lands acquired, which has been laid down authoritatively in a number of cases. Mr. James refers to the case of *Kailash Chandra Mitra v. Secy. of State* (1) where Sir Lawrence Jenkins observes that the market value of the land acquired is the price that the owner willing, and not obliged to sell might reasonably expect from a willing purchaser with whom he was bargaining for the sale of the property. That proposition cannot be disputed. Again, it has been decided in the case of *Government of Bombay v. Merwanji Muncherji Cama* (2) that there is no difference between the term "value to the owner" as used in the Lands Clauses Act in England and the expression "market value" as used in S. 23, Land Acquisition Act. Therefore in arriving at the market value of the property, it must be considered what the owner was actually receiving from the property and what would be the amount of loss to him by the acquisition. The same thing was laid down in the case of *Secy. of State v. Shanmugaraya Mudaliar* (3), where their Lordships observed that the District Judge was right in estimating rent for the whole of the land instead of taking the rent actually received for a part by the owner in coming to his conclusion as to the valuation of the property acquired. It was, their Lordships stated, the best, if not the only, method he had for getting at the "market value of the ownership". Lastly I should refer to the case of *Narsingdas v. Secy. of State* (4). At p. 824 their Lordships of the Privy Council observe:

Now the principle upon which the valuation of the property compulsorily acquired should

(1) [1913] 17 C. L. J. 34=18 I. C. 638.

(2) [1904] 10 Bom. L. R. 907.

(3) [1893] 20 I. A. 80=16 Mad. 369 (P.C.).

(4) 29 C. W. N. 822=A. I. R. 1925 P. C. 91=3 Lah. 69=52 I. A. 133 (P.C.).

be measured has been repeatedly laid down by this Board and by the House of Lords.

To use the words to be found in *Fraser v. City of Fraserville* (5):

It is the value to the seller of the property in its actual condition at the time of its expropriation with all its existing advantages and with all its possibilities excluding any advantage due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired.

The decision in *Fraser's* case was that of the Judicial Committee and it was pronounced by Lord Buckmaster himself who also delivered the judgment in the case of *Narsingdas*. It has therefore been laid down by the highest authority which we are bound to follow that the value to the seller of the property in its actual condition at the time of the sale should be taken into consideration in arriving at the market value. It is not necessary for me to cite all the other cases which have been referred to at the Bar in order to substantiate the proposition submitted for our consideration that it is the value to the seller which should be taken into consideration. But I would refer to one other case only which is instructive as regards the manner in which the matter should be considered. It is the case *In re Athlone Rifle Range* (6). There the question arose with regard to the acquisition of a certain land of which the Secretary of State for War was the lessee. It is unnecessary to state the facts in detail. But there the question arose whether the Secretary of State who was the lessee could be taken as having surrendered the lease at the time of the acquisition and thus reduce the amount of compensation that the owner of the land would otherwise get for the property acquired. The Master of the Rolls in dealing with this argument on behalf of the Secretary of State says:

If the clause of surrender and all the covenants in the lease are gone then the rent is gone also and the arbitrator is bound to deal with the land as free of rent which would amount to an estate in possession. That would be a good way of getting at the land for less than is paid for it as rent, apart from the circumstance that Percy is entitled to a beneficial lease. But is that a sound application of the law? It is not; because, though the service of notice to treat makes the Secretary of State the equitable owner of the land, the interest he takes is subject to the lease, and the assessment of compensation is not to be made as of a

date subsequent to the service of notice to treat. But the circumstances are to be considered as they existed at the date of the notice, that is immediately before its service. That was the very case in *Penny v. Penny* (7), referred to by Mr. Bowen; and *Earl of Eldon v. N. F. Ry. Co.* (8) is an authority for the proposition that if the land which has been taken is likely to continue to produce rent which is being paid for it, the rent does offer the basis on which the value will be calculated.

It seems to me, therefore, that the learned President is not right in the way in which he proceeded to make the valuation by ignoring the lease altogether.

Mr. James, however, contends that the lease cannot be treated as the only basis for making the valuation. For example, what the appellant wanted in the lower Court was to have the valuation made on the basis of 20 years purchase of the rents reserved in the lease and that appears to have been the contention of Sir Benode here at the opening. Mr. Langford James has argued that the lease is certainly a factor to be taken into consideration, but that other matters should also be considered as to whether the lessee was likely to continue to get the rent reserved having regard to the circumstances disclosed, that is to say, whether the personal liability which the lessor undertook by his covenant in the lease is to continue to be of any value for the entire period of the lease, or whether there was any chance of the lessor losing the income stipulated in the lease after the expiry of Mr. Elias's life. Further it should also be taken into consideration as to whether the solvency of Mr. Elias himself would continue for any appreciable period of time. I quite agree with this contention. No doubt these factors should be considered along with the income derived from the lease itself in order to arrive at the proper valuation of the property. But it is contended by Sir Benode on behalf of the appellant that although these other matters put forward by Mr. James should be considered, the President has ignored the lease altogether and there he has gone wrong. He has not considered the lease; he has not considered the other circumstances also. It seems to me that the appellant is correct in the contention he makes.

(5) [1917] A. C. 187=86 L. J. P. C. 91=116 L. T. 258=33 T. L. R. 179.

(6) [1902] 1 Ir. 433.

(7) [1868] 5 Eq. 227=16 W. R. 671=37 L. J. Ch. 340=18 L. T. 13.

(8) [1899] 80 L. T. (N. S.) 723.

I must now deal with the argument of Mr. James that the learned President has actually taken the lease into consideration although he said it should not be done. He has apparently done so, but it seems to me he has done it in a very round about way. In dealing with the argument of the advocate for the claimant that the lease amounted to an absolute sale to the lessee and the rent was a mere annuity, the learned President has observed that in finding the present value of the annuity the rate of interest to be taken cannot be less than that of a mortgage on the property which in Calcutta is ordinarily in the neighbourhood of 8 per cent. Mr. James has argued upon this that the President has taken the lease into consideration and holds that having done so he would give the valuation at the rate of 8 per cent. It may be possible to support the judgment in that way. But as it seems to me to be quite clear that the President has approached the question from a wrong point of view, it would not be proper for us to hold that he did consider the lease in arriving at the true valuation of the property. Similarly in dealing with another argument of the advocate for the claimant the learned President observes:

When the rent has been fixed at an amount which is in excess of the present capacity of the land, the consideration of the security of rent would be entirely absurd and the personal security of the lessee would be the primary guarantee for such a rent.

and for the capitalization of the income the rent should be on very much the same footing as an unsecured annuity which must rank much lower than interest on Government securities and so forth. It may be that the learned President was dealing with the lease in the same roundabout way as he did when considering the other argument on behalf of the claimant. But as in the major portion of his judgment he has elaborately discussed the question as to whether the lease should be taken into consideration in arriving at the valuation of the property and has rejected it I do not think it would be right for us to hold that his judgment takes the correct view of the principle of valuation and should be supported. One of the assessors agreed in the view of the President and the other assessor understood the judgment of the President to have laid down that

the lease should not be taken into consideration at all.

Under these circumstances I think that the judgment of the tribunal should be set aside and the case sent back to that tribunal for dealing with the question of valuation in the light of the observations made above. The lease in question should be taken into consideration and also the other circumstances which would afford the basis for coming to the proper valuation of the land as I have indicated above.

The costs of all Courts will abide the final result.

Cammiade, J.—I am also of the opinion that this case must go back for a reconsideration of the question of valuation on the footing of the lease executed by the tenant, Elias, in favour of the first claimant. It is true that in the judgment delivered by the learned President of the tribunal a reference has been made to this lease and the learned President has made certain observations from which it may be taken that his opinion was that even if the lease was taken into consideration, the valuation based on it would not amount to more than the valuation arrived at by him. It appears, however, from the wording of his judgment that the lease has not been considered in all its aspects and in all its bearings in regard to the question at issue. There is the undoubted fact that the property at the time of acquisition yielded a monthly rent of Rs. 2,000 clear to the first claimant and this rent was reserved to the claimant for a period close upon a century. This matter could not be left out of consideration by any person seeking to purchase the land as an investment, because there would be a ready return for his money for a number of years. This of course assumes that the tenant is a solvent person, a question which has also to be gone into in deciding how far the lease should be taken into consideration in calculating the present market value of the land.

There is also the fact that according to the terms of the lease the tenant is bound to erect buildings at a cost not below one lac of rupees. This is also a factor which the intending purchaser would take into consideration; and it is one which the learned President has entirely overlooked. At how many years' purchase an intending purchaser would

purchase the property which was subject to a lease for a long term of years is a question which can only be answered by taking evidence as to the general custom of business with the purchasers in Calcutta; and this is a matter which the learned President will have to look into and if it is necessary he would have to take evidence on the subject.

For all these reasons the case should go back for a reconsideration of the question of valuation.

N K.

Case remanded.

* A. I. R. 1928 Calcutta 527

MUKERJI AND ROY, JJ.

Azizur Rahman Choudhury and others
—Judgment-debtors—Appellants.

v

Aliraja Choudhry and others—Decree-holders—Respondents.

Appeal No. 125 of 1926, Decided on 23rd March 1927, from appellate order of Dist Judge, Zillah Cachar, D/- 19th December 1925.

* (a) *Civil P. C., O. 21, R. 2—R. 2 contemplates an adjustment consisting of stipulations already carried out.*

An adjustment which does not consist of stipulations that had been carried out but consists merely of terms that had to be carried out in future does not come within the purview of O. 21, R. 2, but may come within the purview of O. 23. The adjustment referred to in O. 21, R. 2, is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed: (1915) *M.W.N.* 225, *Rel. on.* [P 523 C 2]

(b) *Civil P. C., O. 23, R. 4—Adjustment before a decree—Cognizance cannot be taken by an executing Court—Separate suit to restrain the decree-holder from executing the decree must be filed.*

If an adjustment be taken as having been prior to the decree, then it is in effect an agreement not to execute the decree which in future would be passed, and such an agreement cannot be taken cognizance of by an executing Court but to avail of it the judgment-debtors will have to institute a separate suit, to restrain the decree-holder from executing the decree: 31 *Cal.* 179; 29 *Cal.* 810, *Rel. on.*; 22 *Bom.* 463 (*F. B.*); 39 *Mad.* 541; 40 *Mad.* 233 (*F. B.*) and 6 *A. L. J.* 403, *Dist.* [P 530 C 1]

(c) *Civil P. C., O. 21, R. 2—Adjustment not certified—Executing Court cannot inquire even if fraud is imputed to the decree-holder.*

It is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as

required by O. 21, R. 2, even if fraud is imputed to the decree-holder: 21 *C. L. J.* 462; 21 *Mad.* 409; 29 *Mad.* 312; 36 *Mad.* 357; 49 *Mad.* 548 and 5 *P. L. J.* 70, *Rel. on.* [P 530 C 2]

(d) *Civil P. C., O. 21, R. 2—Adjustment notified to the appellate Court—Statement that adjustment had taken place not objected to by decree-holder—Adjustment was held to have been duly certified.*

Where an adjustment was notified to the appellate Court at a time when that Court was in seisin of the whole case and the statement that there had been such an adjustment was not objected to on behalf of the decree-holder,

Held: that the adjustment could not be said to be one which had not been duly certified within the meaning of O. 21, R. 2. 16 *C. W. N.* 923, *Foll.* [P 530 C 2]

Sarat Chandra Roy Choudhury and Satyendra Kishore Ghose—for Appellants.

Gunada Charan Sen and Priya Nath Dutt—for Respondents.

Mukerji, J.—This appeal has been preferred by the judgment-debtors from an order passed by the District Judge of Cachar affirming on appeal an order passed by the Sadar Munsif at Silchar overruling the judgment-debtors' objection in connexion with certain execution proceedings. The proceedings in the Courts below have been so irregular that it is necessary to set out the facts somewhat in detail in order to understand what has exactly happened. The execution proceedings relate to a decree that was passed on 23rd November 1921, in a suit which had been instituted by two persons Aliraja Choudhury and Elim Miah Chowdhury as the plaintiffs against Mansur Miah, Abdul Jalil and Azizur Rahman as the principal defendants. The decree declared the plaintiffs' right of easement on a certain pathway, directed the removal of certain obstructions that had been caused therein and granted a perpetual injunction restraining the defendants from putting up such obstructions in future. The defendants thereupon preferred an appeal from the aforesaid decree to the Court of the Subordinate Judge of Cachar. During the pendency of this appeal one of the defendants, namely, Mansur Miah died and at the hearing of the said appeal it was represented to the Court on behalf of the defendants that there had been adjustment of the said decree and that, therefore, the appeal would not be proceeded with. The adjustment was thus brought to the notice of the Court on 7th May

1923, and on that day the Court disposed of the appeal in the following words:

Appellant's pleader says that he will not proceed with the appeal as his clients who are alive informed him that there has been a compromise out of Court. The appeal is, therefore, dismissed for default.

From the certified copy of this order which is on the record it appears that the order was shown to two pleaders, one Babu R. R. Dutt and the other Babu B. L. Dhar and they put down their initials under the said order with the endorsement "Seen." It may be presumed that these two gentlemen were the pleaders of the parties to the said appeal. On 15th September 1923, an application was filed purporting to have been made by the two decree-holders Aliraja Chowdhury and Elim Miah Choudhury for the execution of the said decree. On 13th November 1923 the two defendants Abdul Jalil and Azizur Rahman who were then the surviving judgment-debtors, Mansur Miah having died, as I have already stated, during the pendency of the appeal, objected to the execution going on, on the ground that the decree that was sought to be executed had been adjusted out of Court by the judgment-debtors having given the decree-holders a pathway somewhat different from what had been awarded to the decree-holders by the decree and because on accepting the same the decree-holders had given up their claim to the decretal costs. This objection was taken up for the consideration by the learned Munsif before whom five witnesses were examined on 8th December 1923. The fact that the said witnesses were examined appears from the record of the depositions of the said witnesses but it is curious that the order-sheet does not contain any entry under that date showing that any witnesses had been so examined. One of these witnesses so examined was one of the decree-holders Elim Miah who supported the objection that was put forward on behalf of the judgment-debtors and who stated that there had been such an adjustment and who further represented to the Court that his name had been signed in the execution proceedings by his son, but that he himself did not want to proceed with the execution. The record does not show that the learned Munsiff arrived at any finding on the question as to whether there was such an adjustment or not. But on 10th December 1923, an appli-

cation was put in on behalf of the judgment-debtors in which they stated that if the Court would care to go to the locality it would be apparent to the Court that there had been such an adjustment and that the parties had been acting upon the said adjustment for a good long time. The Munsif went to the locality on 24th December 1923 as appears from certain statements that are to be found in the petitions that were subsequently filed on behalf of the parties. I may note here again that this local investigation is not referred to in the order-sheet of these execution proceedings and there is no trace whatsoever therein as to what transpired in the course of this local investigation.

The next order in the order-sheet which has any bearing on this matter is dated 5th January 1924 which shows that on that date a petition was filed on behalf of the judgment-debtors stating that on the spot at the time of the local investigation there were certain proposals for giving the decree-holders another pathway and that the said proposals had been accepted and the ultimate result of the negotiations was embodied in a draft agreement a copy of which was filed along with the petition. The judgment-debtors prayed that effect might be given to this agreement that was reached between the parties on the local investigation as aforesaid. On this the decree-holders took time once on 5th January 1924 till 12th January 1924, again on 12th February 1924 and thereafter again on 12th February 1924 till 1st March 1924. On this day the Court made an order to the effect that the parties should bring evidence to prove the compromise mentioned in petition 210. Petition 210, it may be stated, was the petition which had been filed on behalf of the judgment-debtors on 5th January 1924 alleging that there had been a compromise on the spot and filing along with it the draft agreement to which I have already referred. Thereafter the matter was again adjourned from time to time till 10th May 1924. On the last mentioned day an objection was taken on behalf of the decree-holders that the compromise could not be given effect to by reason of the provisions of O. 21, R. 2, Civil P. C. This objection must have referred not to the compromise that was alleged to have been arrived at on the spot because

that was in the course of the execution proceedings themselves and the fact that there had been such a compromise was brought to the notice of the Court well within 90 days from the date on which it had been arrived at but it must have referred to the earlier adjustment which is said to have taken place during the pendency of the appeal. There is a note of this objection in the ordersheet, but it does not appear that the Court came to any finding as regards this objection at any time during the pendency of the proceedings.

We find next that after several adjournments of these proceedings, on 17th May 1924 three witnesses were examined in the case, namely, two on behalf of the judgment-debtors and the decree-holder Aliraja Choudhury himself—all these witnesses having deposed to the adjustment that was alleged to have been arrived at on the spot during the local investigation. On 2nd June 1924, the learned Munsif disposed of the case holding that there was no doubt about the compromise but that the compromise could not be given effect to inasmuch as the terms thereof were at variance with the terms of the decree and because to allow this compromise to stand would be to substitute for the decree in execution a new executable decree which is not permitted under the law. He referred to the decision in the case of *Ladd Govindoss Krishnadoss v. Ramdoss Vishnadoss* (1). The judgment-debtors thereupon preferred an appeal to the District Judge who affirmed the decision of the Munsif holding that the compromise had not been satisfactorily proved and further that even if it was proved, the agreement could not be acted upon because it was arrived at in the course of execution proceedings. He relied upon the aforesaid case reported in *Ladd Govindoss Krishnadoss*

v. Ramdoss Vishnadoss (1) as also on the provisions of O. 23, R. 4, Civil P. C. From this order the present appeal has been preferred on behalf of the judgment-debtors.

Now, as regards the adjustment which is sought to have been arrived at on the spot during the local investigation we have looked into the terms of the compromise that is alleged to have been so arrived at and which are embodied in the draft agreement that was filed on behalf of the judgment-debtors and we find that the adjustment did not consist of stipulations that had been carried out but consisted merely of terms that had to be carried out in future. Such an adjustment does not come within the purview of O. 21, R. 2, Civil P. C. and must, if at all, come within the purview of O. 23 of the Code. Under O. 23, R. 4, however, the provisions of that order do not apply to execution proceedings. The reason of the provision contained in O. 23, R. 4 is that O. 21, R. 2 and S. 47 taken together provide a complete procedure for recording compromises arrived at in execution proceedings. The adjustment referred to in O. 21, R. 2 is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the decree under execution and which will again have to be executed. The view taken in the case reported in 23 I. C. 376, in my opinion, is correct and accordingly even if the latter compromise or adjustment is said to have been proved, in view of the terms thereof, it cannot be given effect to in the course of the execution proceedings.

Turning now to the earlier adjustment, namely, the one which is said to have taken place while the appeal was pending: it was argued before us on behalf of the appellants that the said adjustment should have been given effect to by the learned Munsif. On behalf of the respondent it has been urged that having regard to the conduct of the judgment-debtors as disclosed in the statement which they made in the petition that they filed in the executing Court after the local investigation was held, it should be held that the judgment-debtors no longer relied upon the earlier adjustment, but only relied upon the latter one as affording a bar to

(1) [1915] M. W. N. 225=28 I. C. 376=17 M. L. T. 222.

the execution proceedings. Having examined the materials that are on the record it is not possible for us to hold that the judgment-debtors ever abandoned the position that they had taken up in the first instance, namely, that the decree under execution had already been adjusted before the appeal was disposed of. I am, therefore, of opinion that this argument advanced on behalf of the respondent should not be allowed to prevail. The question then is whether this adjustment can be taken cognizance of by the executing Court and if so, what is the order that we should pass.

It has been argued on behalf of the decree-holders that this was an adjustment which took place before the appellate decree was passed and therefore the objection that such an adjustment stood in the way of execution of the decree is really an objection under S. 47 as to the executability of the decree itself and it need not be certified to the Court under the provisions of O 21, R. 2, Civil P. C. This contention, in my opinion, is not well founded. For if the adjustment be taken as having been prior to the decree, then it was, in effect, an agreement not to execute the decree which in future would be passed. According to the uniform current of authorities of this Court such an agreement cannot be taken cognizance of by an executing Court but to avail of it the judgment-debtors will have to institute a separate suit, to restrain the decree holders from executing the decree: see *Hassan Ali v. Ganzi Ali* (2) and *Benode Lal Pakrashi v. Brajendra Kumar Saha* (3) though the other High Courts have taken a different view on this point (e g, *Laldas v. Kishordas* (4), *Subramania Pillai v. Kumara Velu* (5), *Chidambaram Chettiar v. Krishna Vathiyer* (6) and *Gavri Singh v. Gajadhar Das* (7)).

It has next been contended on behalf of the decree-holders that inasmuch as fraud was alleged, O. 21, R. 2, has no application and that on account of the allegation of fraud the matter is brought within the purview of S. 47, Civil P. C. This

proposition also is not well founded because although it has for its support some earlier cases of the Bombay and the Madras High Courts, it is well settled now, the decisions of this Court having all along been consistent on this point, that it is not competent to a Court executing a decree to enquire into the fact of a payment or adjustment which has not been certified as required by O. 21, R. 2, even if fraud is imputed to the decree-holder, *Biroo Gorain v. Jaimural Koer* (8), *Jogendra v. Ashutosh* (9), *Periatambi v. Vellaya* (10), *Ganapathi Aiyar v. Chenga Reddi* (11), *Budruddin v. Gulam Mohideen* (12), *Mehbunissa Begam v. Mahednussa* (13) and *Imamuddin v. Bindabasini* (14).

The last contention on behalf of the appellants is of considerable substance. Having regard to the fact that the adjustment was notified to the appellate Court at a time when that Court was in seisin of the whole case and the statement that there had been such an adjustment not having been objected to on behalf of the decree-holders as is clear from the endorsements "Seen" of their pleaders to which I have already referred, the said representation made to the appellate Court may well be taken in connexion with the subsequent petition that was filed before the executing Court and the two together may be regarded as satisfying the requirements of O. 21, R. 2, Civil P. C. That this position is maintainable has been held by this Court in the case of *Biroo Gorain v. Jaimural* (8). The facts of that case are exactly on all fours with the facts of the present case. I am therefore of opinion that the adjustment cannot be said to be one which has not been duly certified within the meaning of O. 21, R. 2 of the Code. As the learned Munsif does not seem to have arrived at any finding on the question of fact, namely, as to whether there had been such an adjustment or not the proper order to pass in this case, in my opinion, is to set aside the orders passed by both the Courts below and to direct

(8) [1912] 16 C. W. N. 923=13 I. C. 63=16 C. L. J. 174.

(9) [1916] 24 C. L. J. 462=37 I. C. 738.

(10) [1893] 21 Mad. 409=8 M. L. J. 51.

(11) [1906] 29 Mad. 312=16 M. L. J. 33.

(12) [1913] 36 Mad. 357=24 M. L. J. 541=12 I. C. 562=(1911) 2 M. W. N. 473.

(13) A.I.R., 1925 Bom. 309=49 Bom. 548 (F.B.).

(14) [1920] 5 Pat. L. J. 70=55 I.C. 890=1 Pat. L. T. 149.

(2) [1904] 31 Cal. 179.

(3) [1902] 29 Cal. 810=6 C. W. N. 833.

(4) [1898] 22 Bom. 463 (F.B.).

(5) [1916] 33 Mad. 541=33 I. C. 66.

(6) [1917] 40 Mad. 233=5 M. L. W. 132=32 M. L. J. 13=37 I. C. 886=(1917) M. W. N. 44 (F.B.).

(7) [1909] 6 A. L. J. 403=2 I. C. 608.

that the case be remitted to the original Court with a direction that it will now proceed to arrive at a finding on the question of the said adjustment upon the evidence that is on the record together with such further evidence as may be adduced by the parties and then pass proper orders as to whether the execution case will proceed or not.

The appeal accordingly succeeds. The appellants will have their costs of the appeal, the hearing-fee being assessed at two gold mohurs

Roy, J.—I agree.

N.K.

Appeal allowed

A. I. R. 1928 Calcutta 531 (1)

C. C. GHOSE AND JACK, JJ.

S. N. Banerjee—Complainant—Applicant.

v.

Bengal Paint and Varnish Co.—Opposite Party.

Criminal Revn. No. 41 of 1928, Decided on 2nd May 1928, from order of Dy. Magistrate, Howrah, D/- 13th September 1927.

Calcutta Municipal Act (1899), S. 193—Person in Calcutta tendering for goods to be supplied to the Howrah Municipality—Sale of goods to the Municipality in pursuance of the tender—Such person cannot be held to be carrying on business in Howrah and so cannot be prosecuted for not having a license.

A person who carried on business in Calcutta tendered for certain goods to be supplied to the Municipality of Howrah. His tender was accepted and, in pursuance of the contract between the parties, the person sold goods from time to time to the Howrah Municipality. The Howrah Municipality asked him to take out a license and prosecuted him for his failure to do so :

Held : that the person could not be said by any stretch of language to be one who carried on business in Howrah and, therefore, the prosecution could not stand. [P 531 C 2]

Narendra Kumar Basu and Haradhan Chatterjee—for Applicant.

Suresh Chandra Taluqdar, Mohendra Kumar Ghose and Surojit Chandra Lahiri—for Opposite Party.

Judgment—This is a rule against an acquittal. What happened in this case is this : The opposite party are a firm who carry on business in Calcutta. They tendered for certain goods to be supplied to the Municipality of Howrah. Their tender apparently was accepted

and, in pursuance of the contract between the parties, the opposite party have sold goods from time to time to the Howrah Municipality. It is said on behalf of the Howrah Municipality that the opposite party who supply goods to the Howrah Municipality pursuant to the orders received in Calcutta carry on business in Howrah. A statement of this nature carries its own refutation and it is unnecessary to pursue the point further. The opposite party cannot be said by any stretch of language to be people who carry on business in Howrah. It follows, therefore, that the order made by the Deputy Magistrate on 13th September 1927 complained of by the Howrah Municipality cannot in any way be interfered with. The result is that this rule is discharged.

N K.

Rule discharged.

A. I. R. 1928 Calcutta 531 (2)

MITTER, J.

Payari Mohan Mahajan and others—Plaintiffs—Appellants.

v.

Siddique Ahmed and others — Defendants—Respondents.

Appeal No. 2602 of 1925, Decided on 17th February 1928, from appellate decree of Dist. Judge, Chittagong, D/- 14th August 1925.

(a) Words — “*Daimi*” conveys the notion of *fixity of rent*.

The word “*daimi*” means “relating to what is perpetual, the perpetual settlement of the revenue,” and so conveys the notion of *fixity of rent*. [P 531 C 2]

(b) *Landlord and Tenant—Permanent lease at a fixed rental granted in respect of a transferable raiyati—Implication is that raiyati is transferable without the consent of the landlord.*

The fact that the permanent lease at a fixed rental is granted in respect of a raiyati which is transferable, carries with it the plainest implication that the raiyati was a raiyati at a fixed rent which alone is transferable under the law without the consent of the landlord: A. I. R. 1921 Cal. 451 (F. B.), *Rel. on*.

[P 531 C 2]

Narendra Kumar Das—for Appellants.
M. Md. Nurul Huq Chaudhury — for Respondents.

Judgment.—This is plaintiff's appeal against the decision of the District Judge of Chittagong dated 14th August 1925 which affirmed a decision of the Munsif of Fatickehari dated 27th August 1924.

Plaintiff brought the suit in which this appeal arises to recover possession of the disputed land from the defendants on the ground that he is a raiyat and that the predecessor of the defendants Rahamat Ali had dar-raiyati right under him and that Rahamat Ali having died the defendants have acquired no right to the dar-raiyati as the said interest is not heritable.

The defence of the defendants was that the plaintiff was a raiyat at fixed rate in respect of the land in suit. He granted a permanent and heritable jotedari right to the defendants' predecessor Rahamat Ali by a patta executed in the year 1258 M. E.=1896 and the plaintiff was estopped from denying defendants' title to the land and from claiming khas possession. The Munsif held that the plaintiff was a raiyat at fixed rent and was competent to grant a permanent heritable lease to the defendants' predecessor. To this suit for khas possession a claim for arrears of rent for 1283 and 1284 M. E. was joined. The Munsif dismissed plaintiff's claim for khas possession and decreed the claim for arrears of rent.

An appeal was taken by the defendant to the District Judge. The learned District Judge held that the status of the plaintiff was not that of a raiyat at fixed rent, but was that of an occupancy raiyat. The learned District Judge, however, came to the conclusion

that the plaintiff was estopped from setting up that the interest created by the patta was dar-raiyati and dismissed plaintiff's appeal.

A second appeal has been taken to this Court and it has been strenuously argued by the learned vakil for the appellant that the patta on the face of it shows that the interest of plaintiff's predecessor was that of a raiyat and that therefore the patta which purported to grant a permanent heritable dar-raiyati lease contravened the provisions of S. 85, Ben. Ten. Act, and could not be admitted in evidence and is not operative as a permanent lease between the plaintiff and the defendants' predecessor and on the death of the defendants' predecessor the tenancy must be taken to have been terminated. Reliance is placed on the decision of the Full Bench in *Chandra Kanta v. Amjad Ali* (1), and it is contended that the present case is governed by the first of the three

propositions laid down by the Full Bench. I cannot accept this contention, for it would appear from the statements contained in the patta of 1258 that plaintiff represented to the defendants' predecessor Rahamat Ali that his status was not that of an ordinary occupancy raiyat, but of a raiyat whose interest was transferable, for it is stated that it was the original raiyati of Abinas Chandra Acharjya and had been purchased at an auction by Sarat Chandra Mahajan. The lease which was granted to Rahamat Ali was described as "*bundobasti istemrari daimi kayemi harsana jotedari*". The word "daimi" means

relating to what is perpetual the perpetual settlement of the revenue. See Wilsons, Glossary, p.119.

So it was intended to convey the notion of fixity of rent. The word "daimi" imports the notion of fixity of rent. It is stated that in certain localities in Chittagong kayemi raiyats have written leases at fixed rates of rent so that plaintiff by the patta purported to grant a permanent lease with a fixed rental and he represented that his own interest was that of a raiyat whose interest was transferable: see District Gazetteer of 1903 (Chittagong), 152. These representations would certainly convey the impression that the plaintiff was a raiyat at a fixed rent. The learned District Judge says, the only way in which the terms of the patta can be made consistent is by interpreting raiyati to mean raiyati at fixed rent.

The plaintiff in his evidence does not deny that he represented himself to have mokarari rights; on the contrary he says that he does not know whether his interest is mokarari or not. Plaintiff's raiyati was acquired by auction purchase by his brother Sarat. The sale certificate has not been produced, and the fact that permanent lease at a fixed rental was being granted in respect of a raiyati which was transferable carries with it the plainest implication that the raiyati was a raiyati at a fixed rent, which alone is transferable under the law without the consent of the landlord. The case, therefore, falls within the second proposition laid down by the Full Bench as the patta was granted by the plaintiff who, on the face of the document, professed to have a higher status than that of a raiyat and consequently the defendant may rightly invoke the doctrine of estoppel and plead that the plaintiff cannot be permitted to

(1) A. I. R. 1921 Cal. 451=48 Cal. 789 (F. B.)

prove that his status was not that of a raiyati at fixed rent.

The defendants' predecessor and the defendant after his death had been in possession since 1888 under the patta. I think the lower appellate Court has put a correct interpretation on the patta. The appeal fails and must be dismissed with costs.

N K.

Appeal dismissed.

A. I. R. 1928 Calcutta 533

RANKIN, C. J., AND MITTER, J.

Port Canning and Land Improvement Co., Ltd.—Plaintiffs—Appellants.

v.

Jogendra Mandal—Defendant—Respondent.

Appeals Nos. 736 to 740 of 1925, Decided on 3rd August 1927, from appellate decrees of 2nd Sub-Judge, 24-Parganas, D/- 19th December 1924.

Bengal Tenancy Act (8 of 1885), S. 46—Suit for ejectment—Court should first determine fair and equitable rent and decree for ejectment should not be passed if the tenant agrees to pay such rent.

In a suit for ejectment of non-occupancy tenant, before passing a decree under S. 46, Cl. (6), the Court should determine the fair and equitable rent and fix a time within which the tenants are to appear and signify their election to pay the rent so determined. The Court may record an order in the ordersheet determining what the fair and equitable rent is. If the tenants do not appear within the time fixed by the Court and recorded in the order determining fair and equitable rent or appear and signify their unwillingness to accept the fair and equitable rent determined by the Court, then the Court should pass a decree in ejectment. But such a decree should not be passed where the tenants agree to pay the fair and equitable rent fixed by the Court before ejectment.

[P 534 C 1, 2]

Ram Chandra Majumdar, Rama Prasad Mukhopadhyaya and Mahendra Kumar Ghosi—for Appellants.

Mitter, J.—These five appeals arise out of five suits brought by the plaintiff-company in the Court of the Munsif of Basirhat, for enhancement of rent of the tenants-respondents, who are non-occupancy raiyats, after service of notice under S. 46, Ben. Ten. Act. The plaintiff-company tendered to the tenants-respondents in each of five suits an agreement to pay enhanced rents and the tenants-respondents within three months before the institution of each suit refused to

execute the agreement. Thereupon the plaintiff-company brought five suits for determination of fair and equitable rent and for ejectment in case the tenants-respondents failed to pay the fair and equitable rent determined by the Court under S. 46, Cl. (6), Ben. Ten. Act. Decrees were passed in each of the five suits to the effect that if the tenants-respondents agreed to pay the rent determined under S. 46, Cl. (6), they shall be entitled to remain in possession of the holding at that rent for a term of five years from the date of the agreements respectively, but, on the expiration of the terms, shall be liable to ejectment, unless they have acquired a right of occupancy and that if the tenants did not agree to pay the rent within the time fixed by the Court they would be ejected at the end of the agricultural year in which the decree was passed. The tenants did not appear to signify their election to pay the fair and equitable rent within the time fixed by the Court in each of the five suits and notwithstanding this the Court refused to pass decrees for ejectment. The Court of first instance held that the tenants-respondents may signify their election to pay the fair and equitable rent before the decree for ejectment is actually passed and the Court had power to enlarge the time for signifying election. In this view the trial Court refused to pass decrees for ejectment in the five suits.

Appeals were taken to the Subordinate Judge of 24-Parganas against the decrees of the Munsif refusing ejectment and the Subordinate Judge affirmed the decrees of the Munsif.

Five second appeals have been preferred to this Court by the plaintiff-company and it is argued by Mr. Ram Chandra Majumdar, who has appeared on behalf of the plaintiff-company, that the decrees of the Courts below refusing ejectment are wrong, as the Court had no power to extend the time fixed in the decrees for the tenants to signify their election. The argument is put in this way: It is said that the Courts below are in error in holding that two decrees are contemplated by S. 46, Ben. Ten. Act. It is argued that the decrees having fixed a time for signifying election and having prescribed ejectment as the penalty for non-compliance within the stipulated time with the order of the Court, the Courts below were bound to pass decrees

for ejectment. It is said that there is no provision in the Bengal Tenancy Act, for enlarging the time fixed by the decree for signifying willingness to pay the fair and equitable rent determined by the Court and that S. 148, Civil P. C., does not apply where time is allowed for doing an act fixed by a decree of the Court. In support of this contention our attention has been drawn to notes under S. 148, Civil P. C. (Mulla's edition), where authorities in support of this contention are cited. The point made in the argument is that the Court has no power to extend the time fixed by its decree. Mr. Majumdar, however, has very fairly drawn our attention to the fact that his client, the plaintiff company, treated the decrees passed in these five suits as conditional decrees for ejectment and applied for final decrees, as the time for signifying election granted by the Court had expired.

It is said that, though the plaintiff company might have misread the law and had made an application for a final decree, the law contemplates only one decree and when in S. 46, Cl. (8), it is said that

if the raiyat does not agree to pay the rent so determined the Court shall pass a decree for ejectment,

the willingness to agree or otherwise must be signified before the decree is passed. It seems to me that the Act contemplates that before passing a decree for ejectment the Court shall determine what is a fair and equitable rent: see S. 46, Cl. (6), Ben. Ten. Act. Under S. 46, Cl. (8), if the raiyat does not agree to pay the rent so determined, the Court shall pass a decree for ejectment. If a certain time is allowed in this case for signifying the election to execute the agreement for enhanced rent, it seems only logical that after the expiration of the period a decree for ejectment should be passed. In other words, the scheme of the Act seems to be this: It provides that before ordering ejectment the Court shall determine what is a fair and equitable rent. Keeping this intention of the legislature in view, I think, the proper procedure ought to be this: Under S. 46, Cl. (6), the Court should determine the fair and equitable rent and fix a time within which the tenants are to appear and signify their election to pay the rent so determined. This may be a fortnight

or a month from the date of the determination of the fair and equitable rent. Whether it is necessary or advisable to serve notice on the tenants of the rent fixed and the date by which their election has to be signified is a matter of discretion in the circumstances of each case. The Court may record an order in the ordersheet determining what the fair and equitable rent is. It is not necessary that a preliminary decree be passed determining what the rent is. The Bengal Tenancy Act does not either prohibit or enjoin the passing of a preliminary and a final decree. If the tenants do not appear within the time fixed by the Court and recorded in the order determining fair and equitable rent or appear and signify their unwillingness to accept the fair and equitable rent determined by the Court, then the Court should pass a decree in ejectment. Under S. 44, Cl. (d), a non-occupancy raiyat shall be liable to ejectment on the ground that he has refused to agree to pay a fair and equitable rent determined under S. 46, so that he could not be ejected until an opportunity is given to him to agree to pay the fair and equitable rent within a certain period, after which an effective decree for ejectment can only be passed. S. 46, Cl. (6), only contemplates the determination of what rent is fair and equitable for the holding; Cl. 8 contemplates that if the raiyat does not agree to pay the rent so determined then a decree for ejectment could be passed and Cl. (10) provides that the decree for ejectment shall take effect from the end of the agricultural year in which it was passed.

It seems to me, whether the Bengal Tenancy Act contemplated one decree or two decrees, under S. 46, Ben. Ten. Act, in the present cases, the plaintiff company proceeded on the footing that there are two decrees in each suit and the objection does not come from it with good grace that there should be only one decree in each case. As the tenants-respondents had agreed to pay the fair and equitable rent fixed by the Court before ejectment, they ought not in the circumstances of the present cases to be ejected. The result is that, in my opinion, the appeals should fail and should be dismissed, but without costs, as the respondents have not appeared.

It is said by Mr. Majumdar that these are test cases and we should express our

final opinion on the question. While dismissing these appeals on their special facts, I have indicated what the proper procedure is which should be followed in suits for enhancement of rent and ejectment under S. 46, Ben Ten. Act.

Rankin, C. J.—I agree.

S J.

Appeals dismissed.

A. I. R. 1928 Calcutta 535

PAGE AND GRAHAM, JJ.

Durga Sankar Sarma Roy — Defendant—Appellant.

v.

Kamini Kumar Sarma Roy and others — Respondents.

Appeals Nos. 571 to 573 of 1925, Decided on 2nd August 1927, from appellate decrees of Sub-Judge, Sylhet, D/- 4th November 1924.

Cosharers — Separate occupation of a cosharer even after objection from his cosharers and in defiance of their claim to be in joint possession of the land — Cosharers who are excluded and ousted from joint possession can bring a suit to obtain joint possession of the property—Whether there is exclusion or ouster depends upon circumstances of each case.

If one cosharer separately occupies a portion of the common land without objection from his cosharers, and with their express or implied consent, he is not to be subjected to a suit in which the plaintiffs claim joint possession of the plot of which the defendant is in sole occupation. If the separate occupation of the defendant is with the tacit or express assent of his cosharers, and the cosharers are dissatisfied with the manner in which the joint land is being held in possession by tenants-in-common, their proper remedy is to bring a suit for partition. On the other hand, if the separate occupation of a cosharer is continued after objection from any of his cosharers and in defiance of their claim to be in joint possession of the land, then the cosharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the property. Whether there is exclusion or ouster depends upon the circumstances prevailing in the particular case under consideration: 18 C. W. N. 328, Ref. [P 536 C 1]

Braja Lal Chakrabarty and Birendra Kumar De—for Appellant.

Gunada Charan Sen and Priya Nath Dutta—for Respondents.

Page, J.—This is an appeal from a decree of the learned Subordinate Judge of Sylhet, affirming a decree of the learned Munsif of Habiganj. The suit was brought by one cosharer in order to obtain joint possession of what was

admitted to be joint property from another cosharer, upon the ground that the defendant cosharer had excluded and ousted the plaintiff from his right to joint possession of the land in dispute. It appears that the plaintiff and the contesting defendant were two of three cosharers entitled as tenants-in-common to certain ejmali land. On a portion of the joint property there was a person in occupation who was possessed of a non-transferable occupancy title, and the tenant used to pay rent to the three cosharers. The contesting defendant, now the appellant, purchased the tenure, and after the purchase the tenant abandoned his holding. Thereupon, the appellant went into possession of the land, and has been cultivating it in khas possession. The purchase of the holding by the appellant, and the abandonment by the tenant took place in 1911, and the present suit was brought in 1921. Notwithstanding the labours of the learned advocate for the respondent no evidence has been brought to our attention of any claim by the plaintiff to joint possession of this land during those ten years. Nevertheless, the learned Judges in the lower Courts have held as a matter of fact that the plaintiff respondent was excluded and ousted by the appellant from joint possession of this plot of land. The learned Subordinate Judge passed the following observations in the course of his judgment:

The appellant purchased the tenants' holdings which were abandoned by the original tenants. So defendant 2 virtually expelled the common tenant, and possessed himself to the exclusion of the plaintiffs. Therefore the plaintiffs were ousted from the lands in suits by act of defendant 2.

Now, to hold that a cosharer is in possession of part of the common land to the exclusion of the other cosharers, in my opinion, is much the same thing in the eye of the law as saying that he has ousted his cosharers, for to exclude is to "keep out", to oust "to put out" of possession. But to find that a co-tenant is in sole occupation of part of the joint land may or may not, according to the facts of the particular case, be the same thing as to say that he is in exclusive occupation of the property or has ousted his cosharers from the property. If the Court were to hold that evidence of separate occupation was necessarily proof of ouster it seems to me that the difficulties which are great enough as matters now

are) attendant upon the joint occupation of joint property would become insuperable. For whenever a cosharer is found to be in sole occupation of part of the common land he will be deemed to have ousted therefrom his cosharers. In my opinion, according to well-settled law, if one cosharer separately occupies a portion of the common land without objection from his cosharers, and with their express or implied consent, he is not to be subjected to a suit in which the plaintiffs claim joint possession of the plot of which the defendant is in sole occupation. If the separate occupation of the defendant is with the tacit or express assent of his cosharers, and the cosharers are dissatisfied with the manner in which the joint land is being held in possession by the tenants-in-common, their proper remedy is to bring a suit for partition. On the other hand, if the separate occupation of a cosharer is continued after objection from any of his cosharers and in defiance of their claim to be in joint possession of the land, then the cosharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the *ejmuli* property: see the case of *Bisanta Kumari Dassya v. Mohesh Chandra Shaha* (1). Whether there is exclusion or ouster depends upon the circumstances prevailing in the particular case under consideration. Now, in the present case, the appellant has been in sole occupation of the property in dispute. The question, therefore, is one of fact: Was that separate occupation such that it amounted to an exclusion or ouster of the respondents or not?

The learned Subordinate Judge has held that the separate occupation of the appellant amounted to ouster because, as I understand his judgment, by reason of the separate occupation by the appellant the respondents have been deprived of their share of the profits of the land. The question at once arises: Have the respondents asked for joint possession? The answer is that they have not. The learned advocate for the respondents have been unable to point to any claim by the plaintiffs either to joint possession, or to a share in the profit of the land in suit, or to any objection to the occupation by the appellant of the land in suit

throughout the ten years which elapsed after the appellant went into possession of the land. In my opinion, in such circumstances, there is no room for a finding that the appellant excluded the respondents from joint possession of the property; and the mere fact that the appellant is found to be in sole occupation of the land is not to be regarded as proof that he has either excluded or ousted the respondents from joint possession thereof. The ground, therefore, upon which the lower Courts have based the finding of ouster cannot stand. The learned advocate on behalf of the respondents, however, has urged that, if this finding cannot stand, the proceedings should be remanded in order that there should be a finding upon the issue whether or not having regard to the evidence on the record there was a claim or objection by the respondents, or an assertion of an adverse or exclusive title by the appellant to this parcel of land which would amount to an exclusion or ouster at law. I should have thought that a remand would have been the right course if the learned advocate for the respondents had been in a position to point to any evidence upon the record which, if believed, would justify a finding upon that issue in their favour. Notwithstanding his researches and those of his junior, however, not a shred or tittle of evidence has been brought to our attention which would support the plaintiffs' case on such an issue. In the circumstances, in my opinion, we should not be justified in remanding this case for further consideration. In my opinion, inasmuch as the plaintiffs-respondents have failed to prove exclusion or ouster from the plot of land of which the defendant-appellant has been for this long period in sole occupation, their claim in the suit to be given joint possession fails.

The appeal, therefore, will be allowed: the decrees of the lower Courts set aside and the suit will be dismissed with costs in all the Courts.

This judgment will also govern the other two analogous appeals.

Graham, J.—Though there is a clear finding in the judgment of the Court of appeal below in regard to ouster I agree that in the proper sense of the word no ouster has been proved in this case, nor does it appear that there are any materials whatever on the record to justify

the finding of the learned Subordinate Judge on the point. I agree with my learned brother that the appeals succeed and must be allowed.

N K.

Appeal allowed.

A. I. R. 1928 Calcutta 537

PAGE AND GRAHAM, JJ.

Mt. Fuli Bibi and others—Plaintiffs
—Appellants.

v

Khokai Mondal and others—Defendants
—Respondents.

Appeal No. 1360 of 1925, Decided on 12th August 1927, from appellate decree of Sub-Judge, Nadia, D/- 11th March 1925.

(a) *Specific Relief Act, S. 41*—Section applies only when plaintiff is suing to cancel an instrument.

Section 41 is not ad rem, for it applies to proceedings in which plaintiff is seeking the cancellation of an instrument. It does not apply to a suit where the plaintiff is not seeking the cancellation of an instrument but disregards it as a nullity: 30 Cal. 539 and 34 Cal. 329, *Foll.* [P 538 C 1]

(b) *Specific Relief Act, S. 41*—Contract by minor—Restoration was not ordered.

The doctrine that "those who seek equity must do equity" does not apply to a contract by a minor as the Court cannot say that it is equitable to compel a person to pay money in respect of a transaction which, against that person, the legislature has declared to be void: 30 Cal. 539 (P. C.), *Foll.* [P 538 C 2]

(c) *Evidence Act, S. 115*—Suit by a minor without a next friend—Defendant, though aware of plaintiff's minority, not raising objection as to the maintainability of the suit—He cannot raise this objection for the first time on appeal.

Proceedings in a suit instituted by a minor, and not by the minor's next friend in his name, are not void. The policy of the legislature in enacting O. 32 was that where a minor has instituted a suit in his own name the proceedings in normal cases should not be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner. O. 32, R. 1, is intended for the protection and benefit of the defendant. But the ground upon which the protection is afforded to the defendant in a suit instituted by a minor is removed when the defendant at all material times is aware or has received notice, of the minority of the plaintiff and yet elects to proceed to trial and take his chance of obtaining a decree in his favour on the merits without raising any objection to, or issue upon, the maintainability of the suit and prefers the objection for the first time on appeal when the trial has gone against him: 22 Cal. 270, and 19 Mad. 127, *Rel. on.* [P 539 C 1]

Radha Binode Pal and Bhupendra Kishore Basu—for Appellants.

Santosh Kumar Bose and Radika Ranjan Guha—for Respondents.

Page, J.—On 21st January 1920 the appellants Fuli and Amini, who were minors, executed a kobala by which they transferred to the respondents their shares of a ryoti interest in certain lands that they had inherited. Fuli was born on 21st December 1902 and Amini on 7th March 1905. It was alleged by the respondents that Rs. 950 was paid as consideration for the transfer, and both the lower Courts have held that part, but not the whole, of this sum was received by or on behalf of the appellants.

On 24th January 1923 the appellants brought the present suit against the respondents claiming a declaration that they were entitled to their respective shares in the property, and joint possession with their cosharers, whom they impleaded as pro forma defendants. They also claimed damages and mesne profits against the respondents. When the suit was filed the appellants' mother, Bhadi, was joined as a co-plaintiff, but subsequently she withdrew her claim. The trial Court dismissed Fuli's claim and decreed Amini's claim in part; but the lower appellate Court rejected the claims of both of the appellants, and dismissed the suit with costs. From that decree the appellants have preferred the present appeal.

The kobala in suit was executed by Fuli, and on behalf of Amini by her husband as her guardian. But as the husband of a minor is not her guardian under Mahomedan law, and the lower appellate Court has found that both Fuli and Amini were minors at the time when the kobala was executed, it was conceded that the kobala was null and void as against both the appellants.

At the trial Fuli stated:

I went to the Sub-Registrar for registering the document. As he found me minor he then asked my mother about my age, and said that if she stated my age as major he could register it. My mother then told my age as 17 to 18 years to him.

Now, it is admitted that Fuli would not be estopped by a misrepresentation as to her age made by her mother, *Ram Charan Das v Joy Ram Majhi* (1), and there is no finding, and no evidence to

(1) [1912] 17 C. W. N. 10=16 I. C. 825=16 C. L. J. 135.

justify a finding, that either Fuli or Amini herself made any representation as to her age to the respondents, or that Fuli's conduct was such as would render her amenable to the rule of estoppel by negligence: *Gregg v. Wells* (2), *Freeman v. Cooke* (3). The interesting question that was much canvassed at the hearing of the appeal, whether a minor is a "person" within S. 115, Evidence Act (1 of 1877), therefore, does not arise. *Brohmo Dutt v. Dharmodas Ghose* (4), *Dadasaheb Dasarathrao v. Bai Nahani* (5), *R. Leslie v. Sheill* (6). There being no evidence or finding that either of the appellants was guilty of misrepresentation or fraud prima facie the appellants are entitled to succeed.

Two contentions, however, have been raised by the respondents in support of the decree of the lower appellate Court: (i) that as a condition precedent to passing a decree in their favour the Court ought to require the appellants to repay to the respondents the moneys which they respectively have received as consideration for the transfer, either under S. 41, Specific Relief Act (1 of 1877) or pursuant to the principle that "those who seek equity, must do equity"; (ii) that as the suit was instituted by Amini who was then a minor, and not by her next friend acting in her name, she is not entitled to any relief in the suit which, so far as she is concerned, must be treated as a nullity.

The answer to the first contention is not far to seek. S. 41, Specific Relief Act, is not ad rem for it applies to proceedings in which the plaintiff is seeking "the cancellation of an instrument" whereas in the present suit the appellants are not seeking the cancellation of the kobala, which is void and may be disregarded by the appellants as a nullity. *Mohori Bibee v. Dharmodas Ghose* (7), *Bijoy Gopal Mukerji v. Krishna Mahishi Deli* (8). The attempt of the respondents

to pray in aid of their case the equitable doctrine that "those who seek equity must do equity" is countered by the decision in *Thurston v Nottingham Permanent Benefit Building Society* (9). In that case the plaintiff, a minor, in order to be enabled to purchase some land, and to complete the building of houses in course of erection thereon, applied to the defendants for a loan, and executed a mortgage of the property in their favour to secure advances up to a limit of £1,200. On attaining her majority the plaintiff brought a suit against the defendants in which she claimed a declaration that the mortgage was void, and that she was entitled to possession of the mortgaged property. The defendants did not allege that the plaintiff had been guilty of any fraud or misrepresentation in connexion with the transaction. It was held that to the extent to which the money advanced by the defendants had been paid to the vendor to complete the purchase the plaintiff could not affirm the purchase and repudiate the advance, and that she must repay to the defendants the money so advanced. The defendants contended, however, that the plaintiff ought to be compelled to refund also the moneys advanced by the Society upon the security of the mortgage after the purchase had been completed. This contention was rejected, Romer, L. J. observing, that

the short answer is, that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void. (*ibid* p. 13).

The law thus enunciated by Romer, L. J., has been affirmed *in ipsissimis verbis* both by the house of Lords: *Thurston v Nottingham Permanent Benefit Building Society* (10) and by the Privy Council: *Mohiri Bibee v. Dharmodas Ghose* (7); see also *Guru Shiddswami v. P. D. Narendra* (11), and concludes the matter against the respondents.

In support of their second contention, which prevailed in the lower appellate Court, the respondents relied upon the language in which O. 32, R. 1 is couched; and urged that all proceedings in a suit instituted by a minor, and not by the minor's next friend in his or her name,

(2) [1899] 10 A. & E. 90=2 P. & D. 293.

(3) [1848] 2 Ex. 654=18 L. J. Ex. 114=12 Jur. 777=G. D. & L. 187.

(4) [1898] 26 Cal. 381=3 C. W. N. 468.

(5) [1917] 41 Bom. 480=41 I. C. 190=19 Bom. L. R. 561.

(6) [1914] 3 K. B. 607=93 L. J. K. B. 1145=30 T. L. R. 460=111 L. T. 106=58 S. J. 453.

(7) [1903] 30 Cal. 539=30 I. A. 114=3 Str. 374 (P. C.)

(8) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424 (P. C.).

(9) [1902] 1 Ch. D. 1=36 L. T. 35=71 L. J. Ch. 83=50 W. R. 179=18 T. L. R. 135.

(10) [1903] A. C. 6.

(11) [1919] 44 Bom. 175=55 I. C. 271=22 Bom. L. R. 49.

are void and of no effect, and, therefore, that Amini's suit must fail. In my opinion, however, there is no substance in this contention. The policy of the legislature in enacting O 32 was that where a minor has instituted a suit in his own name the proceedings in normal cases should not be treated as abortive, but that an opportunity should be given to constitute the suit in the regular manner.

The reason why no proceeding can be taken by an infant without the assistance of a next friend is, as stated in Daniell's Chancery Practice, 6th Edn. p. 105 "on account of an infant's supposed want of discretion, and his inability to bind himself, and make himself liable for costs." And it would seem that the rule was intended for the protection and benefit of defendants; for it has been held that when a defendant waives this benefit and protection the suit may proceed without a next friend. [Per Sale, J. in *Doorga Mohun Dass v. Tahir Ally* (12).]

But the ground upon which protection is afforded to a defendant in a suit instituted by a minor is removed when the defendant at all material times is aware, or has received notice, of the minority of the plaintiff, and yet elects to proceed to trial and take his chance of obtaining a decree in his favour on the merits without raising any objection to, or issue upon, the maintainability of the suit; and prefers the objection for the first time on appeal when the trial has gone against him. These, however, are the circumstances obtaining in the present case; for it would appear that the respondents, one of whom is a close relation of the appellants, were fully aware of the age of each of the appellants, and, at any rate after the additional plaint was filed, cannot be heard to say that they had not received notice of the dates upon which Fuli and Amini respectively were born. Moreover, before the suit was heard Amini had attained her majority, and became bound by the decrees and others passed therein. Too often in this country is a suit won or lost because the form has been allowed to swallow up the substance of the case. No doubt, rules and regulations are necessary, and useful when sensibly applied. But let there be too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance; to the detriment of justice, and the consternation of litigants. That ought not to be. This contention of the

(12) [1894] 22 Cal. 270.

respondents, to my mind, is misconceived and cannot be sustained either on principle or on authority. *Kamalakshi v. Ramasami Chetti* (13). *Doorga Mohun Dass v. Tahir Ally* (12).

For these reasons, the appeal must be allowed, the decree of the lower appellate Court set aside, and the decree of the trial Court varied. Each of the appellants is declared entitled to an one anna ten gandas one kara and $6\frac{1}{2}$ dantis share of the property in suit, and to joint possession thereof with their cosharers. No sum is awarded to the appellants for damages or mesne profits. The respondents will pay the appellants' costs in all the Courts.

Graham, J.—I agree.

S J

Appeal allowed.

(13) [1895] 19 Mad. 127.

A. I. R 1928 Calcutta 539

MUKERJI, J.

Nil Kamal Bhattacharjya and another—Plaintiffs—Appellants.

v.

Kamakshya Charan Bhattacharjya and another—Defendants—Respondents

Appeal No. 1601 of 1925, Decided on 5th January 1928, from appellate decree of 2nd Sub-Judge, Tippera, D/- 31st March 1925.

(a) *Decree—Setting aside—Once a decree is passed the suit cannot be dismissed unless the decree is reversed on appeal—Any party can apply to have it enforced.*

After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties on the making of the decree, acquire rights or incur liabilities which are fixed, unless or until the decree is varied or set aside. After a decree, any party can apply to have it enforced: *A. I. R. 1924 P. C. 198, Foll.*

[P 541 C 1]

(b) *Partition Act, S. 4—The word "family" used in S. 4 ought to be given a liberal and comprehensive meaning—The object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live.*

The word "family" as used in S. 4 ought to be given a liberal and comprehensive meaning, and it includes a group of persons related in blood, who live in one house under one head or management. It is not restricted to a body of persons who can trace their descent from a common ancestor; and it is not neces-

sary for the members to constitute an undivided family that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess. It is sufficient if the members of the family are undivided *qua* the dwelling house which they own; and it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play; and the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live: 12 C. L. J. 525; 20 All. 324, 9 O. C. 156; and 23 Bom. 73, *Rel. on*.

[P 541 C 2, P 542 C 1]

(c) *Partition Act, S. 4*—The term "house" includes all that is necessary for convenient occupation of the house but not that which is only for the personal use and convenience of the occupier.

The term "house" embraces, not merely the structure or building but includes also adjacent buildings, curtilages, garden, courtyard, orchard and all that is necessary for the convenient occupation of the house but not that which is only for the personal use and convenience of the occupier. It includes the land on which the structure of the dwelling house stands, and whether a particular plot of land is or is not necessary to the enjoyment of a house is to be determined on the evidence.

[P 542 C 1]

Pyari Mohan Chatterjee for *Upendra Kumar Roy*—for Appellants.

Priyanath Dutt—for Respondents.

Judgment.—This appeal has arisen out of a suit which was instituted for partition of certain homestead lands, to a one third share in which the plaintiffs had been declared entitled to in a previous suit between the parties. The trial Court made a preliminary decree for partition declaring the plaintiffs' right to get a one-third share in the lands and directing the appointment of a commissioner to effect the partition by metes and bounds. On an appeal being preferred by the defendants the Subordinate Judge discharged the preliminary decree aforesaid and ordered that as the defendants are willing to buy the plaintiff's share and to pay a reasonable price of the land in suit, a value of the plaintiff's share would be made by a commissioner by a local inquiry unless the price be agreed to by the parties, and that share of the plaintiffs would be sold to the defendants under S. 4, Partition Act.

The plaintiffs then appealed to this Court. The decree of the Subordinate Judge was made on 31st March 1925, and the appeal was preferred to this Court on 29th June 1925. The record of the suit, however, arrived in the Court of first instance on 13th May 1925, and notwith-

standing that orders were passed for agreeing upon a price of the share or taking steps for the appointment of a Commissioner to ascertain the same, neither party did anything in connexion with the suit in that Court till December 1925. In the meantime, it may be observed, the suit was put up before the Munsif on no less than sixteen occasions and on as many different dates. On one of these dates the plaintiffs were called upon to deposit the fees for the commission, but this order was not complied with. On 9th December 1925, peremptory order was passed adjourning the suit to 21st December 1925, and warning the parties that no further time would be allowed. On 21st December 1925 the plaintiff applied for a further adjournment, but the Munsif refused the application as the pleader who moved the application had no further instructions and the suit was dismissed. Whether there was any appearance on behalf of the defendants on that date it does not appear nor is it clear what their attitude was with reference to the suit. Be that as it may, the order that was passed was worded thus :

The learned pleader has no further instructions. As the plaintiff does not deposit costs of commissioner as directed hence the Court is not in a position to move further. I do not see I have any other alternative than to dismiss the suit. It is accordingly dismissed.

No steps have been taken to set aside the dismissal of the suit.

The first question which arises is whether in the circumstances aforesaid the appeal is maintainable. It is argued on behalf of the appellant: first, that with the reversal of the Subordinate Judge's decision in this appeal, all subsequent orders that may have been passed in the suit, including the order of dismissal aforesaid, will as a necessary consequence of such reversal pass away; second, that the Munsif had no jurisdiction to dismiss the suit in view of the decision of the Judicial Committee in the case of *Lachmi Narayan Marwary v. Bal-makund Marwary* (1), and so his order should be treated as a nullity; and third, that the present appeal may be converted into an appeal embracing a challenge against the decree of the Munsif dismissing the suit.

(1) A. I. R. 1924 P. C. 198=4 Pat. 61=51 I A. 321 (P. C.).

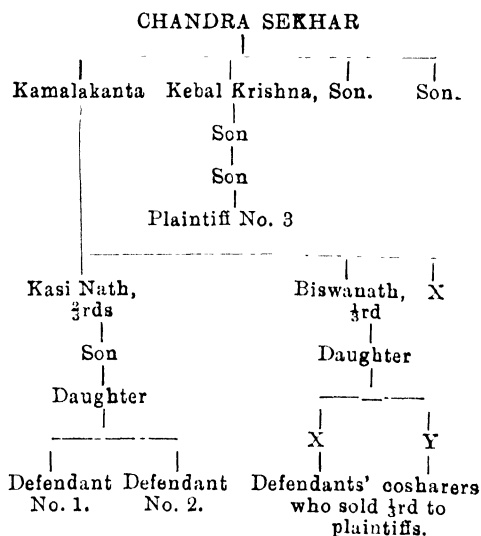
There are difficulties in the way of accepting the first and the third of the aforesaid contentions in their entirety. As regards the second contention it seems unnecessary to go into the question whether in the events that happened the order of dismissal could be justified on the failure on the part of the plaintiffs either to appear or to take steps for the further progress of the proceedings. It is clear, however, on the authority of the decision in the case of *Lachmi Narayan Marwary v. Bal-makund Marwary* (1) that

after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can apply to have it enforced.

Any order of dismissal that was passed, assuming that it was rightly passed, could only affect the further proceedings that followed upon the decree which the Subordinate Judge had made and could not touch the decree itself. The appeal, therefore, in my opinion, is competent and must be dealt with on its merits.

The validity of the decree made by the Subordinate Judge has been challenged on several grounds which may be enumerated as follows: first, the defendants and their cosharers from whom the plaintiffs have purchased, the plaintiffs under their purchase being entitled to one-third share and the remaining two-thirds share belonging to the defendants, do not constitute an undivided family within the meaning of S. 4, Partition Act 4, 1893; second, that if the said cosharers may be regarded as members of "an undivided family" with the defendants, the plaintiffs are equally entitled to be treated as such members as well; third, that the property in suit is not a "dwelling house" within the meaning of that section; and fourth, that besides the portion on which the house stood, there is a quantity of land lying vacant and that the plaintiffs are entitled to have their share allotted out of the same, the findings of the Court below not being sufficient to prevent the same from being partitioned.

To deal with these contentions it will be convenient to give a genealogy of the parties. It is as follows:



In support of the first three contentions reliance is placed, firstly, on the fact that the defendants and their cosharers are not the male descendants of Kamalakanta to whom the property in suit belonged, but are respectively the sons of the daughter of a grandson of Kamalakanta and the sons of a daughter of a son of Kamalakanta; secondly, on the fact that the said defendants do not actually reside in the house and not in joint mess but are in service abroad; thirdly, on the fact that the huts of which the dwelling house comprised have in 1326 been blown down by a cyclone; and fourthly, on the fact that the plaintiffs as well as the defendants and their cosharers, the vendees are all descendants of a common ancestor, namely, Chandra Sekhar. The expression "undivided family" as used in S. 4, Partition Act 4 of 1893 has been explained in a series of cases amongst which reference may be made to *Khirode Chandra v. Saroda Prasad* (2) *Sultan Begam v. Debi Prasad* (3), and *Kalka Prasad v. Banki Lal* (4), which has been relied on with approval in the other two cases just mentioned, and *Vaman Vishnu v. Vasudev Morbhat* (5). These decisions lay down that the word "family" as used in the section ought to be given a liberal and comprehensive meaning, and it includes a group of persons related in blood,

(2) [1910] 12 C. L. J. 525=7 I. C. 436.

(3) [1908] 30 A.L.J. 324=5 A. L. J. 352=(1908) A. W. N. 126.

(4) [1906] 9 O. C. 156.

(5) [1899] 23 Bom. 73.

who live in one house under one head or management; that it is not restricted to a body of persons who can trace their descent from a common ancestor; that it is not necessary for the members to constitute an undivided family that they should constantly reside in the dwelling house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the family are undivided *qua* the dwelling house which they own; that it is the ownership of the dwelling house and not its actual occupation which brings the operation of the section into play: and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferrer's family have a right to live. Judged by these tests the defendants and their cosharers must be held to belong to an undivided family; and the admission contained in para. 1 of the plaint and the fact that there was a partition of the ancestral properties amongst the four sons of Chandra Sekhar about a hundred years ago, and that the plaintiffs have no right to live in the house apart from their right under the purchase, clearly make them strangers to such family. The fact that the huts have been blown down does not make the dwelling house any the less a dwelling house so long as the members have not abandoned it or, at any rate, given up the idea of using it as such. These contentions, therefore, must fail. As regards the remaining contention, it appears that the property in suit comprises an area of 22½ gandas of which only 10 gandas form the site of the house itself and the remaining 12 gandas are appurtenant lands.

As pointed out in the case of *Khirole Chandra Ghoshal v. Saroda Prosad Mitra* (2), the term "house" embraces, not merely the structure or building but includes also adjacent buildings, curtilages, garden, courtyard, orchard and all that is necessary for the convenient occupation of the house, but not that which is only for the personal use and convenience of the occupier. It includes the land on which the structure of the dwelling house stands, and whether a particular plot of land is or is not necessary to the enjoyment of a house is to be determined on the evidence. The finding in this respect that the learned Subordinate Judge has recorded is that the vacant land is

quite necessary for the due enjoyment of the dwelling house and it was so long used as such, and that:

both the plots (meaning the site of the house itself and the vacant land) constitute the dwelling house.

This finding, in my opinion, is sufficient and this contention also fails.

The result is that the appeal fails and must be dismissed with costs.

N K.

Appeal dismissed

A. I. R. 1928 Calcutta 542

BUCKLAND, J.

Ashoke Kumar De—Plaintiff.

v.

Corporation of Calcutta—Defendant.

Civil Suit No. 134 of 1927, Decided on 27th July 1927.

(a) *Calcutta Municipal Act* (1923), S. 538—*Special period of limitation does not apply to a suit by the son for the recovery of Provident Fund of an employee of the Corporation.*

Special period of limitation prescribed in S. 538 cannot apply to a suit, against the Corporation of Calcutta, in which the plaintiff claims as the only son and sole heir of his deceased father to recover from the Corporation a certain sum on account of his father's Provident Fund, unpaid salary and contributions for the purchase of a war bond. [P 543 C 1]

(b) *Provident Fund Act* (9 of 1897), S. 3 (1) (b)—"Representative" means a legal representative of the deceased.

The word "representative" in S. 3 (1) (b), is intended to mean, though it is not very happily expressed, the legal representative of the deceased. [P 543 C 2]

(c) *Provident Fund Act*, S. 5—*A person alleging to be an uncle of a deceased employee in the Calcutta Corporation taking payment of the Provident Fund—Son suing the Corporation for the same—Corporation was held to have no business to pay to the uncle, he not being a representative of the deceased under R. 19 framed under the Provident Fund Act.*

A person who said he was the uncle of the deceased, an employee in the Calcutta Corporation, appeared before the Corporation with some kind of certificate stamped by an Honorary Magistrate and professing to bear the seal of the Court of which that individual was an Honorary Magistrate, and with this certificate he succeeded in getting payment of the Provident Fund of the deceased from the Corporation of Calcutta. The son of the deceased sued the Corporation for the sum but it was pleaded that the sum was already paid to a deceased's representative.

Held: that the person to whom the payment was made was not the representative and the Corporation had no business under the rules to pay anybody other than the legal representatives, executors or administrators of the deceased under R. 19 framed under the Provident Fund Act. [P 543 C 2]

Judgment.—This is a suit against the Corporation of Calcutta, in which the plaintiff claims as the only son and sole heir of his deceased father to recover from the Corporation of Calcutta the sum of Rs. 1,236-13-7 on account of his father's Provident Fund, unpaid salary and contributions for the purchase of a war bond.

The defences put forward on behalf of the Corporation are two. It is first objected that the suit is barred by limitation under S. 538, Calcutta Municipal Act (1923). That is a section which prescribes a period of limitation for suits in respect of any act purporting to be done under the Act or under any rule or by-law made thereunder. The plaintiff does not sue in respect of any act purporting to be done under the Act or any rule made under it, nor has learned counsel for the Corporation been able to point out to me that the Provident Fund is in any way within the Calcutta Municipal Act. There is no question of anything done under the Calcutta Municipal Act. The claim is a simple money claim and the special period of limitation prescribed cannot apply to the suit.

Then a defence is based upon Ss. 3 and 5, Provident Fund Act (Act 9 of 1897). It is doubtful whether this is a Government Provident Fund, to which the Act applies, because, as I understand the position, it is a Provident Fund kept for the employees of the Corporation of Calcutta. I doubt whether a Provident Fund constituted by the Corporation of Calcutta is within this Act at all. But the matter has been argued by learned counsel for the defendant upon that basis, and I will so deal with it, for I have not called upon learned counsel for the defendant to meet the point. S 5 says:

No suit or other legal proceedings shall lie against any person in respect of anything done or in good faith intended to be done in pursuance of the provisions of this Act.

The same answer meets this point, *mutatis mutandis* as that applicable to the defence under S. 538, Municipal Act.

Section 3 (1) (a) provides that payment should be made to any person entitled to receive the money according to the rules of the Fund. The rules of the Fund have been placed before me. R. 19 says:

On the death of any subscriber the Manager shall pay to his representatives, executors or administrators the amount standing to his

credit in the account prepared in accordance with the provisions of R. 14.

Section 3 (1) (b) provides that in cases not provided for the money may be paid to any person appearing to be entitled to receive it. It has been argued that the word "representatives" in the rule is synonymous with the words "any person appearing to him to be entitled to receive it" in S. 3 (1) (b), Provident Fund Rules. With that I cannot agree. The word "representatives" in my judgment, is intended to mean though it is not very happily expressed the legal representatives of the deceased.

What actually happened in this case was that a person who said he was the uncle of the deceased, and whether he was or was not has not been established and, there is nothing to show to the contrary appeared before the Corporation with some kind of certificate stamped by an Honorary Magistrate of Baraset and professing to bear the seal of the Court of which that individual was an Honorary Magistrate, and with this certificate he succeeded in getting payment of this sum from the Corporation of Calcutta. That he succeeded in duping the Corporation there can be no question, but to what extent the Corporation was an incurious dupe and what enquiries were made there is nothing to show. This has been stated in the written statement and it is not denied. I do not suppose there is any doubt about it, but it is no defence to the suit. The matter is governed by the rules, and the Corporation had no business under the rules to pay anybody other than the representatives, executors or administrators of the deceased. In these circumstances, both the defences must fail.

The Corporation say that the deceased took an advance from his Provident Fund during his lifetime, and that the net amount due under all these heads now amounts to Rs. 977-13-4. This on behalf of the plaintiff is very properly not challenged by his counsel, and he is prepared to accept the figures as they appear in the books of the Corporation. There must, therefore, be judgment for Rs. 977-13-4.

In the course of this judgment and while I was engaged in delivering it, my attention was drawn by Mr. S N. Banerji for the defendant Corporation to S. 56, Calcutta Municipal Act, 1923, on which

he says the Provident Fund is founded. It has not been possible for me to deal with this section, and no argument has been founded upon this. I leave the matter as I have dealt with it, namely, upon the basis upon which it was argued on behalf of the defendant Corporation.

The plaintiff is entitled to costs on scale No. 2.

N.K

Appeal allowed

A. I. R. 1928 Calcutta 544

RANKIN, C. J., AND MITTER, J.

Mahim Chandra Sarkar—Plaintiff—Appellant.

v.

E. I. Ry. Co—Defendant—Respondent.

Appeal No 2113 of 1925, Decided on 29th July 1927, from appellate decree of Sub-Judge, Nadia, D/- 29th June 1925

Railways Act, S. 72—A consigning a wagon of coal to a certain station for the use of a Railway Company—Company rejecting the coal as unsuitable for consumption—Re-sale by A to C—C again selling to B—Company issuing a fresh invoice though the coal was used up by them—B suing for damages—B was held to have every right to sue because he had perfectly a good contract with C who had a perfectly good contract with A.

A consigned a wagon of coal from Pathardibi station to a certain station on the E. I. Ry. This coal was consigned to the Loco Foreman of the E. I. Ry. Co., and was intended for use by the E. I. Ry. After some time, A received a notice from the Company stating that that coal was unsuitable for their purposes and it was rejected. A resold that wagon of coal to C who sold it again to B. In the meantime the coal was retained and consumed by the Company. However, the Company issued a new railway receipt or fresh invoice issued in supersession of the old invoice, and on that invoice the sender was A and the consignee was C. The railway receipt was endorsed on the back by C to B. Thereupon, B sued the Company for the recovery of damages. It was contended that B had no locus standi.

Held: that B had every right to sue the Railway Company for the coal that had not been delivered. He had a perfectly good contract with C who had a perfectly good contract with A as regards a specific ascertained wagon-load of coal. The Company accepted a change in that instruction, and they were under an obligation to deliver that coal to A or his nominee and they had no right to use it after they had rejected it. It was an ordinary case by a purchaser of coal against a Railway Company who lost the coal or had converted the coal to its own use by mistake.

Khetra Mohan Ghose and Mohendra Kumar Ghose—for Appellant.

Mrityunjay Chatterji and Biraj Mohan Roy—for Respondent.

Rankin, C. J.—In this case I am of opinion that the appeal must be allowed. The judgments of the Courts below are singularly deficient in dates of the material transactions, but the facts appear to be as follows: Dana Premji & Co. consigned a wagon of coal from Pathardibi station to Sahebganj station on the E. I. Ry. This coal was consigned to the Loco Foreman of the E. I. Ry. Co., and was intended for use by the E. I. Ry. That consignment was on 9th February 1922, and there was a consignment note. The next thing which happened, so far as Dana Premji & Co. are concerned, is that they received a notice from the E. I. Ry. Co., stating that that coal was unsuitable for their purposes and that it was rejected. The date of that notice is not given in the judgments. The next thing that happened was that they resold that wagon of coal to defendant 3. Defendant 3, at some date before 13th March 1922, sold it again to the plaintiff, the plaintiff being a person at Kushtia on the E. B. Ry. The exact dates of the contracts between Dana Premji & Co and Biswas, defendant 3, and between Biswas and the plaintiff are not given, but they must have taken place before the 13th March 1922.

It now appears, according to the case of the E. I. Ry., that although the wagon of coal was rejected, the Railway Company nevertheless retained it and were proposing to use it. They say that the rejection was a mistake; but I need not point out that however much the Railway Company might have been mistaken, their refusal addressed to Dana Premji & Co. to accept this wagon of coal put Dana Premji & Co. in the position of being revested with the ownership of the coal and entitled to resell it. The property in that coal would pass upon such a resale. It is said for the Railway Company that the coal came to Sahebganj and was immediately sent on to Jamalpur in order to be used. When it was used, by whom it was used and when it ceased to be in existence, there is no evidence at all. It may have been about a week or a month on one of the Railway Company's sidings or it may have been immediately consumed. On this point there appears to be no evidence at all, to which the learned advocates on either side are able to point, nor is there any mention of any finding as to this matter or any details about it given in the judgments.

What happened was this: that, in these circumstances, the Railway Company issued a new railway receipt at Sahabganj. It is a railway receipt or fresh invoice issued in supersession of old invoice No. 41 of 9th February 1922 to Sahabganj, and on that invoice the senders are Dana Premji & Co. and the consignee is S. C. Biswas. The address for carriage is Kushtia. This railway receipt was endorsed on the back by S. C. Biswas to the plaintiff. Plaintiff says that he has paid Biswas for this coal and there is no finding to the contrary, nor does it matter.

The plaintiff brings this suit against the E. I. Ry. Co., amongst other defendants and the question is whether, in these circumstances, the E. I. Ry. Co. has any answer to the plaintiff. In my opinion it has none.

The Courts below have differed in opinion. The learned Subordinate Judge of Krishnagar has taken the view, first, that the plaintiff has no locus standi. He has also been under some misapprehension, as is now admitted, upon facts, and says:

It appears that the wagon was first booked to Sahabganj and then was re-booked to Jamalpur; but, as a matter of fact, the coal was used up at Sahabganj. So that there was nothing to send to Kushtia. There was only a paper transaction regarding the fresh invoice No. 10.

That, as is now admitted, is an entire mistake.

Mr. Bose, on behalf of the E. I. Ry. Co., contends that the plaintiff has no locus standi and that unless it can be shown that this coal was not consumed before 13th March 1922 there was no contract vesting the coal in the plaintiff, and the plaintiff cannot recover it. It is to be observed that the Railway Company entered into this matter originally, not merely as carriers, but as purchasers. The coal was delivered to them by their own railway. They rejected the coal and the coal again became the property of Dana Premji & Co. They were as people who had rejected that coal under an obligation to deal properly with Dana Premji & Co.'s property. Dana Premji & Co. required them to re consign the coal to Biswas. That is the basis of the document,—the invoice—to which I have already referred. This is an invoice in supersession of the original invoice. The Railway Company says by it:

We received certain coal at Pathardihi on the 9th February and we now undertake as carriers to send that to Kushtia to the order of S. C. Biswas.

That is the meaning of it. Dana Premji & Co. were quite entitled to give them that instruction and that instruction they accepted as carriers. S. C. Biswas, the nominal consignee, was a servant of the real consignee, defendant 3, J. N. Biswas. I need not say that the fact that he had no title of his own and was a bare trustee for J. N. Biswas does not make him any the less the proper person to endorse over the railway receipt to the plaintiff and the plaintiff gets as good a title in that way as he could have got. Indeed, if it had been endorsed over by J. N. Biswas, then the transaction would have been irregular, because it was for the consignee to make the endorsement. In these circumstances, I am of opinion that the plaintiff has every right to sue the Railway Company for the coal that has not been delivered. He had a perfectly good contract with Biswas, who had a perfectly good contract with Dana Premji & Co., as regards a specific ascertained wagon-load of coal. It is not shown, nor is there any evidence that can be pointed out, that this coal ceased to exist on 13th March 1922. I am clearly of opinion that the burden of proving that it ceased to exist rests upon the person who asserts that proposition. Whether it ceased to exist or not, in my opinion, makes no difference to the present case, because the Railway Company on these facts received the coal on the 9th February upon certain instructions. They accepted, as they were bound to do, a change in that instruction, and they were under an obligation to deliver that coal to Dana Premji & Co. or their nominee and they had no right to use it after they had rejected it. It seems to me that it is an ordinary case by a purchaser of coal against a Railway Company who has lost the coal or, as in this case, has converted the coal to its own use by mistake.

In my judgment, the judgment of the trial Court is right. The decree of the lower appellate Court is set aside and that of the trial Court is restored with costs against the E. I. Ry. Co. in this Court and in the lower appellate Court.

Mitter, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 546**B. B. GHOSH AND CAMMIADÉ, JJ.***M. Mujibar Rahaman* — Defendant—Appellant.

v.

Isub Surati—Plaintiff—Respondent.

Appeal No. 1391 of 1925, Decided on 23rd February 1928, from appellate decree of Addl. Dist. Judge, Howrah, D/- 4th June 1925.

(a) *Evidence Act, S. 116 — Scope—Tenant's estoppel operates even after the termination of the tenancy.*

Section 116 does not contain the whole law of estoppel and the tenant's estoppel operates even after the termination of the tenancy.

[P 547 C 1]

(b) *Practice—Issue not properly decided by the trial Court — Appellate Court may reverse the judgment but cannot send the issue for retrial.*

Where the trial Court frames the issue and decides it against the plaintiff, and the Judge on appeal thinks that it is not properly decided, he may reverse that decision if he chooses, but he has no right to set aside the judgment of the trial Judge and remand that issue for retrial. The Judge must himself decide the issue upon the evidence on the record and if he thinks that it is necessary for him to take any additional evidence under O. 41, R. 27, if there is any good ground for such evidence being admitted, he may follow that procedure; but in any case he has no right to send the matter back for trial to the Court of first instance.

[P 547 C 2]

S. C. Bose and Probodh Chandra Kar — for Appellant.

*Rishundra Nath Sarkar and Kali San-
kar Sarkar* for *Abani Nath Bose* — for Respondent.

B. B. Ghosh, J—This is an appeal by the defendant against the judgment and decree of the Additional District Judge of Hooghly at Howrah. The facts are these: It has been found that the plaintiff let out the premises in suit to the defendant at a certain rate of rent. He afterwards served a notice terminating the tenancy and then sued to recover possession of the property in question and also rent for the period the defendant was in possession as tenant. The plea of the defendant shortly stated was denial of the plaintiff's right to the entire share of the property. He stated that a certain share belonged to the sisters of the plaintiff and the letting out of the property was not by the plaintiff alone. He denied service of notice and he also alleged that the plaintiff was not entitled to any rent as the defendant had spent a large sum of money for repairing the premises on the

basis of a contract by which the owners had agreed that no rent should be demanded until the house was thoroughly repaired. The trial Court found that the plaintiff was the sole person who demised the premises to the defendant and inducted him on the land. He also found that proper notice to quit had been served on the defendant. With regard to the question of title to the property the trial Court held that the plaintiff was only a cosharer, but the defendant was estopped from disputing the title of the plaintiff who had demised the premises to him. Upon that view that Court made a decree for ejectment. With regard to the question of arrears of rent which was put in issue 7 the Munsif held that there was no evidence in the suit that the arrears claimed were due and unpaid, and upon that ground he dismissed the claim for rent. There were two appeals before the lower appellate Court, one by the plaintiff for arrears of rent and the other by the defendant as against the decree for ejectment. The learned Additional District Judge who heard both the appeals affirmed the decree of the Munsif for ejectment on the ground that the defendant was estopped from disputing the title of the plaintiff, but he remanded the case on the question of arrears of rent to the Munsif in the appeal preferred by the plaintiff, that is 252 of 1924, for a fresh trial on the question regarding the claim for rent.

From this decree of the lower appellate Court the defendant appeals, and the principal question that is urged on his behalf is that the defendant is entitled to show that the title of the plaintiff has ceased to exist with regard to the share belonging to the sisters of the plaintiff which the defendant has purchased shortly before the suit was instituted. The Additional District Judge did not allow the plea to be raised on the ground of estoppel as well as on the ground that the decision of this question would involve enquiries of a more complicated nature than an enquiry in a simple suit for ejectment.

The question of fact that it was the plaintiff who put the defendant into possession of the house cannot be questioned. The sole question for decision in this appeal, therefore, is whether the defendant is estopped from raising the plea that the plaintiff was not the sole owner

of the property when he was let into possession by the plaintiff; and substantiating his plea that he had purchased the share from the sisters of the plaintiff and therefore entitled to resist the plaintiff's claim for ejectment. S. 116, Evidence Act, lays down that

no tenant of immovable property or person claiming through such tenant shall during the continuance of the tenancy be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immovable property.

It is contended on behalf of the appellant that the tenancy does not continue now as it was terminated by a proper notice to quit. Therefore S. 116, Evidence Act, has no application to this case. That is quite true, but it has been established by a long series of decisions that S. 116, Evidence Act, does not contain the whole law of estoppel. It has been held in this Court that the tenant's estoppel operates even after the termination of the tenancy. That was held in the case of *Bhaiganta Bewa v. Himmat Bidyalar* (1), relying upon the observation of Chief Justice Tindal in *Doe Dun Joseph Munton v. Austin* (2). This argument therefore that the defendant is not estopped from denying the plaintiff's title because the tenancy is not continuing must fail.

With regard to the general principle of law there cannot be any dispute. Now it has been settled that a tenant may show in an action of ejectment brought by the landlord who put the tenant into possession of the demised premises, that the title of the landlord has determined. But no plea can be set up of which the necessary effect is to dispute the title of the person who gave possession at the point of time of the demise. It is open to the tenant, as I have already said, to show that the title of the person who delivered possession to him has ceased to exist subsequent to the demise. But he cannot say that the interest of the landlord was less in quality than what he must have in order to put the tenant in possession of the entire property. In other words in an action in ejectment by the landlord who put the tenant into possession the tenant cannot plead that the landlord had no title to grant the lease when possession was given, nor can he

defend the suit on the ground that he had acquired an outstanding title adverse to the landlord. It is sought to support the argument on behalf of the appellant on the basis of the analogy of dispossession by a title paramount. It is argued that if a third person having a higher right than that of the plaintiff had dispossessed the defendant, not physically but in case of such dispossession as would amount to legal ouster, the tenant would be in a position to show that the person who put him into possession had no title. Similarly in this case it is said that the co-sharers of the plaintiff had asserted their title and the defendant was obliged to purchase that interest in order to save himself from being sued by those co-sharers. The facts of the case are said to be parallel to the case when there is ouster by title paramount where the landlord's title has ceased subsequent to the demise. But the present is not such a case as that. Here the defendant asserts that the plaintiff who put him into possession had no title to the entire interest at the time when he put him into possession. This is a position which he is not entitled to take. He must give up possession and if he has acquired any right adverse to that of the landlord he may assert it at some future litigation if he is so advised. But he cannot resist the landlord's claim on that ground.

The appeal so far as the question of ejectment is concerned must be dismissed.

Next with regard to the question of the order of the Additional District Judge sending back the case to the Munsif for fresh trial, we are of opinion that this order is wrong in form. What the Judge ought to have done was to decide the issue himself. The Munsif framed the issue and decided it against the plaintiff. If the learned Judge on appeal thought that it was not properly decided he might reverse that decision if he chose, but he had no right to set aside the judgment of the trial Judge and remand that issue for retrial. The learned Judge must himself decide the issue upon the evidence on the record and if he thinks that it is necessary for him to take any additional evidence under O. 41, R. 27, if there is any good ground for such evidence being admitted, he may follow that procedure; but in any case he had no right to send the matter back for trial to the Court of first instance.

(1) [1916] 24 C.L.J. 103=35 I.C. 7=20 C.W. N. 1335.
9 Bing 41.

With this modification we dismiss the appeal. The respondent is entitled to his costs in this appeal

Cammiade, J.—I agree.

N K

Appeal dismissed

A I R. 1928 Calcutta 548

PAGE AND GRAHAM, JJ.

Rishee Case Law—Plaintiff — Appellant.

v

Golam Ali Mirdha and others—Defendants—Respondents

Appeal No 417 of 1926, Decided on 4th August 1927, from order of Addl Sub-Judge, Barisal, D/- 10th September 1926

Bengal Tenancy Act (3 of 1885), S. 52—*Joint tenants—Right to abatement of rent must be asserted jointly by all.*

If two or more co-sharer tenants have a joint right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties : 27 Cal. 417 and A. I. R. 1923 Pat. 397, *Foll.*; A I. R. 1925 Cal. 783, *Dist.* [P 548 C 2, P 549 C 1]

Narendra Chandra Bose and Nalini Chandra Pal—for Appellant

Satindra Nath Roy Chaulhuri—for Respondents.

Page, J.—This is a suit brought by a co-sharer landlord under S. 148A, Ben. Ten. Act, to recover arrears of rent. The plaintiff has impleaded the two tenants of the land whose names are recorded in the Record-of-Rights, and has made his co-sharer landlords pro forma defendants. One of the two tenants-defendants has not appeared. The other has pleaded that he is entitled to an abatement of rent on account of diluvion. The fact of diluvion has been established. It appears, however, that there are two other co-tenants of the holding who are not parties to the suit, and the plaintiff contended that the contesting defendant is not entitled to an abatement of rent in the absence of the other co-sharer tenants. The trial Court upheld the plaintiff's contention, and passed a decree for the full arrears of rent claimed without abatement. On appeal the decree of the trial Court was set aside, and the suit was remanded for the ascertainment of the amount of the abatement to which the defendant was entitled. From that decree the plaintiff has preferred the present appeal.

The case was argued exhaustively before us, and we have no doubt what our decision should be. It is conceded by the appellant that if all the co-tenants are parties an abatement of rent may be claimed by the tenants either in a separate proceeding or in a suit for rent, and by the respondent that if S. 52, Ben. Ten. Act, is applicable one co-tenant cannot claim abatement in the absence of his co-tenants, and that the present case is covered by the decision of this Court in *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (1). The respondent contended, however, that this is not a suit to which the Bengal Tenancy Act applies, and that under the general law the respondent is entitled to claim proportionate abatement. We are of opinion that S. 52, Ben. Ten. Act, does apply to the present suit, and that the decision of the trial Court was correct. But if it be assumed, contrary to our opinion that the present suit is not brought under the Bengal Tenancy Act, but under the general law *Enayutoollah v. Elahee Buksh* (2), *Salimullah Bahadur v. Kali Prosonno* (3), *Kailash Chandra Mitra v. Brojendra K. Chakravarti* (4), that circumstance will make no difference, for we think that the principles laid down in *Bhoopendra Narain Dutt v. Romon Krishna Dutt* (1), would equally be applicable. In that case Banerji, J., observed:

I may add that, so far as the landlord's right to claim enhancement or increase of rent is concerned, that right can be claimed only in a suit brought by all the joint landlords. It is true that under the Bengal Tenancy Act that is so under the express terms of S. 188 of that Act; but under the law as it stood before the passing of the Bengal Tenancy Act, the rule was the same, and the rule was based upon considerations of justice. And if that was so, there is no reason why similar considerations should not be given effect to in the converse case of a tenant seeking to obtain against one of several joint landlords abatement of rent, though such a case may not be provided for by any express provision of the Tenancy Act applicable to it.

In *Kisho Prasad Singh v. Ramdeni Singh* (5), Das, J., also stated that

the only principle which underlies S. 188 of the Act is that where two or more persons have a joint right between them, they cannot assert it except jointly. That principle is recognized in S. 52 of the Act and I quite accept that if two or more co-share tenants have a joint

(1) [1899] 27 Cal. 417.

(2) [1864] W. R. Act X, Rul. 42.

(3) [1915] 22 C. L. J. 569=33 I. C. 349.

(4) A. I. R. 1925 Cal. 1056 (F.B.).

(5) A. I. R. 1923 Pat. 397=2 Pat. 183.

right for abatement of rent, they can only assert that right in a suit to which all the tenants are parties.

We agree with the above observations, and think that they are based both upon good sense and good law. The decision in *Sivadas Dutt v. Birendra Krishna Dutt* (6), is not an authority to the contrary, for in that case all the tenants of the holding were parties to the suit: see also *Narendra Nath Kuti v. Satyadhan Ghosal* (7). For these reasons the appeal must be allowed, the order of the lower appellate Court set aside, and the decree of the trial Court restored.

Graham, J—I agree.

S. J. *Appeal allowed.*

(6) A. I. R. 1925 Cal. 783.

(7) [1919] 30 C. L. J. 203=54 I. C. 396.

A. I. R. 1928 Calcutta 549

SUHRAWARDY AND GRAHAM, JJ.

Sadar Ali Karikar—Plaintiff—Appellant.

v

Sreemati Abeda Bibi and others—Defendants—Respondents.

Appeal No. 872 of 1925, Decided on 18th January 1928, from appellate decree of 2nd Sub-Judge, Zillah Faridpur, D/- 19th January 1925.

(a) *Mahomedan Law—Marriage—Option of puberty—Marriage effected by a guardian other than the father or grandfather—The minor has the right of repudiation.*

When marriage is effected through the guardianship of the father or grandfather, the minor has no right to avoid such marriage, except in very special circumstances, but if it is contracted by any other person the minor has the right of repudiation which is technically called "the option of puberty." In order the minor may be entitled to exercise the "option of puberty" it is necessary that there should be a marriage which is binding on him or her unless such option is exercised; and for that purpose the marriage must be valid ab origine and brought about by a person other than the father, etc., who stands for the time being in the position of a guardian in marriage of the minor.

[P 550 C 1]

(b) *Mahomedan Law—Marriage—Repudiation—There is need for obtaining a judicial decree to confirm repudiation, but it is not compulsory to obtain it in a proceeding apart from that in which the question of validity of marriage is raised.*

The very fact that the Court declares in a suit or in a case which comes before it, that there was repudiation is enough to satisfy the requirement of the Mahomedan law about judicial decree confirming a repudiation. It is

undoubtedly true that there is need for obtaining a judicial decree, but there is no authority for saying that the judicial decree must be obtained in a proceeding apart from that in which the question of the validity of the marriage is raised: 19, Cal. 79, *Rel. on.* [P 550 C 2]

(c) *Practice—Precedents—Stare decisis—Marital relations.*

The principle of stare decisis ought to apply to a doubtful question of law, if it is so regarded, the decision on which may have affected the marital relations of many persons and the legitimacy of their offsprings. [P 550 C 2]

(d) *Mahomedan Law—Repudiation of marriage—Imam does not make a knowledge of right of option a condition for the girl to repudiate a marriage. (Obitor).*

(Obitor) In exercising a right of repudiating a marriage by the girl the Imam does not make a knowledge of her right of option a condition, because that is an institute of the law, and ignorance is no plea with respect of an institute of the law, with which it is supposed that every person ought to be acquainted: A. I. R. 1922 All. 155, *Ref.* [P 551 C 1]

Asita Ranjan Ghose—for Appellant

Rajendra Chandra Guha and Bhagirath Chandra Das—for Respondents.

Suhrawardy, J.—This is an appeal by the husband in a suit for restitution of conjugal rights which has been dismissed by both the Courts below. The facts found by the Courts below are that the mother of the girl, who is a defendant in the case gave her in marriage to the plaintiff in 1319 B. S., but the defendant exercised her "option of puberty" given to her under the Sunni Mahomedan law, by which the parties are governed, in 1330 soon after she had attained puberty, by marrying defendant 5. In this view the plaintiff's suit for restitution has been dismissed inasmuch as the alleged marriage between the plaintiff and defendant 1 does not any longer exist. The learned vakil who appears for the appellant has strenuously argued that the marriage between the plaintiff and the defendant having been found to have been contracted as a matter of fact, there should be a judicial decree confirming the repudiation of such marriage. The learned vakil's contention is met completely by the decision in *Badal Aurat v. Queen-Empress* (1). If that decision is correct there can be no question that the decree of the lower appellate Court is also correct.

Before entering into a discussion of the question it is necessary to point out that it was not proved before the Courts below or raised in the pleading as to

(1) [1892] 19 Cal. 79.

whether the mother was the guardian of the girl for the purpose of the marriage at the date when the marriage took place. Under the Mahomedan law as affects the Sunnis, the guardianship in marriage originally vests in the father, and, failing him, on the father's father, how highsover. Failing these, the right to contract the minor in marriage provisionally, i.e., subject to the option of repudiation devolves upon the brother and agnate relations of the minor in the same order as they stand under the law of inheritance. Failing these it devolves upon the mother and the maternal kindred; and failing these upon the Sultan or the ruler and then on the Judge or a person appointed by him. According to a saying of the Prophet which is the foundation of the rule of guardianship in marriage the nearer guardian excludes the more remote; that is, in the presence of the nearer guardian the more remote guardian has no right to give the minor in a valid marriage. It will thus be seen that when marriage is effected through the guardianship of the father or grandfather the minor has no right to avoid such marriage, except in very special circumstances, but if it is contracted by any other person the minor has the right of repudiation which is technically called "the option of puberty". In order that the minor may be entitled to exercise the "option of puberty" it is necessary that there should be a marriage which is binding on him or her unless such option is exercised; and for that purpose the marriage must be valid ab origine and brought about by a person other than the father, etc., who stands for the time being in the position of a guardian in marriage of the minor. In the present case it ought to have been enquired as to whether there was no paternal relation who could be the guardian of the minor at the time when the marriage is said to have taken place or whether the mother had the right to give her daughter in a valid marriage. This point seems to have been lost sight of in most of the cases that come before us and also in some of the reported cases.

As to the question whether there should be a judicial decree confirming the repudiation before a suit for restitution of conjugal rights or relating to the marriage is brought, no authority has been placed before us in support of this

proposition. In *Badal Aural's case* Ameer Ali, J., whose opinion it is needless to say carries a very great weight on a question of Mahomedan law, is of opinion that the very fact that the Court declares in a suit or in a case which comes before it that there was repudiation is enough to satisfy the requirement of the Mahomedan law about a judicial decree confirming a repudiation. It is undoubtedly true that there is need for obtaining a judicial decree. The law insists that the repudiation should be made soon after attainment of puberty and it will not be effective unless a judicial decree is obtained confirming it; and for this there are many passages in the text-books, but there is no authority for saying that the judicial decree must be obtained in a proceeding apart from that in which the question of the validity of the marriage is raised.

There is another consideration which has weighed very greatly with me in giving effect to the decision in *Badal Aural's case* (1). Since it was pronounced in 1891 it has been consistently followed by Courts of this presidency and outside it and the principle of stare decisis ought to apply to a doubtful question of law, if it is so regarded, the decisions on which may have affected the marital relation of many persons and the legitimacy of their offsprings.

Our attention has been drawn to various text-books on Mahomedan law which lay down that a judicial decree is necessary to give legal effect to the exercise of the option of puberty. There is no doubt that the law is so, but in my judgment its requirements are fully complied with if the Court in any judicial proceeding declares in favour of such exercise.

In this connexion another question has been raised as to whether the right was exercised immediately after the attainment of puberty by defendant 1. The finding is that she attained puberty in May 1923 and that she married defendant 5 in November 1923. There is no finding, however, when she came to know of the marriage. There is also no finding that she knew that under her personal law she had the right to repudiate the marriage. Knowledge of the last fact has been considered to be essential in the case of *Bismilla Begum v. Nur Mahomed* (2). There the learned Judges have

(2) A. I. R. 1922 All. 155=44 All. 61.

held that if the girl does not know that she has the right of rescinding the marriage she will have the right to do so when she becomes aware of it; and in support of this view they rely upon the opinion of Imam Mahommed one of the Mahomedan jurists who is followed in this country. It appears that the opinion of Imam Mahommed is just the other way. What the learned jurist has said is this:

It should be a condition in a case like this that the girl be duly informed of the marriage because she cannot exert her right of option without a knowledge of that circumstance, as the guardian may effect the marriage altogether unknown to her and that she would in such a case be excused on the ground of ignorance. But the learned author of the Hedaya says that the Imam does not make a knowledge of her right of option a condition, because that is an institute of the law, and ignorance is no plea with respect to an institute of the law, with which it is supposed that every person ought to be acquainted, Hamilton's Hedaya, vol. 1, p. 104.

This view is in accordance with the well-known maxim that ignorance of law is no excuse. If the opinion of the learned Judges of the Allahabad High Court is correct the defendant, as is expected from an ignorant woman, was probably not aware that she had such a right under the law. But the question as to whether option was exercised immediately after the attainment of majority or her knowledge of the marriage was not raised in any of the Courts below and we have not the necessary findings of fact on that point. As appears from the judgment of the trial Court, the option was exercised immediately after she had attained puberty and the lower appellate Court finds that the marriage between the plaintiff and the defendant was never consummated. These findings are enough to support the validity of the exercise of the option of puberty by the girl. In this view the appeal has no force and it should be dismissed with costs.

Graham, J.—On the facts proved in in this case and upon the law the Courts below were in my opinion right in dismissing the suit. I agree with my learned brother that the appeal fails and it should be dismissed.

N.K.

Appeal dismissed.

* A. I. R. 1928 Calcutta 551

SUHRAWARDY AND CAMMIADÉ, JJ.

Mahammad Sagiruddin and another—
Accused—Appellants.

v.

Emperor—Opposite Party

Criminal Appeal No. 743 of 1926, Decided on 23rd March 1927.

* (a) *Criminal P. C., S. 276—Deficiency of jurors can be filled up only from persons present in Court.*

Where out of 12 jurors summoned only two were present and the Sessions Court sent for three of the professors from the local college and one of them being objected to, a third professor was called in.

Held. the procedure was illegal and vitiated the trial.

Where there is deficiency of jurors the Court should empanel other persons present in Court to fill up the vacancy in the jury

[P 552 C 1]

(b) *Criminal P. C., S. 297—Misdirection.*

Where the Judge has not put it to the jury that when a case is based on circumstantial evidence the circumstances should be such that there can be no reasonable possibility of the innocence of the accused, it is a misdirection vitiating the trial.

[P 552 C 2]

(c) *Criminal P. C., S. 537—Question to witness in cross-examination answered in a particular way—Judge telling the foreman of the jury to ask the same question in another form—Witness giving an opposite answer—Judge directing the jury to consider what he had stated before and what he said later on in answer to the foreman's question if the jury thought that the witness did not understand the first question—Nothing on record from which it could be inferred that the witness did not understand the question—The procedure followed by the Judge was held wrong.*

One of the witnesses, in answer to a question put in cross-examination, said that the reason why information was not given to the police immediately after the occurrence although the police station was only a short distance away from the scene of occurrence was that the persons who had committed the offence were then unknown. The Judge then told the foreman of the jury to put the question in another form to the witness and the witness said that he and others had recognized the appellants at the place of occurrence and seen them running away. The Judge said to the jury in his charge "as to this particular witness he had no doubt said in answer to an invalid question from the pleader for the defence which was repeated by me that the culprits could not be ascertained that night. If you think that he gave the answer after understanding the question, there is an end of the case for prosecution and the accused should be forthwith acquitted. If on the other hand you think that he did not understand the question you are to consider what he had stated before and what he said later on in answer to foreman's question." The Judge

did not record anything from which it could be inferred that the witness did not understand the question put to him.

Held : that the procedure followed by the Judge was wrong. [P 552 C 2]

(d) *Criminal P. C.*, S. 297—*Direction to the jury that there is a presumption of law that the witness who has spoken untruth must be believed in so far as he deposes to facts spoken to by other witnesses is a misdirection.*

Where the Judge directs to the jury that there is a presumption of law that the witness who has spoken untruth must be believed in so far as he deposes to facts spoken to by other witnesses, it is a misdirection because there is no hard-and-fast rule making other statements, which are not proved to be false, binding on the jury. [P 551 C 1]

Mritunjoy Chatterjee and Fazlul Huq — for Appellants.

Satindra Nath Mukerjee — for the Crown.

Cammiade, J—The two appellants were charged with offences under Ss. 295, 297 and 436, I. P. C. They were found guilty by a majority of 3:2 of the jury of offences under the first two sections. They have been found not guilty by the unanimous verdict of the jury of the offence under S. 436. The objections taken in regard to the trial are : firstly, that the procedure in empannelling the jury was illegal ; secondly, that the learned Judge did not point out to the jury that in regard to circumstantial evidence, it is necessary that the jury should find that the circumstances placed before them are not consistent with the innocence of the accused ; thirdly, it has been pointed out that the learned Judge has misdirected the jury with regard to the statement of one of the witnesses to the effect that the culprits had not been recognized at the time of the occurrence ; and lastly, it has been pointed out that the learned Judge is wrong in stating to the jury that there is a presumption of law that the witness who has spoken untruth must be believed in so far as they depose to facts spoken to by other witnesses.

In regard to the first matter what happened is this : Out of 12 jurors summoned only two were in attendance. The learned Judge sent for three of the professors from the local college, and when objection was taken to the sitting of one of them as a juror, he sent for another professor of the same college to fill up the vacancy in the jury. This procedure is not justified by the provisions of S. 276, Criminal P. C. Provision 2 to that section

provides that in case of a deficiency in the required number of jurors, the Court may empanel other persons present in Court to fill up the vacancy in the jury. There has been illegality in regard to the empannelling of the jury and this illegality has vitiated the trial.

The second objection is also good. The learned Judge has not put it to the jury that when a case is based on circumstantial evidence, the circumstances should be such that there can be no reasonable possibility of the innocence of the accused.

The third matter has come up in the following circumstances : One of the witnesses in answer to a question put in cross-examination said that the reason why information was not given to the police immediately after the occurrence although the police station was only a short distance away from the scene of occurrence was that the persons who had committed the offence were then unknown. The Judge then told the foreman of the jury to put the question in another form to the witness and the witness said that he and others had recognized the appellants at the place of occurrence and seen them running away. The learned Judge has said to the jury in his charge :

As to Hridoy, he has no doubt said in answer to an invalid question from Khan Bahadur, the learned pleader for the defence which was repeated by me, that the culprits could not be ascertained that night. If you think that he gave the answer after understanding the question there is an end of the case for prosecution and the accused should be forthwith acquitted. If on the other hand you think that he did not understand the question you are to consider what he had stated before and what he said later on in answer to foreman's question.

This is a very improper way of dealing with an answer in favour of the defence. The learned Judge has not recorded anything from which it can be inferred that the witness did not understand the question put to him. The question itself is a simple question and we do not see how the witness could have had any difficulty in understanding it. If it was possible that the witness could have misunderstood the question put to him it was necessary that the facts which led to the inference that the witness had misunderstood it should have been placed on the record and should have been placed before the jury for their consideration. Nothing of this sort was done and the procedure followed by the learned Judge was wrong.

Lastly the presumption laid down by the Judge in regard to the testimony of witnesses is entirely without authority. If a witness says something which appears to be untrue, it is still open to the jury to believe any other statement made by that witness. But that is a matter entirely within their own discretion and there is no hard-and-fast rule making other statements which are not proved to be false binding on the jury, as the learned Judge has put it to them. The case relates to the setting fire to a thatched hut used as a temple to the goddess Sitala and to the desecration of certain earthenware images in another hut standing near it. It is stated that the accused Sagiruddin was seen standing close to these huts when the fire started and that the accused Jahiruddin was seen coming out of the Kali temple and joining Sagiruddin and running away with him. The jury have unanimously found the accused Jahiruddin not guilty of the charge of arson. There was no reason why they should find Sagiruddin guilty and Jahiruddin not guilty. Both men are said to have been seen at the spot. Neither of them is said to have been seen setting fire to the huts and it is therefore impossible to understand how one of them could be found guilty and the other not. As regards the charge of desecration: the circumstances of the case clearly indicate that that charge is without foundation. The earthen images which were in the hut known as Kali Ghar were not destroyed; only the heads of those earthen images were found lying on the ground.

If these images had been broken by a person who intended to desecrate the temple, it is extremely improbable, in fact utterly improbable, that the person who desecrated the temple would have contented himself with merely removing the heads of the images and placing them on the ground. We have it in evidence that these earthen images are made on the occasion of a certain puja and that they are kept for the whole year and destroyed when new images are put up when the puja comes round again. As these images are made of cheap earthenware, it is quite likely that the heads and other parts which are stuck on should fall off. In such circumstances the charge does not seem to be justifiable. Further, as already stated, the police station is very near to the temples, and although the occurrence is said

to have taken place at midnight information was not given at the police station till the following evening. If the case had been a true one and any person had been recognized, there is no reason why information should not have been given at once or at least in the morning. The fact of the delay in lodging the first information is in itself strongly suggestive of fabrication. The explanation that has been offered is that the Muchies who were owners of the temples, were afraid of going to the police station at night and that in the morning, instead of going to the police station, they went to the Panchayet and as the Panchayet was absent from home they went to him again in the evening and after consulting him they gave information at the police station. Considering how suspicious the other circumstances of the case are this additional circumstance of the delay in giving the information makes the case unworthy of credit. We find that the juror's verdict cannot be maintained because the Court was wrongly constituted and the only question left to decide is whether or not there should be a retrial. In the circumstances stated above we do not think that we should be justified in ordering a fresh trial. The appellants are therefore acquitted. They will be discharged from their bail bond.

Suhrawardy, J.—I agree.

N K.

Appeal allowed.

A I. R. 1928 Calcutta 553

RANKIN, C J, AND MITTER, J.

Goolool Chunder Law and others—Appellants.

v.

Jamal Biswas and others—Respondents.

Appeal No 1686 of 1925, Decided on 4th August 1927.

(a) *Bengal Tenancy Act, 1885, S. 52 (1) (a)—Interpretation.*

The words "The area for which rent has been previously paid by him" mean the area with reference to which rent was assessed or adjusted: *A. I. R. 1922 Pat. 215, Foll.*

(b) *Bengal Tenancy Act, 1885, S. 52—Measurement at partition under Estates Partition Act is no occasion upon which rent is assessed.*

The measurement of land at partition of superior holding under the Estates Partition Act is no occasion upon which rent of land held by tenant is assessed or adjusted. [P 555 C 2]

(c) *Bengal Tenancy Act, 1885, S. 52—Time of creation of tenancy uncertain—Manner of assessment of rent not known—Nature of rent not known—Nothing to show whether there was*

measurement at inception of tenancy—Landlord must base claim upon some measurement on the basis of which rent was assessed.

Where there is nothing to show when the tenancy was created, how the rent was assessed whether rent was a consolidated rent or whether assessed at a certain rate per bigha and whether there was any measurement of the holding at the inception of the tenancy, it is necessary for the landlord to base his claim for additional rent upon some measurement on the basis of which rent was assessed or adjusted.

[P 556 C 1]

Narendra Chandra Bose and Nalini Chandra Pal—for Appellants.

Bhular Halidar—for Respondents.

Rankin, C. J.—This is an appeal from a decision of the Special Judge of Jessore, affirming a refusal on the part of the Assistant Settlement Officer of Jessore to give to the appellant additional rent for additional area under S. 52, Ben Ten. Act

Plaintiff's case is that there was a partition under the Estates Partition Act in the year 1909, that the Deputy Collector in accordance with powers given to him under Ch. 6 of that Act, measured the lands comprised in the tenancy and that it was found upon that measurement that the area in the occupation of the tenant was some 78 bighas. It is said that in the Record-of-Rights it is found that the area now in the occupation of the tenant has increased. Accordingly it is said that there have been two scientific measurements and that the previous measurement for the purposes of the Estates Partition Act should be taken as showing what the area was for which the tenant was then paying rent, and that he is now proved to be in possession of additional area and must pay additional rent therefor.

The Assistant Settlement Officer has taken the view that the measurement for purposes of the Estates Partition Act is not reliable, that while it is quite true that the tenant gets information of the proceeding, he is not seriously interested in checking the area or disputing the figure of the area at which it is proposed to record the tenancy for the purpose of partition of the superior interest. That being so, he has refused to accept the area found in the partition proceeding as being a reliable measurement of the right of the tenant at that time. He has also taken the view (which for the purposes of this case I shall assume to be inaccurate) that the standard of measurement

adopted in 1909 is not shown. As a matter of fact the area is stated in terms of acres and therefore it has been represented to us that the standard measurement was the measurement employed.

When the matter came before the learned Special Judge the question was decided in this way :

It is clear, however, that the tenancy existed at the same rate from long before the partition of 1916 B. S. The onus is upon the plaintiff to show that the present area is greater than the area at the inception of the tenancy.

On the view, therefore, that the proceedings in 1909 were not proceedings which throw any light upon the inception of the tenancy and the original terms of the tenancy, the learned Special Judge has affirmed the decision of the Assistant Settlement Officer.

On appeal to this Court, the learned advocate for the plaintiff points out that the doctrine that in all cases the plaintiff has to show what the area was at the inception of the tenancy cannot be supported. The true principle is one which permits of additional rent being granted not on the basis of what happened at the inception of the tenancy, but on the basis of what happened at any subsequent occasion when the rent was last assessed or adjusted. That doctrine is to be found laid down in several cases, though in cases where there is no question of an intermediate assessment or adjustment, the language of the decisions is sometimes apt to mislead. In particular, there is a decision of my own in *Manindra Chandra Nandi v Kaulat Shaik* (1), where no question of intermediate assessment or adjustment was raised and it may be that the language used with reference to those particular facts is open to the comment that it does not take account of the circumstance that the occasion, which is important, is not necessarily the first assessment or adjustment of rent, but the last assessment or adjustment of rent—that adjustment under which the tenancy was being held at the time of the alleged discovery of excess area. If authority be wanted for the proposition that it is sufficient for the landlord to establish that since the inception of the tenancy rent has been assessed on the basis of a certain area and that the tenant is in possession of land not included in that area and on which no rent was assessed, it may be sufficient to refer to the case

(1) A. I. R. 1924 Cal. 374=50 Cal. 957.

of *Durga Priya v. Nazra Gain* (2). In these circumstances, it is contended on the part of the appellant that the present case is really governed in principle by a decision of the Patna High Court in the case of *Bishun Pragash Narayan Singh v. Acharb Dusadh* (3). In that case there had been a previous measurement at the time of a settlement made in 1898 under Ch 10, Ben. Ten Act. The tenant was recorded in the Record-of-Rights as holding such and such an area for certain rent and when the case came first before that High Court, Mr. Justice Ross refused the landlord's claim to additional rent on the ground that it was not shown what were the conditions of the tenancy at the inception thereof. The Court, on Letters Patent appeal, dissented from that view and the principle which they proceeded on was this: that the Record-of-Rights defines the relationship between the landlord and tenant in various respects, including the area of the holdings for which rent is paid and is presumed to be correct until the contrary is proved. In other words they treat the settlement proceedings as being an assessment or adjustment of rent, a restatement prima facie binding on both parties, not merely of the area in fact in the occupation of the tenant and of the rent he is in fact paying, but a correct statement of the tenant's right—a statement, namely, that that is the area which he is entitled to hold. The principle of the decision may be exhibited from a passage in the judgment of Adami, J. :

The rent payable by the tenants was ascertained and recorded, and it must be presumed that the tenants accepted that rent as the rent payable for the area as recorded. They did not come forward and prove that the area recorded was less than the area of the holding at its inception. The entry shows that the rent entered there was either the rent for the area which the tenants had been paying previous to 1898, or was the rent assessed or adjusted after dispute during the settlement proceedings between the parties as to the amount payable. In my opinion, the area shown in the Record-of-Rights was the area with reference to which the rent previously paid by the respondents was assessed or adjusted.

If that view be right, it is reasonably clear that there is nothing in this decision which in any way detracts from the authority of the principle that the words "the area for which rent has been previously paid by him" in Cl. (1) (a) of

S. 52 mean the area with reference to which rent was assessed or adjusted.

In the present case we are asked to hold that the landlord's claim to additional rent can be made out on the basis of a measurement made for purposes of the Estates Partition Act, and it appears to me that such a measurement is in a different position for this purpose from the measurement recorded under Ch 10, Ben. Ten Act. Under Ch 6, Estates Partition Act, it is quite true that a Deputy Collector has all the powers of a Revenue Officer under Ch. 10. What he is to do, however, is merely to assess or describe the assets of the estate under partition for the purpose of partition. It is not impossible that the tenant's interest may be affected, as for example, if the superior right over his own tenancy should be divided under Ch. 8 but what the Deputy Collector has to do is really to make a list and valuation of the assets of the estate under partition. He has to record the situation, the area and the boundaries of the tenancy, the rent as stated by the landlord, as stated by the tenant and as taken by himself for the purpose of partition. It is true enough that he has to publish a notification, that he has to be present in the village, that he has to read out the particulars and attest, as it is called, the survey papers and record of the existing rents and other assets. If the correctness of an entry is disputed, he may pass a summary order. If the correctness of any measurement is disputed, he may require the costs of re-measurement to be deposited. He has to publish the survey papers and the record. He has to send a copy to the landlord and to the tenant. When he has done that, he fixes a day to determine the partition of the land into several estates.

Now, it will be reasonably clear from this: that, from the point of view of evidence, the statement of area as regards a tenancy may be of no great value as against the tenant. Indeed, in one of the cases which were cited to us, this was pointed out : *Janki Dobey v. Kirtarath Roy* (4). But apart from the mere value of evidence it seems to me that there is a question of principle, whether or not it can be said of such a measurement that it is an occasion upon which the rent is assessed or adjusted. In my

(2) A. I. R. 1921 Cal. 345.

(3) A. I. R. 1922 Pat. 215=1 Pat. 459.

(4) [1909] 13 C. W. N. 93=4 I. C. 316.

opinion it is not such an occasion and while I am not disposed to dispute that the settlement under Ch. 10, Ben Ten, Act may be such an occasion, I think it would be extending the principle of the case decided by the Patna High Court, if we were to hold that on the basis of this measurement the landlord is entitled to additional rent. It has to be remembered that we are dealing, as the Patna High Court was dealing, with a case where there is nothing to show when the tenancy was created, how the rent was assessed, whether the rent was a consolidated rent or whether assessed at a certain rate per bigha and whether there was any measurement of the holding at the inception of the tenancy. In these circumstances, it seems to me that, on the authority of the case-law and on principle it is necessary for the landlord to base his claim upon some measurement on the basis of which the rent was assessed or adjusted, otherwise we should be bound to hold that if at any time any reliable measurement was made of a tenant's land and if at any subsequent time it was found that he was in possession of a greater area the landlord would have made out a case prima facie for additional rent. No case in this Court has ever gone so far.

In my judgment the ground upon which the learned Special Judge based his decision is incomplete and taken by itself incorrect, but the result at which he has arrived is correct. I think, in these circumstances, that the appeal should be dismissed with costs. We assess the hearing-fee at two gold mohurs.

Mitter, J.—I agree

D R./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 556

SUHWARWADY AND CAMMADE, JJ.

Tunga Bidya Devi and others—Plaintiffs—Appellants.

v.

Panna Sashi Devi and others—Defendants—Respondents.

Appeal No. 1530 of 1925, Decided on 11th May 1928, from appellate decree of District Judge, Nadia, D/- 19th March 1925.

Compromise—Maintenance—One wife claiming property under a gift—Suit by husband to set aside the alleged gift—Compromise that certain sum should be paid annually by the

wife to the husband and after his death to the second wife—Second wife making a will and appointing plaintiff as executor and beneficiary—Plaintiffs suing for recovering arrears of maintenance—Plaintiff is not entitled to recover arrears as the maintenance charge being intended to be kept alive for the benefit of the family only and not for the strangers or assignees.

One M had two wives and one of them claimed the whole of a certain property under a gift. There was a suit in which M sought to set aside the alleged gift. The suit was compromised and in the compromise it was agreed that a certain sum should be paid annually by the first wife and her successor to M and after him to the other wife, if she survived him, and to her heirs and successors. M died and was succeeded by the second wife who enjoyed the maintenance; and when she died she made a will appointing the plaintiffs as executors and also a beneficiary under the will. Thereupon plaintiffs sued to recover arrears of maintenance under the terms of a compromise entered into between the defendants and M.

Held: that the maintenance charge was intended to be kept alive for the benefit of the family only and not for the benefit of the strangers or assignees or persons who may take it as legatees from one of the members of the family. [P 557 C 1]

Rishendra Nath Sarkar, Abani Nath Bose and Diptendra Mohan Ghose—for Appellants

Brojo Lal Chakrabarti, Karunamoy Ghose and Prokash Chandra Pakrasi—for Respondents

Ramendra Mohan Majumdar and Biraj Mohan Majumdar—for Dy Registrar

Judgment—This is an appeal by the plaintiffs against the decree of dismissal of their suit which was for recovery of arrears of maintenance under the terms of a compromise that had been entered into between the predecessor of the defendants and a certain Mahatap Mukherjee. This Mahatap Mukherjee had two wives and one of them claimed the whole of a certain property under a gift. There was a suit in which Mahatap sought to set aside the alleged gift. The suit was compromised and in the compromise it was agreed that a certain sum should be paid annually by the first wife and her successor to Mahatap and after him to the other wife, if she survived him, and to her heirs and successors. Mahatap died and was succeeded by the second wife who enjoyed the maintenance; and when she died she made a will, appointing the plaintiffs as executors and also making one of them the beneficiary under the will. The plaintiffs have therefore sued to recover the arrears of mainten-

ance. The learned Court of appeal below has held that the will does not devise the maintenance subsequent to the death of the testatrix to the legatees. The terms of the will have been correctly interpreted by the learned District Judge. The will expressly states that it devises the moveable and immovable properties of the testatrix and the claim for future maintenance cannot come under either of those heads. That the testatrix did not intend to make any disposition of the future maintenance is abundantly clear from the provisions in the will that the maintenance due to her up to the time of her death should be taken by the plaintiffs. The fact that she made such a provision showed clearly that the testatrix did not intend to make any disposition of the maintenance allowance in the clauses relating to the disposal of moveable and immovable properties. Over and above this, there can be no doubt that the maintenance allowance was purely one for the benefit of the family of the descendants of Mahatap. The compromise that was recorded states that the heirs, successors and representatives of the second wife should be entitled to this maintenance from the first wife and her successors. If the property had been ordinary property undoubtedly the terms of the compromise would indicate that the intention was to convey the property out and out; in other words a hereditary estate capable of being transferred. But the property dealt with in the compromise is an allowance taken from another property which was given to the first wife as compensation for the taking of the property by the first wife; and because the family had been deprived of the profits from that property, and the compromise was entered into so as to compensate the family for the loss. In these circumstances the proper construction of the terms of the compromise would be that the maintenance charge was intended to be kept alive for the benefit of the family only and not for the benefit of the strangers or assigns or persons who may take it as legatees from one of the members of the family. In all these circumstances it appears that the decision of the learned District Judge is correct. The appeal therefore fails and is dismissed with costs.

N.K.

*Appeal dismissed.***A. I. R. 1928 Calcutta 557**

C. C. GHOSE AND GREGORY, JJ

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant

v.

Murray and others—Accused—Respondents.

(Government Appeals Nos 2, 3, 4, 5 and 6 of 1928, and Criminal Revns. Nos. 120, 154, 179, 180 and 181 of 1928, Decided on 1st June 1928, from order of Dy Magistrate, Howrah, D/- 28th October 1927.

Factories Act, S. 42—Under S. 42 one proceeding is split into two proceedings—Manager or occupier initially charged with an offence under the Factories Act can go into the witness-box and give the evidence himself because, he goes into the witness-box not as an accused in the case originally started but in his own right as a complainant on the complaint against the other person whom he has brought in—Criminal P. C., S. 342 (4).

The structure of S. 42, Factories Act, indicates that one proceeding is split up into two proceedings and while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceeding in which the manager or the occupier is the complainant, he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This must mean that the manager or occupier *qua* complainant must give evidence himself. There is no substance in the objection that the manager or occupier who initially is charged with an offence against the Act cannot go into the witness box and give evidence himself, because he goes into the witness-box not as an accused in the case originally started against him, but in his own right as a complainant on his complaint against the other person or persons whom he has brought in. It is not a material irregularity to dispose of the two matters by one judgment or to record the evidence in the two matters together. [1599 C 1]

Khundkar, Anil Ch Roy Chaudhuri and Sachindra Nath Banerji—for Appellant

Mrityunjoy Chatterjee and Bholanath Roy—for Respondents.

Judgment—This is an appeal on behalf of the Local Government against an order of the Deputy Magistrate of Howrah dated 28th October 1927, by which he acquitted the accused under S. 245, Criminal P. C., of the offences alleged to have been committed by him under S. 41 (a) read with S. 26 and S. 41 (h) read with S. 35, Factories Act (Act 12 of 1911, as amended by Act 5 of 1923).

What happened in this case was as follows : On 28th June 1927, the Inspector of Factories, Bengal, inspected the Howrah Jute Mills of which the accused Murray was the Manager and found three persons, named, Jokadia, Varalee and Sukfaria, employed and working in the Drawing Department without having any specified hours fixed for their employment in contravention of S. 26, Factories Act, and further found that though the said three persons had commenced to work at 9-30 a. m. their names had not been entered in the prescribed register at 10-20 in contravention of S. 35 of the Act and R. 76 thereunder.

The accused Murray appeared before the Magistrate on 16th August 1927, and filed two petitions of complaint under S. 42 of the Act in respect of the aforesaid offences against three other persons named Whitton, Charan Das Chatterjee and Sali Dutt, alleging inter alia that he had always used due diligence to enforce the provisions of the Act, that the offence if committed at all, was committed without his knowledge and consent and that the persons mentioned in his petition of complaint who were under him and whose duty it was to look to the proper and lawful working of their department were directly responsible for any wrongful acts of commission or omission.

The Magistrate enquired into the complaint of Mr Murray. He started two order-sheets, one being numbered 1136 of 1927 and the other 1149 of 1927. The three persons named by Mr Murray appeared before the Magistrate on 26th August 1927 and pleaded not guilty to both the charges. It is alleged that the Magistrate proceeded to try Mr. Murray and the aforesaid three persons on the two accusations summarily and in one proceeding and that although Mr. Murray was an accused person under trial, the Magistrate allowed him to give evidence on oath.

It appears from the Magistrate's judgment that he went into the merits and found that it was Charan Das Chatterjee whose duty it was to keep the register properly and that the manager, Mr. Murray, took all necessary steps to see that the Factories Act and the rules thereunder were not violated. He came to the conclusion that Murray, Whitton and Sali Dutt were not guilty and acquitted them. He found accused

Charan Das Chatterjee guilty under S. 41 (h), Factories Act, and fined him Rs 30 and, in default, fifteen days rigorous imprisonment.

The contention on behalf of the Local Government is that the joint trial of the several persons involved in the two accusations is contrary to the provisions of the Code of Criminal Procedure and that the procedure adopted by the learned Magistrate in examining an accused person as a witness in the case is contrary to law and has vitiated the trial.

Section 42, sub-S. 1, Factories Act, runs as follows :

Where the occupier or manager of a factory is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other persons whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge, and if, after the commission of the offence has been proved, the occupier or the manager of the factory proves to the satisfaction of the Court :

(a) That he has used due diligence to enforce the execution of this Act, and;

(b) That the said other person committed the offence in question without his knowledge, consent or connivance;

that other person shall be convicted of the offence and shall be liable to the like fine as if he were the occupier or manager, and the occupier or manager, shall be discharged from any liability under this Act.

It is quite clear from the language used that when the manager or occupier of a factory is charged with an offence, he is entitled to make a complaint against these whom he considers the offender or offenders and to have such person or persons brought before the Court at the time appointed for hearing of the charge brought against him. This means that the manager or occupier who is charged and the person or persons whom he complains against are both before the Court at the same time; in other words, the section contemplates both sets of complainants and accused being before the Court at one and the same time. When both parties, i.e., both sets of complainants and accused are before the Court, it must in the first instance be proved in the case against the manager or occupier that an offence against the Act has been committed. As soon as this is proved, the manager or occupier has to prove two things, namely, that he has himself used due diligence to enforce the execution of the Act and that the other per-

sons named by him have committed the offence in question without his knowledge, consent or connivance. If these two things are proved, the persons named by the manager or occupier shall be convicted and the manager or occupier shall be discharged from liability under the Act.

The structure of the portion of the section quoted above indicates that one proceeding is split up into two proceedings and that while the manager or occupier is accused of having committed an offence under the Act, he is also a complainant on his complaint against the other person or persons he has brought in. In the proceeding in which the manager or the occupier is the complainant, he is liable to be cross-examined by the other person or persons who has or have been brought before the Court on his complaint. This, of course, must mean that the manager or occupier *qua* complainant must give evidence himself. The procedure indicated above is a special one prescribed by the Act and it would appear from an examination of the record in this case that the Magistrate has in no way departed from that procedure. In our opinion, there is no substance in the objection that the manager or occupier who initially is charged with an offence against the Act cannot go into the witness-box and give evidence himself. In the circumstances contemplated in the latter part of the section quoted above he goes into the witness-box not as an accused in the case originally started against him but in his own right as a complainant on his complaint against the other person or persons whom he has brought in. We have examined the record for ourselves and are of opinion that what the Magistrate has done in this matter is in substantial compliance with the provisions of the Act. But even if it be considered an irregularity to dispose of the two matters by one judgment, or to record the evidence in the two matters together, it is an irregularity which in no way has caused any prejudice to any of the parties concerned and is as a matter of fact well covered by the provisions of S. 537, Criminal P. C. In our opinion the present appeal fails, and must be dismissed. We desire to observe that we have examined the merits also

and on the merits it is not a matter for our interference.

Appeals Nos. 3, 4, 5 and 6.

The facts of these cases are on all fours with the facts in appeal No 2 and the order that we have just passed will apply to them also.

The connected rule in Revision Cases Nos. 120, 154, 179, 180 and 181 must also be discharged.

N K.

Appeal dismissed

A. I. R. 1928 Calcutta 559

B. B. GHOSH AND CAMMIADÉ, JJ.

Tarak Nath Saha and others—Decree-holders—Appellants.

v.

Moti Lal Agarwala and others—Judgment-debtors—Respondents

Appeal No. 390 of 1926, Decided on 27th February 1928, from original order of 2nd Sub-Judge, Pabna, D. 21st August 1926.

Civil P. C., O. 21, R. 15—Joint decree—Decree holders giving up a portion of the decree—Application for the execution of the rest is not illegal.

A judgment-debtor cannot be harassed by different applications for execution made by different decree-holders for their own shares of the decretal amount. But if some of the joint decree-holders apply for execution with regard to certain portion of the decree giving up the rest, making the joint decree-holders parties to the application who do not object to the application giving up the rest of the decree, the application is not liable to be dismissed.

[P 560 C 1]

Bansori Lal Sarkar—for Appellants

Rishindra Nath Sarkar and Kalsankar Sarkar—for Respondents.

Judgment.—The application for execution out of which this appeal arises was dismissed on the ground that it contravened O 21, R. 15, Civil P. C. We do not see how it contravenes that rule. The decree was made in favour of the applicants and the pro forma defendant in the original suit for a lump sum of Rs. 1,000. On a previous occasion it was held by the Subordinate Judge that the application was barred by limitation. On appeal to this Court that judgment was set aside, and it was held that the application was not barred as it was a joint decree that was sought to be executed by the other decree holders within the period of limitation. The matter was sent back for the decision of the other questions in

dispute. This time the Subordinate Judge has held that the applicants have done what is forbidden by O 21, R. 15. O 21, R 15 does not forbid anything to be done. It is rather an enabling rule. It enables one or more of the persons in whose favour a decree has been passed to apply for execution of the whole decree for the benefit of them all. Sub-R (2), R. 15 provides for safeguarding the interest of persons who have not joined in the application. In the present application the applicants asked in the tenth column for the entire decretal amount being realized by attachment and sale of the immovable properties of the judgment-debtors. In the seventh column they stated that the total amount of the decree was Rs 1,000. Out of this they deducted one-half share of the pro forma defendant and asked for their own share of Rs 500. It is hardly necessary to state that a judgment-debtor cannot be harassed by different applications for execution made by different decree-holders for their own shares of the decretal amount. But if some of the joint decree-holders apply for execution with regard to certain portion of the decree giving up the rest making the joint decree-holders parties to the application who do not object to the application giving up the rest of the decree, we do not see how it can be said that the application is liable to be dismissed. If one decree-holder gives up a portion of his decree the application for execution for the rest cannot be said to be illegal; and in the present case the circumstances amount to that. The present application cannot be held to be contrary to law. The judgment-debtors cannot, however, be harassed by any subsequent application for execution of the balance of the same decree either by the present applicants or by the pro forma defendant who has been made a party to this execution proceeding.

The appeal therefore should be allowed and the execution shall proceed on the application made by the appellants with costs to the appellants in both Courts. We assess the hearing-fee at three gold mohurs.

N K.

Appeal allowed.

A. I. R 1928 Calcutta 560

SUHRWARDY AND GRAHAM, JJ.

Haran Chandra Saha and another —
Defendants 1 and 2—Appellants

v

Behari Lal Bhumia and others—Plaintiffs—Respondents.

Appeal No. 891 of 1925, Decided on 25th January 1923, from appellate decree of 2nd Sub-Judge, Faridpur, D/- 12th January 1925

(a) *Bengal Estates Partition Act (5 of 1897), S. 81 — Power of the Collector to split up a tenure should be exercised only where necessary for equitable partition.*

Under S. 81, the right to split up, for the purposes of partition, any tenure or holding is given to the Collector under which he can divide any tenure or holding into separate parts apportioning the rent to be attached to each such part and giving an opportunity to the tenants to raise any objection to such division. But the right should be exercised only where it is reasonably necessary to do so in order to effect an equitable partition. [P 561 C 2]

(b) *Bengal Estates Partition Act (5 of 1897), S. 81—"Split up" means completely sever in parcels.*

The word "split" in S. 81 means to cause to part asunder or to divide by a quick or sharp cut. The addition of the word "up" intensifies the meaning of "split" and means severing completely in several parcels the holding, which before the partition was held under several persons: 10 C. W. N. 818, *Foll.* [P 561 C 2]

(c) *Bengal Estates Partition Act (5 of 1897), S. 81—A cosharer landlord after partition of an estate under the Act can evict a transferee prior to partition of a non-transferable holding.*

Plaintiffs were cosharer landlords with some other persons in respect of a holding within more than one estate. The original tenants transferred to the defendants a portion of a holding in one of the estates and the defendants were in possession of that portion. Subsequently there was a partition of that estate under the Estates Partition Act among the cosharer landlords of the holding. The transferred plots fell to the share of the plaintiffs alone. They therefore claimed ejectment of the defendants on the ground that they were trespassers being the transferees of a non-transferable holding.

Held: that, as against the plaintiffs, defendants have acquired no title or interest although the plaintiffs for the time being had no right to evict them, as under the law they had no right to re-enter unless the entire holding had been transferred by the original tenants. But so soon as the plaintiffs acquired, instead of a share of the rent to which they were entitled, a specified portion of the lands comprised in the holding, they obtained the right to enter on it if they found it to be in the occupation of a trespasser. [P 563 C 1]

Sarat Chandra Basak and Bhagirath Chandra Dass—for Appellants.

Dwarka Nath Chakravarti, Rajendra Chandra Guha and Diptendra Mohan Ghose for *Charu Chandra Choudhuri* — for Respondents.

Subrawardy, J.—This appeal arises out of a suit by the plaintiffs for ejectment of defendants 1 and 2 from the lands in suit on the allegation that the holding was abandoned by the former tenants and the defendants as transferees from them of the holding which is a non-transferable one are liable to be ejected. The plaintiffs were cosharer landlords with some other persons in respect of a holding within more than one estate. The original tenants Kokai and Mehar Ali transferred to the defendants appellants a portion of the holding comprising settlement plots 189 and 190 of mauza Kedarpur appertaining to Estate No 4054 and the defendants were in possession of that portion of the holding. Subsequently there was a partition of this estate under the Estates Partition Act among the cosharer landlords of the holding. The disputed plots fell to the saham of the plaintiffs alone. Thereupon the plaintiffs claimed ejectment of the defendants on the ground that they were trespassers being the transferees of a non-transferable occupancy holding. Both the Courts below have decreed the suit.

Defendants 1 and 2 have appealed and it has been argued on their behalf that the view of the law taken by the Courts below is erroneous and should be reversed. The sole point involved in this case is one of construction of S. 81, Estates Partition Act 5 of 1897 Bengal Council. The plaintiffs' case is that before the holding was split up by the Collector among the different cosharers, the defendants being transferees of a portion of it, the plaintiffs had no right to eject them. But after the partition the plots now in possession of the defendants being allotted solely to the plaintiffs formed into a new holding and the plaintiff being the sole landlords of that holding have obtained the right of ejecting the defendants as transferees of that newly-formed holding. The defendants on the other hand contend that the effect of the partition is to divide the landlord's interest in the lands among the cosharer landlords, but not to destroy the character of the holding as it stood before. In my opinion

the view taken by the Courts below seems to be correct and should be upheld. Under S. 81, Estates Partition Act, the right to split up for the purposes of partition any tenure or holding is given to the Collector. But the right should be exercised only when it is reasonably necessary to do so in order to effect an equitable partition. And further, if the tenure or holding is split up, the existing rent should be apportioned among the several parts into which it is divided. The section further provides that before such a division of the tenure or holding is effected notice ought to be served on the tenants and that objections by them to such division should be heard. The provisions standing by themselves clearly indicate that the law confers upon the partition authorities the power to divide any tenure or holding into separate parts apportioning the rent to be attached to each such part and giving an opportunity to the tenants to raise any objection to such division. All these provisions are necessary only in a case where it is proposed to create several holdings out of one holding. If the intention was to keep the holding intact and only to divide the superior interest of the landlords it would not have been necessary to hear the tenants with reference to the division. The word used in the section is "split" which lexicographically means "to cause to part asunder or to divide by a quick or sharp cut". The addition of the word "up" intensifies the meaning of "split" and it has been used in my judgment in the sense of severing completely in several parcels the holding which before the partition was held under several persons. This view has been taken by this Court in the case of *Protap Chandra Das v. Kamala Kanta Shaha* (1). The facts are similar to those in this case with a slight difference to which reference will be made below. The learned Judges observed that the partition made by the Collector had the effect of dividing the old holding into new ones and the plaintiffs became the sole landlords of 5 kais held by the defendants and which defendant 6 clearly had abandoned.

This case has been attempted to be distinguished on the ground that in that case the Collector had made the partition before the defendants' purchase. I fail to see what difference in principle which underlies the decision this fact is

(1) [1905] 10 C. W. N. 818.

calculated to make. From the judgment it does not appear that this special fact had any influence on the view which was taken of the law in that case. The mere fact that the Collector proposes allotment does not change the position of the parties before such allotment is sanctioned by the higher authorities. It makes no difference whether the defendants entered upon the land previous to the allotment made by the Collector or after it. There is an unreported decision of this Court which was placed before the lower appellate Court and which took the same view, though in that case [it was subsequent to *Protap Chandra Das's* case (1)] the latter case was not cited. It has got this merit that two other learned Judges of this Court came to the same conclusion independently and uninfluenced by the view taken in the previous case. In Appeal from Appellate Decree No. 1425 of 1907, decided on 14th April 1909, Chitty and Vincent, JJ, observed that it was urged before them that

the Deputy Collector had no power to split up the holding of the original tenants for the purposes of partition but no tangible reason had been given to show why he had not that power.

According to the learned Judges S. 81, Estates Partition Act, 1897 distinctly gave him that power though, no doubt, it imposes the condition that it must be reasonably necessary to exercise it. Then in dealing with the defendants similarly situated as in this case their Lordships observed:

The main argument for the appellants was that, having been recognized by the co-sharers of the plaintiff, they were in the position of joint tenants, of the whole jote including that portion of it which fell to the plaintiff's share; but we cannot accede to this argument. If the partition was duly effected and the holding split up the plaintiffs' portion of that holding would become a complete jote in itself and Baku and Naimuddi (the original tenants) would have no right to sell their interest in that to the predecessors of defendants 1 to 4 who could not claim to be the tenants of the plaintiff and her co-sharers in that land. It would not be a case of transfer of a portion of a holding the remainder being held under the same landlord, but it could be a transfer of a complete jote and Baku and Naimuddi having ceased to occupy that jote, to pay rent for it, or to have any connexion with it may fairly be held to have abandoned it in which case the landlord had a right to re-enter.

This case in all its facts is similar to the one before us as it is claimed by the appellants in this case that they were recognized by all the co-sharer landlords except the plaintiffs and such as they

could not be ejected from the lands in suit. Then it is attempted on behalf of the appellants to distinguish the unreported case on the same ground as the case of *Protap Chandra Das* (1), as it appears from the statement of facts in the judgment that the defendants-appellants in that case had purchased the portion of the holding after the proposed allotment by the Deputy Collector. As I have said before, this fact has nothing to do with the application of the law and does not seem to have in any way affected the conclusion of the learned Judges. Against these decisions of this Court certain decisions of the Patna High Court have been cited before us. They are reported in a series of reports called Indian Cases which do not seem to be authorized reports. The attention of the Courts has been drawn on several occasions to the desirability of avoiding citing cases from unauthorized reports specially of cases of other High Courts as there are no means available to check the correctness of the reports and of the facts stated there. But as the point is of some interest we have looked into those reports and considered the arguments in the judgments of those cases. The decision in *Suraj Deo Narayan Singh v. Pachh Narain Singh* (2), takes a view at variance with that expressed in *Protap Chandra Das's* case (1). But it appears that the decision of this Court was not cited before their Lordships of the Patna High Court. The view expressed by the learned Judges in the Patna case may be treated as obiter on the facts of the case as it was a case in which the occupancy holding was found to be a transferable one. Another case of that Court is to be found in *Radha Kishun v. Bhagwat Prasad* (3), decided by the same learned Judges.

There also no case was cited and the learned Judges did not discuss the point beyond making an observation that the partition between the maliks did not give the plaintiffs a right to treat the transfers of parts of holdings as transfers of the entire holdings merely because those parts were allotted to his patti at the partition. I am unable to follow the view taken in those cases and I am of opinion that the interpretation of the

(2) [1917] 2 Pat. L. J. 225=39 I. C. 98=1 Pat. L. W. 443.

(3) [1917] 1 Pat. L. W. 19=33 I. C. 72=(1917) P. H. C. 76.

A. I. R. 1928 Calcutta 563

MUKERJI, J.

Bir Bikram Kishore Manikya Bahadur—Defendant—Appellant.

v.

Dasharath Rishi and others—Defendants—Respondents.

Appeals Nos. 1787 and 1788 of 1925, Decided on 5th January 1928, from appellate decrees of 2nd Sub-Judge, Tipperah, D/- 8th April 1925.

Adverse Possession—A, B and C jointly inheriting a homestead though in separate occupation of different huts therein—Landlord getting ejectment decree but never executing it—C alone executing a kabulyat in favour of landlord for a certain period—Landlord trying to eject all after that period—A and B can acquire title by adverse possession in respect of the shares in their possession.

A, B and C, three brothers, jointly inherited a certain homestead. A and B had two-thirds share and C one-third share, all being in joint possession of the homestead though in separate occupation of the different huts therein. In 1905 the landlord under whom they held the homestead obtained a decree for ejectment against the three brothers but the decree was never executed and the three brothers remained in possession as before. Subsequently one of the brothers, C, executed a kabulyat in favour of the landlord for a term of five years. On the expiry of the said term he obtained another ejectment decree against C and attempted to pull down the huts in execution of the decree. A and B then instituted the suit for declaration of their *niskir* title to a two-thirds share in the homestead, for confirmation of possession therein and for injunction restraining the landlord from interfering with their possession.

Held: that A and B were entitled to the decree. C could not, by entering into arrangements with the landlord, put him in constructive possession of anything in excess of the share of which he was in possession. There was no obstacle to A and B having acquired a title by adverse possession in respect of the shares to the extent of which they were in possession for the statutory period. [P 564 C 2]

Ramesh Chandra Sen and P. C. Sen—for Appellant.

Jatindra Mohan Ghose—for Respondents.

Judgment.—These two appeals arise out of two suits, Nos. 17 and 18, for declaration of title and confirmation of possession of two different homesteads. In Suit No. 17 the plaintiff's case was that the disputed homestead formerly belonged to their father who left behind him his three sons, the two plaintiffs and the pro forma defendant, as his heirs; that the two plaintiffs thus acquired two-thirds share and the pro forma

Act which appealed to the learned Judges of this Court is more convincing. It appears that the Patna High Court too is not unanimous on this point. In *Ram Lochan Koer v. Jagannath Misir* (4), Mullick, J., took a different view and followed *Protap Chandra Das's* case (1) of this Court. The learned Judge went further to say that even if there were private partition among the landlords the effect would have been the same as in a partition under the Estate Partition Act.

The learned Subordinate Judge in his considered judgment has referred to the various inconveniences which would flow from the adoption of a contrary view. Thus he says:

If it is held that the defendants are entitled to remain on the land, the effect would be that the plaintiffs would be compelled to recognize the transfer although they did not recognize it. They, can no longer sue the old tenants . . . There can be no gainsaying the fact that the defendants had no interest in the lands before partition (as against the plaintiffs) . . . It would be conferring an interest on them by partition if they are allowed to remain on the lands and the plaintiffs are compelled to receive rent from them.

If the appellants' contention be allowed to prevail the plaintiffs would be compelled to recognize the defendants as their tenants although the relation between them was not created either by contract or by operation of law. The position seems to me to be absurd and must be relieved against. As against the plaintiffs the defendants-appellants have acquired no title or interest although the plaintiffs for the time being had no right to evict them, as under the law they had no right to re-enter unless the entire holding had been transferred by the original tenants. But so soon as they acquired, instead of a share of the rent to which they were entitled, a specified portion of the lands comprised in the holding they obtained the right to enter on it if they found it to be in the occupation of a trespasser. Considering all the circumstances and there being clear authorities of this Court which are binding upon me, I hold that the view taken by the Courts below is correct in law.

This appeal, accordingly, is dismissed with costs.

Graham, J.—I agree.

A.L./R.K.

Appeal dismissed.

defendant one-third share, all being in joint possession of the homestead though in separate occupation of the different huts therein : that they held the same under the Maharajah of Hill Tipperah ; that in 1906 the Maharajah obtained a decree for ejectment against the three brothers but the decree was never executed and the three brothers remained in possession as before ; that subsequently one of the brothers, namely, the pro forma defendant, executed a kabuliyat in favour of the Maharajah for a term of five years from 1318 to 1322 ; that on the expiry of the said term the Maharajah obtained another ejectment decree against the pro forma defendant and attempted to pull down the huts in execution of the decree. The two plaintiffs then instituted the suit for declaration of their niskar title to a two-thirds share in the homestead for confirmation of possession therein and for an injunction restraining the Maharajah from interfering with the plaintiff's possession. In Suit No. 18 the facts were somewhat similar except that the plaintiff therein claims a one-half share in the homestead concerned in that suit.

The Munsif decreed Suit No. 17 declaring the plaintiff's title to a two-thirds share and confirming their possession therein and granting the injunction prayed for ; the plaintiffs' niskar title not being proved, he dismissed Suit No. 18.

There were appeals from both the decisions by the plaintiffs in Suit No. 18 and the Maharajah in Suit No. 17. There were some cross-objections as regards the order for costs, but with these we are not concerned. The Subordinate Judge upheld the Munsif's decision in Suit No. 17 and reversed his decision in Suit No. 18 and gave the plaintiff a decree therein. The Maharajah has appealed.

The view upon which the Subordinate Judge has proceeded is that the Maharajah's case, that the plaintiffs vacated their respective homesteads after the ejectment decrees obtained against them and the pro forma defendant, has not been made out, that they remained in possession after the said decrees as before, that they were not affected by any arrangement which may have been entered into by the pro forma defendant in favour of the Maharajah, and that their

possession since they were treated as trespassers in the said ejectment suits was adverse to the Maharajah.

The main contention that has been urged in support of the appeals is that if during the continuance of a trespasser's possession which is adverse to that of a true owner some acts of possession, though slight, are performed by the true owner, a title by adverse possession cannot accrue in favour of the trespasser, his possession having, in the eye of the law, ceased during the time that the true owner has performed those acts. As a proposition of law the argument, no doubt, is sound, but the principle in my opinion has hardly any scope for application in the present case. The possession of the two plaintiffs to the extent of two-thirds in the homestead concerned in Suit No. 17, and that to the extent of one-half belonging to the plaintiff of Suit No. 18 in the homestead concerned therein, has continued all along upon the findings of the Subordinate Judge. The pro forma defendant could not by entering into arrangements with the Maharajah put him in constructive possession of anything in excess of the shares of which they themselves were in possession. Whatever may have been the nature of the possession of the Maharajah, that is to say, by realization of rent or anything of that sort such possession could only extend to the share which legitimately belonged to the said pro forma defendant. There was no obstacle to the plaintiffs having acquired a title by adverse possession in respect of the shares to the extent of which they were in possession for the statutory period. The plaintiffs, therefore, are clearly entitled to have a declaration of their right to the shares which they claimed and also the consequential reliefs that they prayed for.

There was a further contention put forward in Appeal No. 1788 of 1925 which arises out of Suit No. 18. The contention is that the decree of the Subordinate Judge, in so far as it purports to decree the plaintiff's suit, must involve a declaration in his favour of the niskar right which he set up, but there is no finding in the judgment of the Subordinate Judge that that right has been established. On looking into the materials which the plaintiff has produced before the Court it seems to me that no

serious attempt was made by the plaintiff to prove such right. The result is that this contention will succeed.

Second Appeal No. 1787 of 1925 will be dismissed with costs. Second Appeal No. 1788 of 1925 will be allowed with costs, the decree of the Subordinate Judge to which it relates being modified by the addition of the words "and the plaintiff's prayer for a declaration that he has a niskar right in the property in suit is dismissed."

S. A. 1787 dismissed

N.K.

S. A. 1788 allowed.

* A. I. R. 1928 Calcutta 565

PAGE AND DUVAL, JJ.

Madhu Molla—Defendant 1—Appellant.

v

Babonsa Karikar and others—Plaintiffs and Defendants—Respondents.

Appeal No. 1669 of 1925, Decided on 22nd December 1927, from appellate decree of Sub-Judge, Jessore, D/- 25th March 1925.

* *Registration Act, S. 32—Executant dead—All legal representatives need not join in presenting the document—Any one of such persons may present the document for registration.*

The object of the legislature in enacting S. 32 is to prevent a mere outsider from presenting for registration a document with which he has no concern, and in which he has no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery, and the legislature, therefore, intended to provide that the registration should be initiated by the document being presented for registration by a person "having a direct relation to the deed." But in order to give effect to that intention, it is not necessary or reasonable that all the representatives of a deceased executant should join in presenting a document: 23 All. 233 (P.C.) and A. I. R. 1923 Cal. 35, Ref. [P 566 C 1]

Prafulla Kamal Das—for Appellant.

Hemendra Chandra Sen—for Respondents.

Page, J.—This appeal raises an interesting question with respect to the construction of S. 32, Registration Act (3 of 1877), now S. 32 of the Act 16 of 1908. The suit was brought by the plaintiffs for a declaration of their title to a share in certain lands comprised in two jamas, and for partition. As regards an eight annas share of the lands in suit, the plaintiffs traced their title through a

kabala which was granted to their vendors by one Panchu. This kabala was executed in 1896 by Panchu, who died shortly after; and, on his death, was presented for registration by his widow. Panchu left him surviving his widow, a brother, a sister, and a mother, and if this kabala was inadmissible as "evidence of any transaction affecting the immovable property comprised therein," (S. 32) it is common ground that each of these four persons as the heirs of Panchu would be entitled to a share of his estate. The kabala having been presented by the widow was registered. The contention of the appellant is that inasmuch as the kabala was presented for registration by the widow alone under S. 49, Registration Act, it could not "be received as evidence of any transaction affecting the property. The question is: Was the kabala presented for registration by "the representative" of Panchu? It is contended on behalf of the appellant that in S. 32 the term "representative of such person" means all the persons who legally represent such person; and that unless all the heirs jointly presented this document to the Registrar, the document was not duly presented, and the Registrar had no jurisdiction to effect the registration of it. In support of this contention, a number of authorities were canvassed before us. It was conceded, however, that there is no direct authority upon the question that falls for determination in this appeal. It has been laid down by Lord Robertson, expressing the opinion of the Judicial Committee of the Privy Council in the case of *Mujbunnissa v. Abdul Rahim* (1), that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed,

and later in his judgment his Lordship added that no case had been cited that gives any countenance to the view that the absence of any party legally entitled to present a deed for registration is a defect in procedure falling under S. 87.

In that case the Judicial Committee held that the deed not having been presented by a person entitled in that behalf the registration was illegal. The question which we have to consider is whether when the widow of Panchu presented the kabala for registration the jurisdiction of the Registrar was invoked "by the repre-

(1) [1901] 23 All. 233=28 I. A. 15=7 Sar 829 (P. C.).

sentative" of Panchu. It is not contended that the widow's interest in Panchu's estate was not directly affected by the deed. But it is said that the intention of the legislature was that all the heirs must combine in presenting a document for registration in order that the jurisdiction of the Registrar should duly be invoked. I am of opinion that that contention is ill-founded. It may be, (though it is unnecessary to decide), that the four heirs of Panchu were bound to admit the execution of the deed under S. 35, although the failure of any of the heirs so to do would amount to a mere irregularity and would not vitiate the registration. But why was it necessary that all the heirs of Panchu should have presented the document for registration? The object of the legislature, as I apprehend, in enacting S. 32 was to prevent a mere outsider from presenting for registration a document with which he had no concern, and in which he had no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery, and the legislature, therefore, intended to provide that the registration should be initiated by the document being presented for registration by a person "having a direct relation to the deed." But in order to give effect to that intention I do not think that it was necessary or reasonable that the other heirs of Panchu should have joined with the widow in presenting the kabala for registration.

If it had been intended that all persons directly concerned in the execution of a document should present the document, one would have expected to find in a case in which, for instance, four persons had jointly executed a registrable document, that the document could only duly be presented for registration by all four of such persons jointly and in combination. But it is provided by S. 32 that any one of such persons may present the document for registration. *Ezekiel & Co., v. Annoda Charan Sen* (2). I see no reason, if one of four persons who are jointly interested in the execution of a document may present the document for registration, why one of the persons who were the heirs and representatives of Panchu, and who had "a direct relation to the deed," should not in like manner be entitled duly to present the document for

registration. In my opinion, in the circumstances of this case, the presentation of the kabala for registration by the widow of Panchu conformed with the requirements of S. 32, Registration Act, and that the kabala was presented for registration according to law. There are no other points raised on behalf of the appellant to which I need advert, or which possess any substance. The result is that the appeal fails, and is dismissed with costs.

Duval, J—I agree.

N K.

Appeal dismissed.

**** A. I. R. 1928 Calcutta 566 Special Bench**

**RANKIN, C. J., AND SUHRAWARDY,
B. B. GHOSE, MUKERJI AND
CAMMIADÉ, JJ.**

In the matter of Stamp Act.

Reference No. 27 of 1928, under S. 57, Indian Stamp Act, Decided on 12th June 1928.

**** Finance Act (5 of 1927), S. 5—Demand drafts are bills of exchange and are exempt from stamp duty—Stamp Act, S. 2 (2).**

Demand drafts by one branch of a Bank on another branch of the same Bank in the form a bill of exchange payable on demand to a third party is a bill of exchange within the meaning of S. 2 (2), Stamp Act, and is exempt from stamp duty by virtue of Act 5 of 1927. *English and Indian Case Law Discussed.* [P 569 C 2]

Rankin, C. J.—This is a Reference made to us under the provisions of S. 57, Stamp Act. It would appear that certain instruments were presented on behalf of the holder for adjudication as to whether it was necessary that they should be stamped under S. 19, Stamp Act. The documents of which three in number are before us may be sufficiently exemplified by choosing one of the three. The one which I shall choose is a document in the form in which bills of exchange are accustomed to be couched. It is headed "Imperial Bank of India." It is addressed from Calcutta. It is signed as drawer by the Secretary and Treasurer and the Accountant of the Imperial Bank of India. It is addressed to the Imperial Bank of India, Lahore, as the addressee or drawee and it is made payable to a third party, the Commercial Syndicate Ltd or order. It will be observed, upon a strict reading of the instrument, that there are two parties and only two parties—the Im-

perial Bank of India on the one hand and the payee, the Commercial Syndicate Ltd., on the other. The question is whether these instruments are required to be stamped by virtue of the terms of the Stamp Act as amended recently by the Finance Act, 1927, and I shall discuss first whether this instrument is a bill-of-exchange within the meaning of the phrase as it is used in the Stamp Act. If it is a bill-of-exchange, then as by its express terms it is payable on demand, it is *prima facie* freed from stamp duty by the amendment introduced by the Finance Act (5 of 1927).

When we come to consider the question whether it is a bill-of-exchange, we have to refer to Cl. 2, S. 2, Stamp Act. By that clause "bill-of-exchange" is defined as meaning

a bill-of-exchange as defined by the Negotiable Instruments Act, 1881 and includes also a hundi, and any other document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money.

Now, the first question is whether this document is a bill-of-exchange as defined by the Negotiable Instruments Act, 1881, and, on that question, we have to look to S 5 of the Act. We find that a bill-of-exchange is defined there as an instrument in writing containing an unconditional order, signed by the maker directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.

This definition may be contrasted with the definition contained in S 3 of the English Bills of Exchange Act, 1882 (45 and 46 Vic 61) whereunder an instrument to be a bill-of-exchange must be an unconditional order in writing, addressed by the person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer. It is to be observed that, whereas in the English Act express provision is made by sub-S. 2, S 5, for the case where in a bill the drawer and the drawee are the same person, namely, that the holder may treat the instrument either as a bill-of-exchange or as a promissory note; the Indian statute, which has not expressly required that the instrument in order to be a bill-of-exchange must needs be addressed by one person to another,

nevertheless contains a provision in S. 17 that where an instrument may be construed either as a promissory note or a bill-of-exchange the holder may at his election treat it as either, and the instrument shall thenceforward be treated accordingly. So far as the first part of the wording of sub-S. 2, S. 2, Stamp Act of 1899 is concerned, the question whether the document before us is a bill-of-exchange as defined by the Negotiable Instruments Act, 1881 raises certain considerations. It is, in my judgment, a case which is governed by S. 17, Negotiable Instruments Act, in the sense that it would be open to the holder to treat the document as a promissory note. But I must emphatically decline to say that it is made out to my satisfaction that the instrument itself is not a bill-of-exchange within the definition given by S. 5 of that Act. Indeed if this were so the case would not come under S. 17 at all and in my judgment the reason why the definition in S. 5 does not include the requirement that the drawee should be a different person from the drawer—a requirement which had long been insisted upon in English case-law—is because the intention was that this kind of document should with other cases be dealt with by the general provision made by S 17. To imply this requirement and thus insert it into the definition of "bill-of-exchange" seems to me to spoil the draftsman's work.

However, let us proceed further to the definition given by the Stamp Act. There we find, that, for the purposes of the Stamp Act, a document is a bill-of-exchange, even although it be not so within the definition in the Negotiable Instruments Act, if it be a document entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of any sum of money.

Now, these words which conclude sub-S. 2, S. 2, Stamp Act, are modelled upon or taken from the provisions of a section which in the English Stamp Act of 1891 (54 and 55 Victoria, Ch. 39) stands as S. 32 and it appears that in the previous English Stamp Act, 1870 it stood as S. 48. It has been held in cases in England, to which I will refer, that the language which I have quoted cannot be taken literally because the language is so wide that it might include all sorts of

instruments which are not for any purpose capable of being called or classed as bills of exchange. It has been pointed out that a mortgage or a lease may be a document entitling a person to payment by another person of a sum of money. Hence, in the present case, we have to consider whether any difficulty that may arise upon the definition in S. 5, Negotiable Instruments Act, is or is not removed by the concluding words of sub-S. 2, S. 2, Stamp Act.

Now, on the strength to which those words may legitimately be carried, certain cases have been cited to us and there are two cases to which our attention has been drawn which appear to me to afford some assistance. These cases are illustrations on either side of the line. In the case of *Fisher v. Calvert* (1), where a person entitled to a sum of money under a will signed a document purporting to authorize and direct the trustee of the will to pay a certain sum of money to a creditor, it was held that although that instrument was within the literal meaning of the wider language used by the English Stamp Act, the case was not one which could be intended to be covered by the expression "bill-of-exchange" even for the purpose of a Stamp Act. The instrument in question in that case was really in the nature of an equitable assignment by way of charge of the right to receive a sum of money under the will; in other words, it was not a document of the general character which was in the contemplation of the legislature while using the wide language to which I have referred. On the other hand, in the case of *Rothschild & Sons v. Commissioners of Inland Revenue* (2) we have an illustration of an instrument which was not a bill-of-exchange in the technical sense, but was held to come within the extension of the usual definition which is operated by the Stamp Act. In that case a certain foreign Government had issued bonds and had issued interest coupons for ten years. As part of the same document, there was what was called talon, namely, a document stating that interest coupons for another ten years would be forthcoming at the end of ten years. The question arose whether these interest coupons were liable to duty as being bills-of-exchange and it was held

that, although the documents merely stated that interest would be paid at a certain time and place and were not bills of exchange within the legal definition of that phrase, nevertheless they did come within the more general language by which the Stamp Act had extended the definition.

Now, as I have stated already, I am not prepared to say that these instruments are not bills-of-exchange within the definition of the Negotiable Instruments Act, but I am without any difficulty prepared to say that they do come within the extension which the Indian Stamp Act by Cl. 2, S. 2, has put upon the usual definition. We are not here concerned with an equitable assignment or anything foreign to the nature of a bill-of-exchange. The document before us is a document of a mercantile character which has all the appearance of a bill-of-exchange. On the face, it is a bill-of-exchange. In any case the holder can treat it as a bill-of-exchange. It is just such a document as may well be drawn within the concluding terms of sub-S. 2 without running any risk of going beyond the intention of the legislature. In my judgment this document is a bill-of-exchange which is payable on demand.

Two cases of this Court have been cited: *Kishori Chand Surana v. Asharam Mahato* (3) and *Asharam v. Kishari Chand* (4). Both cases had reference to Sahajogi hundies which were attested and were drawn by a firm upon itself. Mookerjee, J., held that the instrument before him did not fall within the wider definition of "bill-of-exchange" given by sub-S. 2, S. 2, Stamp Act. I cannot say that it is evident to me that the document before him was not one entitling any person whether named therein or not, to payment by any other person of any sum of money,

but his reasons may have been based upon the fact that in a Sahajogi hundi the holder must be a "respectable holder." He also held that it was clear that the document was not a promissory note as it contained no unconditional promise to pay. Fletcher, J., in the earlier case, had held a similar document to be an attested promissory note which for the reasons given later by Mookerjee, J., seems to me to be wrong. He over-

(1) [1879] 27 W. R. 301.

(2) [1894] 2 Q. B. 142.

(3) [1915] 19 C. W. N. 1826=33 I. C. 250=22 C. L. J. 209.

(4) [1915] 22 C. L. J. 22=33 I. C. 247.

looked the statutory provision made in S. 17, Negotiable Instruments Act. In both cases the documents were held to be "bonds," and in this way the claim of the plaintiff succeeded on payment of duty and penalty under S. 35. It will be observed that Fletcher, J., applied S. 6, Stamp Act, and admitted the document under S. 35, although he found that it was a promissory note because it was also a "bond."

In the present case the question which we have to answer seems to me to be this: Can it be said that this document which is a bill-of-exchange and which is not dutiable as such because it is payable on demand is nevertheless dutiable as being a promissory note? The Stamp Act contains no extension applicable to this document of the definition of "promissory note" given by S. 4, Negotiable Instruments Act, and unless this document be

an instrument in writing containing an unconditional undertaking signed by the maker to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument

it is not a promissory note. This is not a case under S. 6, Stamp Act, of an instrument coming within two descriptions so as to be chargeable with different duties.

It has been pointed out to us that there are English decisions which say that instruments such as this contain all the essentials of a promissory note, *Milner v. Thompson* (5) and *Allen v. Sea Fire & Insurance Co* (6). These cases proceed on the ground that

there is an absence of the circumstances of there being two distinct parties as drawer and drawee, which is essential to the constitution of a bill-of-exchange. That being so the only alternative is, that this instrument is a promissory note (per Tindal, C. J., in the former case).

The law on this point, so far as we are concerned is declared now in the Negotiable Instruments Act. The document may imply but it does not express any promise to pay, though it is covered by S. 17. If it is for the Crown to show that the language of S. 19, Stamp Act, clearly covers it. Now that the intention to exempt bills-of-exchange payable on demand is clear, we have to see whether it is consistent with the intention of the statute that it should be dutiable as a promissory note though it is a bill-of-ex-

change within the Stamp Act and is payable on demand. Under the Negotiable Instruments Act it is in form a bill-of-exchange and it may be treated as a bill-of-exchange. It does not seem to me to be at all plain that this document which can claim now exemption under its proper category should be treated under the Act as dutiable under another category to which it never may belong. I think we should answer this Reference by saying that demand drafts such are described therein are exempt from stamp duty. No order as to costs.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree.

Mukerji, J.—I agree.

Cammiade, J.—I agree.

R.K.

Reference answered.

A. I. R. 1928 Calcutta 569

C. C. GHOSE AND JACK, JJ.

Ram Prosad Maitra—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 112 of 1928, Decided on 28th May 1928, from order of Sess. Judge, Hooghly, D/- 7th December 1927.

Criminal P. C., S. 203—Complaint dismissed without examining complainant, he being absent—Case cannot be sent back for further inquiry.

Where a Magistrate dismisses a complaint under S. 203 without examining the complainant, he not being present on any of the dates of hearing, the complainant cannot afterwards be heard to say that the matter should be sent back for further inquiry. [P 570 C 1]

Suresh Chandra Talukdar and Mahendra Kumar Ghose—for Petitioner.

Judgment—In this case, the complaint was dismissed under S. 203, Criminal P. C. Subsequently, the matter went before the learned Sessions Judge and he was of opinion that the complaint should not have been disposed of under S. 203, Criminal P. C., without the complainant been examined on oath. It appears, however, that the complainant was not present in Court on any of the dates on which the matter came before the Magistrate. Therefore, the Magistrate had no oppor-

(5) [1842] 3 M. & G. 576=11 L. J. C. P. 21=1 D. (N. S.) 199=4 Scott (N. R.) 204.

(6) [1850] 9 C. B. 574=14 Jur. 870n.

tunity whatsoever of examining the complainant on oath. It was the business of the complainant to be present in Court if he desired to have his statement taken on oath. As already stated he not being present in Court the matter was disposed of by the Magistrate under S. 203, Criminal P. C. In a case like this, where the complainant does not choose to be present, he cannot be heard afterwards to say that the matter should be sent back to the Magistrate for further enquiry. In this view of the matter the order made by the learned Sessions Judge is set aside. The Rule is accordingly made absolute.

A.L./R.K.

Rule made absolute.

A. I. R. 1928 Calcutta 570

DUVAL AND MUKERJI, JJ.

Kuarmony Singh Mandhata—Plaintiff—Appellant.

v.

Dashrathi Pati and others—Defendants—Respondents.

Appeals Nos. 121 to 134 and 136 and 137 of 1925, Decided on 6th December 1927, from appellate decrees of Dist. Judge, Midnapur, D/- 2nd June 1924.

Bengal Tenancy Act, Ss. 32 and 35—Both the sections must be read together—S. 35 gives discretion in the Court as to the extent to which the enhancement should be allowed.

The words used in S. 32 on the face of them appear to be of a mandatory character. But S. 32 should be read along with S. 35 which controls it. S. 32 only lays down the procedure by which the enhancement is to be calculated and S. 35 gives a discretion in the Court as to the extent to which the enhancement should be allowed. [P 570 C 2]

Mrityunjay Chatterjea and Hem Kumar Bose—for Appellant.

Amarendra Nath Bose and Arun Chandra Basu—for Respondents.

Mukerji, J.—(S. A. No. 136).—In this case, since the filing of the appeal, one of the respondents joint tenants died. The suit was one for enhancement of rent. No substitution has been made and the appeal has been dismissed as against him by an order dated 17th February 1926. This appeal must also fail as against respondent 1 and will be dismissed with costs as it cannot proceed when all the tenants are not on the record.

S. A. Nos. 121—134 and 137.—These appeals arise out of suits instituted

by the landlord for recovery of rent and for enhancement thereof under S. 30, Cl. (b), Ben Ten. Act. The trial Court enhanced the rent at the rate of 4 annas per rupee. On appeal preferred by the defendants, the learned District Judge has modified the decrees of the trial Court on the question of enhancement by allowing the plaintiff enhancement at the rate of one anna per rupee instead of at the rate of 4 annas per rupee.

Two grounds have been urged in support of this appeal by the learned vakil who appears on behalf of the appellant. The first ground is to the effect that in view of the provisions of S. 32, Cl. (b), Ben Ten. Act, the learned Judge was wrong in holding that the plaintiff was entitled to anything less than what was decreed by the Court of first instance. The second ground is that assuming that the learned Judge was right in holding that he had a discretion as to the amount by which the rent could be enhanced that discretion has been wrongly exercised.

With regard to the first of these contentions, it is true that the words used in S. 32, Ben. Ten. Act, on the face of them, appear to be of a mandatory character. But that section evidently has got to be read along with S. 35 which controls it. S. 35 says that notwithstanding anything contained in the foregoing sections—and S. 32 is one of such sections,—

the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable.

When the two sections are read together, it is clear that S. 32 only lays down the procedure by which the enhancement is to be calculated and S. 35 gives a discretion in the Court as to the extent to which the enhancement should be allowed.

As regards the second contention that has been put forward on behalf of the appellant, I am unable to say that the considerations upon which the learned District Judge has proceeded do not justify the reduction in the enhancement that he has made. He has referred to the fact that the cost of cultivation is now three or four times what it was twenty years ago: he has also referred to the fact that even upon the calculation which the learned Munsif has made, the average price of paddy had increased by 4 annas

3 pies and that the tenant was certainly entitled to a substantial portion out of it and he has also relied upon the fact that it was only so recently as 15 years before these suits that the landlord had succeeded in getting an enhancement. These circumstances in my opinion, are sufficient to justify the decree which the learned District Judge has passed and in this view of the matter I think that there is no substance in any of these appeals and that they should be dismissed with costs.

Duval, J.—I agree.

N.K.

Appeals dismissed

*** A. I. R. 1928 Calcutta 571**

MITTER, J.

Secretary of State—Defendant—Petitioner.

v.

Kali Brahma Chatterjee—Plaintiff—Opposite Party.

Civil Rule No. 387 of 1928, Decided on 11th June 1928, against decree of Small Cause Court Judge, Jangipur

** Tort—Negligence—Damages due to fire from a locomotive engine—Railway Company authorized to run it—Reasonable care taken for preventing such fire—Company is not liable.*

A Railway Company which has been authorised to run locomotive engines on its line of railway under the statutory powers given to it, is not liable for damages caused by fire escaping from its engine when the Company has taken all reasonable care to provide against such fire by the use of engine of the best construction fitted with fire arrester and perforated damper. : *Vaughan v. Tuff Vale Ry.* (1860) 5 H.&N. 679, *Foll. (Case-law Discussed.)* [P 574 C 1]

Torick Ameer Ali, Ambika Pada Choudhari and Bhabesh Narayan Bose—for Petitioner

Jadunath Kanjilal and Subodh Chandra Dutt—for Opposite Party

Judgment.—The question raised by this rule is one of considerable importance. This rule was obtained on behalf of the Secretary of State for India, who is the defendant in the action, and was issued on the plaintiff opposite party to show cause why the decree of the Small Cause Court Judge of Jangipur in his favour should not be set aside. The rule relates to an action commenced by the plaintiff opposite party for recovery of a certain sum as damages on the allegation that on the 18th February 1927

his house and other properties were destroyed by fire caused by sparks coming out of the engine attached to Saheb-gunge Howrah passenger train (Down train No. 56) and that the said damage was caused by the neglect of the E. I. Ry. Co. and its agents or servants for which the defendant Company is liable. To this action the Agent of the E. I. Ry. and the Secretary of State for India in Council were made parties. The Agent's defence was that as the administration of the E. I. Ry. had been taken over by the Government he was not a necessary party. The Secretary of State rested his defence on several grounds, viz.: (i) the fire was not caused by spark emitting out of the engine; (ii) damage was not caused by any act on the part of the Railway Administration or its servants; (iii) the engine attached to the passenger train was an A class engine and was fitted with fire arrester and perforated damper and it was not possible for sparks to remain alive and set fire to a house situated at a distance of 115 feet from the railway line where the fire is said to have originated, (iv) the plaintiff was vague as it did not disclose particulars of the negligence of the Railway Administration or its servants, which had resulted in the fire. The plaintiff was asked by the Court to furnish particulars of acts of negligence on the part of the Railway Administration or its servants. No such particulars of negligence or carelessness were furnished. On the day of hearing when witnesses were being examined on plaintiff's side a new case was made out to the effect that the engine fire was poked by the driver and sparks were emitted.

On these pleadings, the Munsif, after taking evidence, found in favour of the plaintiff and reached the following conclusions :

(i) I believe the evidence of plaintiff and his witnesses to be true and hold that the fire to Hari Maji's house was caused by the spark of the engine due to poking by the driver or the fireman who has not been examined to give a denial and that the fire spread to the huts of the plaintiff;

(ii) In this case plaintiff has proved that though there was dry wind blowing and though there were straw huts lying near the railway line the driver or the fireman poked the fire of the engine against rules and was guilty of negligence or carelessness. It was due to this act of carelessness that the fire spread from Hari Maji's house to plaintiff's house.

(iii) The engine of 56 down train was a C class engine fitted with spark arrester and perforated damper.

(iv) It is admitted that even in a C class engine it is possible for sparks to come out if the fire is poked by a driver or fireman, but that spark is not potent to cause the damage and to run at some distance.

The second finding above referred to is challenged on behalf of the Secretary of State and it is said that there was no rule which forbade the driver from poking the fire of the engine, and this finding that the driver poked the fire against rules is based on no evidence. No rule to that effect was produced before me. It was also not produced before the Munsif. This finding, therefore, must be set aside. The question which therefore arises is whether a Railway Company which had been authorized to run locomotive engines on its line of railway, under the statutory powers given to it, is liable for damages caused by fire which had escaped from its engine although the Company took all reasonable care to provide against such fire by the use of engine of the best construction fitted with fire arrester and perforated damper. The argument of the learned Standing Counsel, who appears for the Secretary of State is that as the E. I. Ry. Co., have got statutory powers to use locomotive for hauling their trains, the necessary use of fire in them, and the occasional escape of sparks from them, must have been anticipated, and therefore if every reasonable precaution is taken against such escapes the Railway Companies are relieved of the consequence of any fires resulting from sparks accidentally escaping. It is argued that the lower Court was wrong in holding that the poking was against rules and that on the other hand the lower Court should have held that poking was necessary for maintaining the necessary steam for running the train. If, as it has been shown in this case that the Railway Company ran an engine provided with fire arrester, etc., the defendant is relieved of liability if notwithstanding these precautions fire escaped.

It is contended on the other hand, on behalf of the opposite party that it was no defence that all possible care and skill had been used in the construction of the engines to prevent the escape of sparks and the burden was on the Railway Company to show that there was

no negligence on their part. In support of this contention reference has been made to *Powell v. Fall* (1) and to *Smith v. L. & S. W. Ry Co* (2).

In the case of *Powell v. Fall* (1), the defendant was held liable for damage caused by the escape of fire from locomotive steam engines used by them, and, it is true, that it was held to be no defence that all possible care and skill had been used in the construction and management of these engines to prevent the escape of sparks. But the fact which distinguishes the present case from that is that in that case the engine was not used under any statutory authority which granted any protection against the ordinary rule of liability at common law. It seems clear that that is not a case of absolute liability for fire at all, but is merely illustrative of the familiar principle that if any operation cannot be carried on without causing damage by the escape of deleterious or dangerous things the carrying on of that operation is an actionable nuisance and it is no defence that all possible care and skill were used to prevent the injury or damage done by it.

The facts of the case of *Smith v. L. & S. W. Ry. Co.* (2) are distinguishable from the facts of the present case. In that case the servants of the defendant Company during exceptionally dry weather, cut the grass and hedges along the line, and left the cuttings lying there in heaps for a fortnight. A spark from a passing train ignited these cuttings and a high wind sprang up and carried the fire across a stubble field and a public road to the plaintiff's cottage situated 200 yards from the railway. There it was held that it was for the jury to decide what the defendants' servants ought as reasonable men to have contemplated as the result of leaving the cuttings and trimmings where and as they did. Now it can scarcely be doubted that the defendants were bound in such a manner knowing that trains were passing from which sparks might fall on them to remove these heaps of trimmings, and at any rate it was a question for the jury whether it was not negligent for them not to do. In this case the liabi-

(1) [1880] 5 Q. B. D. 597=49 L. J. Q. B. 428 =43 L. T. 562.

(2) [1871] 6 C. P. 14=40 L. J. C. P. 21=19 W. R. 230=23 L. T. 678.

lity was based on the negligence of the Railway Company in leaving combustible matter along the banks of the railway-likely to be ignited by sparks from the engine although they used properly equipped engines in a proper manner.

The true rule applicable to the present case is that which had been laid down in the case of *Vaughan v. Tuff Vale Ry Co* (3) where the defendant Company having statutory authority to use locomotive steam engines was held not liable for a fire caused by an escape of the sparks, it being proved that the engines were constructed with all due care and skill and that it was wholly impossible to prevent the escape of sparks. At common law it would have been an actionable nuisance to use engines which were such a source of danger; and it would have been no defence that they had been made as safe as they could be: see *Jones v. Festiniog Ry. Co.* (4). This last case is of the same type of cases as *Power v. Fall* above referred to where the engines were not run under some statutory authority. Statutory protection is, however, possessed by railway companies in respect of various nuisances which are necessarily incident to the management of their business, e g., noise and vibration. See *Hammersmith Ry. Co. v. Brand* (5) and *London Brighton Ry. Co. v. Truman* (6).

The case of *Power v. Fall* (1) relied on by the learned advocate for the opposite party lays down this principle that where the defendants make use of locomotive engines without having obtained the necessary authority of the law and the plaintiff suffers damage by reason of fire proceeding from the same they are liable though not guilty of any negligence in the management of the engines and the case of *Vaughan v Tuff Vale Co.* (3) illustrates the rule that in the same case they would not have been liable had they had the proper authority. This latter case was followed by the Privy Council in *Canadian Pacific Ry.*

Co. v. Roy (7) where their Lordships of the Judicial Committee of the Privy Council laid it down that a railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence but by the ordinary and normal use of its railway or, in other words, by proper execution of the power conferred by statute. It is true that in that case there was no question of the appellants having been guilty of negligence in the management of their engine or its appliance being defective.

It is a significant circumstance in the present case that the fact of the poking of the fire either by the engine driver or the fireman did not form any item of the particulars of negligence on which the claim of the plaintiffs was founded, and yet it is upon this the Munsif has founded his judgment on the question of the negligence of the defendant company's servants.

My decision proceeds, however, on the assumption that there was poking of the fire by the driver and that such poking was necessary in the ordinary course for maintaining steam. In poking the fire the servants of the company did nothing more than what was necessary for the running of the train and if notwithstanding all precautions known to science taken by the railway company to prevent damage by fire occurring the sparks were emitted, the company cannot be held liable. This principle has been lucidly expounded by Lord Hatherley in the case of *Geddis v. Proprietors of Baun Reservoir* (8), thus:

If a company, in the position of the defendants there has done nothing but that which the Act authorized—nay may in a sense be said to have directed—and if the damage which arises therefrom is not owing to any negligence on the part of the company in the mode of executing or carrying into effect the powers given by the Act, then the person who is injuriously affected by that which has been done must either find in the Act of Parliament something which gives him compensation, or he must be content to be deprived of that compensation, because there has been nothing done which is inconsistent with the powers conferred by the Act, and with the proper execution of those powers. My Lords, I say the proper mode of executing those powers because it appears to me that it is very neatly and appositely put by Mr. Baron Fitzgerald, in

(3) [1860] 5 H. & N. 679=8 W. R. 549=29 L. J. Ex. 247=6 Jur. (N. S.) 893=2 L. T. 394.

(4) [1869] 3 Q. B. 733=9 B. & S. 835=18 L. T. 902=17 W. R. 28=37 L. J. Q. B. 214.

(5) [1869] 4 H. L. 171.

(6) [1885] 11 A. C. 45=55 L. J. Ch. 354=50 J. P. 388=54 L. T. 250=34 W. R. 657.

(7) [1902] A. C. 220=71 L. J. P. C. 51=18

T. L. R. 200=50 W. R. 415=86 L. T. 127.

(8) [1878] 3 A. C. 438.

giving his judgment in the Court of Exchequer Chamber, in this form, Mr. Baron Fitzgerald says: 'The substantial question raised on the pleadings in the first and second counts of the declaration, appears to me to be whether these acts of the defendants were done in a due exercise of their authority, under the local and personal statute which has been mentioned, without negligence.'

The view which I take is supported by the case of *Port Glasgow and Newark Sail Cloth Co. v. Caledonian Ry.* (9), in which it was held that the legislature by authorizing the use of steam engines or railway has impliedly indemnified railway companies against the consequence of the use of such engines, provided they are of the best construction, and that the proper safeguards are used for minimizing the risk of fire damage.

I think this rule must be made absolute. The decree of the Small Cause Court Judge must be set aside and plaintiff's suit must be dismissed.

I fully sympathize with the plaintiff in his distress in the loss of his house by fire but I have to administer the law as I find it. I am convinced that the principle for which the Secretary of State contends is supported by English jurisprudence by which Courts in India are governed in all cases in which there is no codified law. In England, however, the Railway Fires Act 1905 (5 Edw. 7 C 11) has been enacted; this Act has to some extent altered the law as laid down in *Vaughan v. Tuff Vale Ry. Co.* (3), for it provides that, railway company shall be liable, notwithstanding their statutory authority to the extent of £100 at the most for damage done to agricultural land or crops by the escape of sparks and cinders from locomotive engines; but there is no such legislation here in India and the rule in the leading case of *Vaughan v. Tuff Vale Ry. Co.* (3) must govern the present case. I can find no facts which can distinguish the present case from that of the *Vaughan* case. *Vaughan* was the proprietor of a plantation adjoining the embankment of the Tuff Vale Railway Company. One day the plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from a spark from one of the defendants' engines, but they contended, and it was decided, that they were not responsible as they were authorized to use

such engines, and had adopted every precaution that science could suggest to prevent injury: *Vaughan v. Tuff Vale Ry. Co.* (3).

I have given my most anxious consideration to this case and for the reasons I have given this Rule must be made absolute, but, in the circumstances of the present case, there will be no order as to costs.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 574

RANKIN, C. J., AND C. C. GHOSE, J

Ramchandra Saha and others—Defendants—Appellants.

v.

Lakshmi Kanta Saha and others—Plaintiffs—Respondents.

Appeals Nos. 1631 and 1632 of 1925, Decided on 15th May 1928, from appellate decrees of 3rd Sub-Judge, Tippera, D/- 21st March 1925.

(a) *Cosharer*—One cosharer in sole occupation—Other cosharers cannot claim joint khas possession unless occupation amounts to ouster.

Where one cosharer is in sole occupation of a portion of a joint property but his possession is not hostile or inconsistent with the joint ownership of the other cosharers, the latter are not entitled to get a decree for khas possession of such property [P 576 C 2]

(b) *Cosharer* — Ouster means dispossession by one cosharer in assertion of hostile title.

Ouster means dispossession of one cosharer by another where a hostile title is set up by the latter and where the occupation of the latter is not consistent with joint ownership: 18 C. W. N. 328, *Foll* [P 576 C1]

Atul Chandra Gupta and Nipendra Chandra Das—for Appellants.

Jogesh Chandra Roy, Upendra Kumar Ray and Bhagirath Chandra Das—for Respondents.

C. C. Ghose, J.—In these appeals the defendants 1, 2 and 3 are the appellants before this Court. The plaintiffs in the two suits out of which these appeals have arisen and defendant 1 are cosharers in respect of the lands in suit. These lands were formerly in the occupation of certain tenants. The latter abandoned their holdings and repudiated their tenancies. It is alleged that during the settlement operations in the district where the lands are situate, defendant 1 got his name recorded as purchaser of the holdings. The Record-

of Rights was finally published on 20th October 1919. The plaintiffs contend that the holdings being non-transferable without the consent of the landlords, defendant 1 acquired no rights whatsoever as against the plaintiffs, and in the events that have happened the plaintiffs are entitled to joint khas possession of the lands in accordance with their shares. The two other defendants are other co-sharer landlords of the holdings in question. On behalf of the defendant 1, who is the principal defendant, it was alleged that the holdings in question were homestead lands which had been held by tenants from time immemorial at fixed rents and in enjoyment of permanent transferable rights. It was further alleged that defendant 1 after his purchase of these homestead lands had possessed the same, building pucca structures and making various improvements, and that in the circumstances the plaintiffs were merely entitled to receive rent to the extent of their shares (which the defendant had always been willing to pay) and could not recover joint khas possession of any portion of the lands. The defendant further stated that the plaintiffs were in possession of similar lands acquired from former tenants within the joint taluk without payment of rent to the defendant and that this suit was not maintainable so long as the properties remained unpartitioned.

The first Court found that the lands in question were homestead lands and that the principal defendant 1 after his purchase had built pucca structures on the lands, constructed walls and raised the level of the lands at the expenditure of considerable sums of money. It was also found that the plaintiffs and defendant 1 had in many instances purchased the holdings of the tenants within their joint taluk and had separately possessed these lands. It was further found that the lands in suit were transferable holdings, that the transfers in favour of defendant 1 were valid and had been recognized by the plaintiffs who were some of the landlords. In the course of his judgment the learned Munsiff observed as follows :

I am convinced that after the purchase of the homesteads in suit by defendant 1, the plaintiffs allowed him to possess them peacefully and make improvements for his residence just as defendant 1 allowed the plaintiffs to possess their purchased lands. So long as the

parties were on good terms there was no difficulty.

The learned Munsif, therefore, dismissed the plaintiffs' suits, holding that the same were not maintainable. On appeal by the plaintiffs, the lower appellate Court held, reversing the judgment of the first Court, that the holdings in question were not mokarari, that there had been no recognition on the part of the plaintiffs of the transfers in favour of defendant 1, that there was no evidence of the erection of pucca structures to the knowledge of the plaintiffs and that on the abandonment of the holdings in question by the tenants all the co-sharer landlords were entitled to the possession of the lands proportionate to their shares. The lower appellate Court held that the plaintiffs were entitled to joint khas possession of the lands in proportion to their respective shares.

As far as I can make out from the judgment of the lower appellate Court, the finding of the Munsif as regards the transferability of the holdings in question has not been reversed on appeal. There is no doubt that it has been laid down in this Court in a series of cases that under the law as it stood before the passing of the Transfer of Property Act, tenancies, whether of homestead lands or of agricultural lands, were not transferable in the absence of a custom to the contrary or an express contract to that effect ; but there have always been exceptions to this rule and in the case of *Benec Madhub v. Joy Krishna* (1) Peacock, C. J., observed that if one man granted a tenure to another for the purpose of living upon the land, that tenure in the absence of evidence to the contrary was assignable. The same view was also taken in the case of *Durga Pershad v. Brindaban* (2). But in this case, as I have said, there is a clear finding that the holdings in question were and are transferable and it is unnecessary to discuss this point further.

The next question is whether in the circumstances of this case there has been such an ouster of the plaintiffs as to entitle them to maintain suits of this description and to ask for a decree for joint khas possession. As I read the judgments of the two Courts below no

(1) [1869] 12 W. R. 495 = 7 B. L. R. 102.

(2) [1871] 15 W. R. 274.

hostile title has ever been set up by defendant 1; his position, as I understand, is this: In the taluk owned jointly by the plaintiffs and the defendants there are various plots of land which were formerly in the occupation of tenants but which have been abandoned by them; some of these plots have been taken possession of by the plaintiffs; no objection was ever raised to the plaintiffs possessing these lands separately and there ought not, therefore, to be any objection to defendant 1 possessing certain other lands which were abandoned by the original tenants thereof. In these circumstances defendant 1 contends that the mere fact of occupation by him of the holdings in question does not necessarily constitute an ouster of other cosharers nor does it entitle the latter to a decree for joint khas possession; in other words, defendant 1 contends that his occupation of the holdings in dispute in the circumstances of this case is not inconsistent with joint ownership. The position is according to him somewhat analogous to the case of a tenancy-in-common where each tenant is allowed, for purposes of mutual convenience, to remain solely and severally seized of certain plots within the ambit of the joint property and where his cotenants are not in control or possession of the said plots. I am of opinion that this contention is well founded and ought to be given effect to. This case is on all fours with the case of *Basanta Kumari Dassya v. Mohesh Chandra Shaha* (3), where it was observed as follows:

When a cosharer is in sole occupation of a portion of the joint property, for instance, by building or by carrying on cultivation on it, the other cosharers are to that extent excluded from making any use of that particular portion, as it is difficult to see how two different cosharers can at the same time build upon or carry on cultivation on one and the same piece of land. If, however, the sole occupation of one cosharer in this manner constitutes ouster of the other cosharers, then in every case the occupation by the cosharers of the lands in their respective possession would constitute an ouster of each other and this certainly cannot be held. Ouster must therefore mean dispossession of one cosharer by another where a hostile title is set up by the latter and where the occupation of the latter is not consistent with joint ownership.

I respectfully agree with what was laid down in the above case and in my

(3) [1913] 18 C. W. N. 328=21 I. C. 621.

opinion, on the facts found in this case and specially in view of the fact that the title of the plaintiffs has always been admitted, no valid reason has been assigned or can be assigned for the passing of a decree in favour of the plaintiffs for joint khas possession. In law such a decree could not in the circumstances of this case have been passed and I would therefore set aside the judgment of the lower appellate Court, restore the judgment of the first Court and allow the appeals with costs both in this Court and in the lower appellate Court.

Rankin, C. J.—I agree

A.L./R.K.

Appeal allowed.

A I. R. 1928 Calcutta 576

SUHRAWARDY AND CAMMIADE, JJ.

Hemangini Debi — Plaintiff — Appellant.

v.

Mundir Mridha and others — Defendants—Respondents.

Appeal No 251 of 1924, Decided on 2nd May 1928, from appellate decree of Dist. Judge, Pabna and Bogra, D/- 25th September 1923.

Bengal Survey Act, S. 41—Survey officer unable to decide fact of possession from the evidence collected by him—His order that the boundary should be plotted as it stood in the revenue survey map was held to be not an order determining the fact of possession.

A Survey Officer being unable to decide the fact of possession from the evidence collected by him refused to decide who was in actual possession and directed that the boundary should be plotted as it stood in the revenue survey map.

Held: that his order was not an order determining the fact of possession though S. 47 of the Bengal Survey Act directs that the Survey Officer in deciding a dispute as to boundaries between two mauzas must determine the boundary with reference to actual possession.

[P 577 C 1]

Atul Chandra Gupta, Dines Chandra Roy and Sachchidananda Roy — for Appellant.

Brojolal Chakravarti and Girija Prosanna Roy Choudhury — for Respondents.

Biraj Mohan Majumdar — for Dy. Registrar.

Judgment.—The plaintiff who is the appellant before us sued for declaration of her tenancy right in certain lands and for recovery of possession. Her case was that the lands formed part of Estate

No. 239 of the Patna Collectorate corresponding to Estate No. 77 of the Rajshahi Collectorate and were comprised within Chaks Nos. 25 and 28 of the Mehalwar map of village Katabari. She alleged that these lands which admittedly had been under water previously had become culturable and had been leased by the zamindar of the Estate No. 239 to third parties who defaulted in the payment of their rent and that the tenancy was sold in execution of a decree for arrears of rent and was purchased at that sale by the plaintiff. The defendants denied these allegations, alleging that the lands belonged to village Mashinda within the district of Rajshahye and that they (the defendants) had been in possession of those lands for at least 28 years under leases granted by the Zemindar of Mashinda. The Court of first instance gave the plaintiff a decree which was reversed by the learned Court of appeal below. The grounds on which the learned Judge of the Court below dismissed the suit are that the lands in suit have not been identified as forming part of the mouza named by the plaintiff and that the suit is barred by limitation because the defendants have been in possession of the lands for at least 28 years. These findings of the learned Court below are assailed in second appeal before us.

With regard to the question of limitation, it is urged that the learned District Judge committed error in not treating the decision of the Survey Officer who demarcated the boundary of the two adjoining villages in the year 1913 as one that proved possession on the part of the plaintiff. This contention has no force having regard to the terms of the order passed by the Survey Officer. S. 47, Survey Act (5 of 1875), directs that the Survey Officer in deciding a dispute as to boundaries between two mauzas must determine the boundary with reference to actual possession. S. 62 of that Act gives that decision the force of the decree. The order passed by the Survey Officer was that he was unable to decide the fact of possession from the evidence collected by him. He therefore refused to decide who was in actual possession and directed that the boundary should be plotted as it stood in the revenue survey map. The contention set up on behalf of the appellant is that because the Survey Officer in his order used the word "determine" and

said that the boundary should be determined according to that laid down in the survey map, the use of that word had the effect of making the order an order determining the fact of possession. Such a contention cannot be sustained for a single moment as there would be a contradiction between the conclusion and the premises. The decision of the Survey Officer therefore cannot assist the plaintiff in disproving the possession of the defendants and therefore that decision does not in any manner stand in the way of the learned Court below coming to the conclusion on the facts that the defendants have been in possession for at least 28 years. That is a finding of fact; and, as that finding cannot be disturbed, it follows that the conclusion arrived at by the learned Court below, that the suit is barred by limitation, is correct. It is unnecessary, therefore, to go into the other question whether or not the lands in suit have been identified as the lands which formed part of the tenancy set up by the plaintiff. On this question also it may be said that the findings of the learned Court below are findings of fact. The learned Judge has stated that the evidence brought on the record is insufficient to establish the identity of the lands claimed. The findings therefore cannot be disturbed. The appeal is accordingly dismissed with costs.

N.K.

Appeal dismissed.

* A. I. R. 1928 Calcutta 577 Special Bench

RANKIN, C J., C. C. GHOSE AND
BUCKLAND, JJ.

*In the matter of the Dibrugarh Dist.
Club Ltd.*

Income-tax Reference, made by Commissioner of Income-tax, Bengal, Decided on 22nd December 1927.

* *Income-tax Act, S. 10—Company running a Club—All share-holders not members of Club—All members not shareholders—Company making profit out of the Club is not a mere mutual trading society making "quasi profit" by trading with its own members and returning such "profits" to the members and is liable to pay income-tax on full amount of profit.*

A company ran a club out of which they made profit. All the shareholders of the Club were not members and the membership

of the Club was open to shareholders as well as those who were not shareholders.

Held: that though some of the shareholders and some of the members were the same, the Company cannot be called a mere mutual trading society making "quasi profit" by trading with its own members and returning such "profit" to the members, and it would be liable to pay income-tax on the full amount of the profit independently of what it proposed to do with that profit: *New York Life Insurance Co. v. Styles*, (1889) 14 A. C. 381, *Dist.*

[P 578 C 2]

Rankin, C. J.—The assessee in this case is the Dibrugarh District Club, Limited, which is a company limited by shares incorporated under the Companies Act, 1882. I shall refer to it as "the Company" and I shall not refer to it as "the Club" for the reason that by the terms of its regulation the "Club" is reserved for a different body. The main objects of the Company are to maintain and conduct a Club for the benefit of such persons as may become members of that Club. The Club's membership is unlimited in number and there are two classes of members—permanent and temporary. Save for certain persons who are by the rule of the Club entitled to become permanent members without ballot or entrance fee, all permanent members are elected by ballot. The voters at such ballot are the existing body of permanent members of the Club. The arrangement as to temporary members need not be set forth here. The general management of the Club is vested in a Committee of seven members of whom at least five must be shareholders of the Company and the directors of the Company have an ultimate control in matters affecting the financial position of the Company.

It will be seen, therefore, that membership of the Club is quite a different thing from membership of the Company which involves the ownership of a share or shares. Art. 12 of the Company's Articles of Association provides that: no shareholder as such shall be entitled to use the Company's Club premises, or enjoy the accommodation provided by the Company for the use of members of the Club, unless and until he has been duly elected as a member of the Club, or is exempt from ballot in accordance with the rules and regulations contained in Sch. 2, hereto which shall be read as part of these articles.

Conversely the rules of the Club make it equally clear that persons may become members of the Club without being shareholders in the Company: cf. R. 6.

Now it appears that in 1925-26 the Company made a profit of some ten thousand rupees. It did this clearly enough out of the various charges made to members of the Club but it could be wished that the Commissioner of Income-tax had stated the facts as to this matter more explicitly. (Whether the Article of Association and the Club's rules are logical and consistent on this point may be a question; apparently a member's subscription and the amount of his Club bills are payable by him to the Club; how and on what account the Company becomes entitled to get money from the Club or from a member is not clear.)

The following facts are stated by the Commissioner of Income-tax as showing the position in 1926. The number of shareholders in the Company is not given but the number of shares issued was 445 shares. Of these shares 74 are held by persons who are not members of the Club; by how many of such persons is not stated.

The number of members of the Club was apparently 289 of whom 220 were not shareholders of the Company and 69 held shares.

It appears that in recent years the Company has paid dividends out of its profits—8 and 12 per cent has been declared and paid. By Art. 104 it is provided that the dividend shall not exceed 12 per cent on the issued capital, the balance of profit if any being intended for the reserve, depreciation and sinking funds.

In these circumstances the Company claims to escape payment of income-tax upon its profits and puts forward statements such as these that the Club does no business with and makes no profit on dealings with non-members, that the members of the Club and shareholders are the same save in 13 instances and in these instances the shareholders were at one time members or relations of members.

These statements are confused and erroneous. The Company dealt in 1926 with 220 members of the Club who were not shareholders, i. e. with 220 persons not members of the Company. The Company is not a mere mutual trading society making "quasi profit" by trading with its own members and returning such "profits" to the members. The case is wholly different on the material

facts from *New York Life Insurance Co. v. Styles* (1).

I agree with the Commissioner in his view that in this case it is not a matter of importance that some of the shareholders and some of the Club members are the same people. I am further of opinion that in this case the fact of incorporation cannot be neglected and the Company (which is the assessee) is not to be confounded with the individual shareholders. In this case it is found that the assessee has made a profit and it must pay income-tax on the full amount thereof independently of what it proposes to do with that profit.

The assessee must pay the costs of this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

D R / R.K. *Reference answered.*

(1) [1889] 14 A. C. 381.

* A. I. R 1928 Calcutta 579 Special Bench

**RANKIN, C. J., AND C. C. GHOSE AND
BUCKLAND, JJ.**

In the matter of Howrah Amta Light Ry. Co. Ltd.

Income-tax Reference made by the Commissioner of Income-tax, Bengal, Decided on 13th December 1927.

* (a) *Income-tax Act, S. 10—Profits.*

Destination of profits has got nothing to do prima facie with the question of liability to pay income-tax. What may be done with the profits after the tax has been paid upon them is immaterial. [P 590 C 1]

* (b) *Income-tax Act, S. 10, sub-S. (2)—Agreement between District Board and Tramway Co. for free use of road for laying down tramway—Tramway Company agreeing to pay moiety of profits exceeding 4 p. c. upon capital for time being—Payment of half profits is not rent and cannot fall under Cl. (5) of sub-S. (2)—It is not sum paid on account of local rate, nor is it "any expenditure (not being in nature of a capital expenditure) incurred solely for purpose of earning such profits or gains."*

There was an agreement between a District Board and a Tramway Company as to the free use by the latter of as much portion of a certain road as was necessary for laying a tramway. The Company further agreed to pay moiety of surplus profits to the Board if the same exceeded 4 per cent. upon the capital of the Company for the time being.

Held: that the payment of such moiety is not rent so as to fall under "rent paid for the premises" in Cl. (5), sub-S. (2), S. 10 of the

Act, that it is not a "sum paid on account of local rates" and that it is also not "any expenditure (not being in nature of a capital expenditure) incurred solely for the purpose of earning such profits or gains" so as to fall under Cl. (9) of the said sub-section. The payment is therefore not an allowable item of expenditure under S. 10 of the Act. [P 580 C 1]

Rankin, C. J.—In this case the Commissioner of Income-tax has been ordered to state and has stated three points for the opinion of the Court. The first question is—whether the assessment is in order. I do not understand that there is any meaning in particular in that passage, but the assessment is plainly in order. The second and the only point is this:

whether the whole or any part of the amount paid to the District Board is or is not an allowable item of expenditure under S. 10 of the Act.

The third question which apparently he was ordered by a Rule issued by this Court to state is not a question at all. It is as follows:

The legal relation subsisting between your petitioners and the District Board and the character of the payment by your petitioners to the District Board.

The Commissioner of Income-tax has in the end said that what it appears to him that it is not his place to define the legal relationship subsisting between the petitioner company and the District Board. I respectfully agree and I am personally sorry that any Rule was ever issued or made absolute calling upon the Commissioner of Income-tax to state something which was not a question at all. I therefore propose to confine my attention to the second question which I have stated and that question takes its meaning from the circumstance that the Howrah-Amta Light Railway Co. Ltd. was apparently constructed in or about 1889 pursuant to an agreement between the District Board of Howrah and certain other persons called the "promoters" dated the 12th June 1889. By that agreement the Board granted to the Company the free use of as much of the portion of a certain road as was necessary for the purpose of laying thereon a steam tramway of two feet gauge to be worked by the Company. It was agreed by Cl. 3 that the Board would for twenty-one years exempt the Company from the tax on account of road cess if the law and the Government so allowed, or would exact only a nominal tax. The Board further promised, so soon as five

miles of the tram way should have been constructed and declared open to the public, to pay to the Company any sum which might be required to make the net profit of the Company equivalent to Rs. 850 per mile. It is the fifth clause which is the most important :

If and whenever the net profits of the Company in respect of the said tramway from Howrah to Amta should be in excess of 4 per cent. upon the capital for the time being of the Company such surplus profits shall be divided between the Company and the Board in equal moieties.

Now, the second question to which I have referred has reference to the sum which the Tramway Company, The Light Railway, has to pay to the District Board as being one-half of the surplus profits in excess of 4 per cent. upon the capital for the time being. In my judgment this is a typical case in which to apply the well-settled principle that the destination of profits has got nothing to do *prima facie* with the question whether they are liable to income-tax. What may be done with the profits after the tax has been paid upon them is a different matter, but the question is whether the Company in this case is liable to pay income-tax upon its profits or only upon that part of its profits which it does not hand over to the District Board under Cl. 5.

In my opinion, the attempt to bring this case under any of the sub-heads of sub-S. (2), S. 10 of the Act cannot succeed. In view of the fact that for the purpose of income-tax assesses have a right to be dealt with according to their own method of accounting I desire to guard myself from assuming that sub-S. (2), S. 10 is intended as an exhaustive list of deductions which are permissible for the purpose of income-tax. But in the present case an attempt is made to bring it under one or other of the three divisions of sub-S. (2). It is said first of all that this payment under Cl. 5 comes under the head of "rent paid for the premises". In my opinion it is certainly not "rent." Again it is said that it comes under the head "sums paid on account of local rates." In my opinion it is not a sum paid on account of local rates. No. (ix) is :

Any expenditure (not being in nature a capital expenditure) incurred solely for the purpose of earning such profits or gains.

In my judgment the Commissioner of

Income-tax has very properly held that this is not a description which covers the money in question. The payment to the District Board is not an expenditure incurred solely for the purpose of earning the Tramway Company's profits.

However this matter is looked at I am of opinion that the Commissioner of Income-tax has correctly decided the only question which arises which is the second of the three questions stated. In my opinion the answer to that question is in the negative.

I think, in these circumstances, that the assessee must pay the cost of this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree and have nothing to add.

D.R./R.K

Reference answered.

A. I. R. 1928 Calcutta 580

B. B. GHOSE AND CAMMIADÉ, JJ.

Sailabala Dasi—Petitioner — Appellant.

v.

Baidya Nath Rakshit and another—Respondents.

Appeal No 235 of 1926, Decided on 2nd February 1928, from original order of 2nd Addl Dist Judge, Zillah, 24 Parganahs, D/- 6th March 1926.

Succession Act, Ss. 229 and 224—Widow named as executrix along with other executors in husband's will—Executors applying for probate—Widow joined as opposite party disputing will but praying that if will be proved she be granted probate along with others—Court cannot refuse grant to her.

Where there is a statutory law governing a question of grant of probate, it is not open to the Court to refuse grant of probate to a named executor on the ground of his disputing the will or any other ground not authorized by law for the refusal of the grant of probate.

[P 581 C 2]

A widow was named as executrix along with other executors in her husband's will. The executors applied for probate and joined the widow as opposite party, as she did not apply for probate. The widow disputed the will, but prayed that if the will be proved she might be granted the probate along with the others. The lower Court refused to grant her the probate.

Held : that the widow could not be refused grant of probate on the ground that she disputed the will.

[P 581 C 2]

Nasim Ali and Anil Chandra Roy Chowdhury—for Appellant.

Atul Chandra Gupta and Susil Chandra Ghose—for Respondents.

B. B. Ghose, J.—This appeal arises out of a very novel proceeding before the lower Court. The facts are these: The respondents applied for probate of a will executed by one Jatish Chandra Pal. The appellant in this appeal is his widow. The respondents as well as the appellant were named as executors in the will. The appellant did not apply for probate and so she was joined as opposite party in the application for probate made by the respondents. The lady presented a petition alleging that she did not admit the will nor did she admit that the will had been properly executed or attested according to law. She, however, stated in para. 8 of her petition that if the will be proved to have been properly executed and attested she was willing and claimed to get the probate as executrix; and in her prayer she said that the petition for probate might be dismissed after taking evidence, or if the will be proved to have been properly executed and attested probate might be given to her jointly with the respondents. It appears that the question about the due execution of the will was fought out. The lady in her evidence disputed the genuineness of the will. In spite of her evidence it was found that the will was properly executed and probate was granted to the respondents. Thereupon the lady presented a petition in which she said that by an omission she was not granted probate along with the respondents and prayed that probate might be granted to her along with the other named executors. This matter came up for hearing before the learned Judge who dismissed her application mainly upon the ground that the widow had renounced her executorship and in clearer terms than a mere statement that she desired to renounce the executorship. The learned Judge observed that when a will was challenged by a person and entirely repudiated by him, he could not turn round and say that he was entitled to probate. He observed that the principle was founded on equity that one cannot approbate and reprobate at the same time. The learned Judge also refers to the doctrine of election. At the end the learned Judge stated that by challenging the will as forged the widow repudiated the will and by her conduct renounced her right to probate. Upon that finding he dismissed the application.

She has appealed from that order and it is contended on her behalf that the order of the learned Judge is not warranted by law and that she is entitled to probate. Reference was made in the course of the agreement to S. 230, Succession Act 1925, where it is stated that renunciation may be made only in the presence of the Judge or by writing signed by the person renouncing and it was urged that nothing like that having been done, the widow, although she contested the will, was entitled to ask for probate. The question is free from authority and neither the appellant nor the respondents could point out any authority with reference to this question. The matter of probate is governed by statute and we must look to the statute in order to find whether a particular executor is entitled to grant of probate or not according to the provisions of the law.

It is contended on behalf of the respondents that S. 230 does not apply to the present case. That section must be read along with S. 229. S. 229 provides that letters of administration cannot be granted unless the executor has renounced his executorship and without citation being issued calling upon the executor either to accept or to renounce his executorship, and S. 230 refers to the manner of renunciation in such a case. That argument seems to me to be sound. Leaving the question of applicability of S. 230 of the Act aside there does not appear to be any other provision in the Act which precludes an executor from asking for probate at any time. Under S. 224, Succession Act, where several executors are appointed probate may be granted to them all simultaneously or at different times. Where there is a statutory law governing the question of grant of probate to executors, I do not think that it is open to us to apply any general principles of law and to refuse grant of probate to a named executor on the ground of his disputing the will or any other ground for which the law does not authorize the Court to refuse grant of probate. In this case, therefore, in our judgment we do not think that it would be right to refuse grant of probate to the appellant on the ground that she actually gave evidence against the due execution of the will. To do so might seriously affect her right to any legacy under the will.

We, therefore, set aside the order of the learned Judge and direct that probate be granted to the appellant along with the respondents who have already been granted probate.

The appellant is entitled to her costs in this Court. We assess the hearing fee at five gold mohurs.

Cammiade, J.—I agree.

D.R./R.K.

Appeal allowed.

A 1. R. 1928 Calcutta 582

MALLIK AND GARLICK, JJ.

Monmotho Nath and others—Defendants 1 to 3—Appellants.

v.

Bepin Behary and others—Plaintiffs and Defendants—Respondents.

Appeal No. 1431 of 1925, Decided on 22nd May 1928, from appellate decree of Addl. Dist. Judge., Howrah, D/- 12th May 1925.

Limitation Act, Art. 144—Defendant in possession of plaintiff's property from 1897 for management—Defendant asserting hostile title in 1915—Plaintiff suing in 1922 for recovery of possession—Plaintiff's suit was held not time barred as his title was not extinguished by the defendant's adverse acts.

Plaintiff entrusted for management certain property to defendant who was in possession from 1897. Plaintiff brought in 1922 a suit for recovery of possession of that property. Defendant asserted that he had got adverse title to the property. But it was proved that defendant had been all along in permissive possession and only in 1915 he began to do acts whereby in a way he asserted a hostile title to the plaintiff.

Held: that the suit was not barred by limitation as the title of the plaintiff was not extinguished by adverse possession of defendant. The article applicable in the case was 144, and not 142 or 143. [P 583 C 2]

Nares Chandra Gupta and Urukramdas Chakravarti—for Appellants.

S. C. Basak, Kshitish Chandra Chakravarti and Panchanon Ghosal—for Respondents.

Judgment—This appeal arises out of a suit for recovery of possession of some land on a declaration of the plaintiff's title thereto. The allegations on which the plaintiff brought the suit were briefly these: The land belonged to one Preonath Lahiri, the father of defendants 1 to 3 and defendants 17 and 18. In the year 1300 B. S. Preonath sold the land to one Promothonath Ghose. Promotho

possessed the land for a short period after which he sold the same to the plaintiff, in the year 1302 B. S. After the purchase the land was for some time under the direct management of the plaintiff but as the plaintiff was an inhabitant of Calcutta it was not very convenient for him to look after the property and so he entrusted the management of the property to Preonath who was no other than his sister's husband. After Preonath's death his sons were placed in charge of the property and they continued managing the property for a pretty long term of years. Preonath's sons subsequently colluded with the landlord's gomasta and caused the rent of the holding to fall into arrears. The holding was sold in execution of a rent decree and purchased by Preonath's sons in the name of their servant Sibu Santra. The plaintiff, when he came to hear of the sale, applied for setting it aside and succeeded in doing so. Thereafter, he brought a suit for rent against defendants 4 to 16 who were the tenants on the land in suit and in this suit the tenants-defendants denied the plaintiff's right, with the result that the plaintiff had to withdraw the suit.

On these allegations, the plaintiff brought a suit for a declaration of his right to the disputed land and for recovery of possession against the sons of Preonath and for khas possession as against the tenant and defendants on the ground that they had forfeited their rights as tenants by their denial of the plaintiff's title. The substantial defence that was set up in the case was that the plaintiff was nothing but benamdar of Preonath and that it was Preonath and not the plaintiff who was the real owner of the property in dispute. The Court of first instance dismissed the plaintiff's suit. On appeal the lower appellate Court held that the plaintiff was not the benamdar of Preonath, but was the real purchaser and owner of the property in dispute; and on that finding the learned Additional District Judge gave a decree to the plaintiff as against the sons of Preonath but refused the plaintiff's prayer for khas possession as against the tenants-defendants on the ground that nothing had been shown to substantiate the allegation that the tenants-defendants had forfeited their tenancy in any way.

Defendants 1 to 3 have appealed to this Court.

The learned advocate for the appellants first of all contended that the lower appellate Court was wrong in law when it came to the finding that the plaintiff was the real owner and not the benamdar of Preonath. We do not think there is much substance in this contention. The plaintiff was the person in whose name the property was purchased and if the defendants wanted to establish that plaintiff was nothing but a benamdar the onus to substantiate that point was on them. The learned Additional District Judge has fully discussed all the circumstances that were present in the case apparently in support of the defence case on the point that after a full discussion of those circumstances he came to the conclusion that those circumstances were of no avail to the defendants. Over and above that, the learned Additional District Judge has found as a fact that it was from the plaintiff and not from Preonath that the purchase money came. In these circumstances, we do not think it can reasonably be contended for a moment that there is any error of law when the learned Additional District Judge came to the finding that the plaintiff was the real purchaser and the real owner of the property and not the benamdar of Preonath as the defence wanted to establish.

The learned advocate next contended that even if it be accepted as a fact that the plaintiff is the real owner of the property, the plaintiff, before he could succeed, was bound to show that he was in possession of the property within twelve years before the institution of the suit. But the finding of the lower appellate Court is that if the defendants were in possession of the property, it was nothing but a permissive possession. The learned advocate took exception to the finding of the lower appellate Court as regards permissive possession and he contended that the finding of fact arrived at by the lower appellate Court was not sufficient to make out a case of permissive possession. In this connexion the learned advocate drew our attention to the observation of the learned Additional District Judge which runs as follows :

It is clear from the facts and circumstances of the case that the plaintiff, when he left his

direct connexion with the property in the year 1903 had no idea to possess it or even to claim it and that therefore he allowed the defendants and their father to possess the same as he expected that he would get back his money or would be given some profit at least.

But towards the concluding portion of the judgment the learned Additional District Judge has clearly found also that the plaintiff never intended to abandon his right or to create any absolute right in the defendants. In these circumstances we are unable to agree with the learned advocate in the view that the finding of fact arrived at by the learned Additional District Judge was not sufficient to make out a case of permissive possession.

The third point that was argued before us was in connexion with the question of limitation. It was said on behalf of the appellants that Art. 142 or 143, Sch. 1, Lim. Act, is the article that would be applicable to the present case. Art. 142 cannot, in our opinion, apply to the present case, because the present case is not of dispossession or discontinuance of possession. The defendants no doubt were in possession of the property from about 1903 B. S., but that possession was, as found by the lower appellate Court, a permissive possession. Art. 143 either, cannot apply to the present case. The plaintiff brought the suit not on the allegation of any forfeiture or breach of condition, but on the allegation that he had entrusted the management of the property to the defendants and that from about 1915 the defendants began doing acts whereby in a way they asserted a hostile title to the plaintiff. These being the circumstances of the case, the case, in our opinion, would be governed not by Art. 142 or 143, but by Art. 144. Lim. Act. The plaintiff, as the lower appellate Court has found, is the real owner of the property and if the defendants wanted to defeat his title they could successfully do so only by establishing that the title of the plaintiff had been extinguished by the defendants' adverse possession. It is true that the defendants had been in possession of the property from 1897 and the suit was instituted in the year 1922. But the learned Additional District Judge has found that it was only in the year 1915 that there was something like an assertion by the defendants of a hostile title. If any hostile title was as-

serted only in the year 1915 the title of the plaintiff could not possibly be extinguished by adverse possession of the defendants, inasmuch as the suit, as observed before, was instituted in the year 1922.

All the points that were taken before us, therefore fail. The appeal is accordingly dismissed with costs.

N.K.

Appeal dismissed.

A. I. R 1928 Calcutta 584

CUMING AND MUKERJI, JJ.

Abdul Rahim and others—Plaintiffs—Appellants.

v.

Tufan Gazi and others—Defendants—Respondents.

Appeal No. 543 of 1925, Decided on 25th January 1928, from appellate decree of 3rd Sub-Judge, Comilla, D/- 24th November 1924.

(a) *Mahomedan law—Pre-emption—Invocation of witnesses is a necessary formality for talab-i-ishtishhad—If this is done in first demand, no second demand is necessary.*

The invocation of witnesses is a necessary formality for the talab-i-ishtishhad; if that is done at the time of making the talab-i-mowasibat, in the presence of the seller or purchaser or on the premises there is no necessity for the second demand: 10 Cal. 1008, *Foll.* 17 Cal. 543 (F. B.), *Ref.* [P 585 C 1]

(b) *Mahomedan Law—Pre-emption—Invocation of witnesses—No prescribed form is necessary but the fact that first demand was made must be indicated.*

No particular form of words is necessary for the invocation of witnesses, but claimant must say in presence of witnesses to the following effect: "Such a person bought such a property (sufficiently indicating same) of which I am the Shufi, I have already claimed my right of Shufa and now again claim it, be, therefore, witness thereof." Even where the two demands are combined, the last word or words to that effect must be said: 4 B. L. R. A. C. 171 and *∞ B.L.R.* 455, *Rel. on.* [P 585 C 2]

(c) *Specific Relief Act, S. 17—Whole contract not enforceable for plaintiffs' conduct—Specific performance of part should be refused.*

Where the plaintiff, by his conduct, has made it impossible for the Court to give effect to the contract in its entirety, the Court will not allow specific performance of a part: *Merchants Trading Co. v. Banner*, 12 Eq. 18, *Foll.*

[P 586 C 1]

Upendra Kumar Roy and Hiran Kumar Roy—for Appellants.

Sasadhar Roy (Sr.) and Biraj Moñan Majumdar—for Respondents.

Mukerji, J.—The plaintiffs are the appellants in this appeal. They instituted the suit which has given rise to this appeal for recovery of possession on declaration of their right of pre-emption in respect of a 4 annas share in a tank with its banks. The entire tank with its banks at one time belonged to the plaintiffs who in Shraavan 1325 sold a 6 annas share of the same to defendant 1. There was a condition in the sale-deed, which, translated literally, runs :

Be it mentioned that if any necessity arises for you (i. e., vendees) to sell the tank and its banks, you shall not be entitled to sell the same anywhere else: on receipt of proper price you will give the same to us (i. e., the vendors); and also if any necessity arises for us to sell them instead of selling them elsewhere we shall sell them to you on receiving proper price.

The plaintiffs' case was that in violation of this stipulation defendant 1 sold a 4 annas out of the share purchased by him to defendants 2 to 6, and coming to know of it they made the necessary demands, namely, the talab-i-mowasibat and the talab-i-ishtishhad and then instituted the suit.

Defendants 3, 4 and 5 contested the suit. Their allegations were that defendant 6 was a minor and was not properly represented, that there was no contract for re-sale such as was alleged on behalf of the plaintiff, that the defendants were bona fide purchasers and that the formalities requisite for the demands for pre-emption were not observed.

The minority of defendant 6 was proved and he not being properly represented the Munsif, holding that the requisite demands had been made by the plaintiffs, gave them a decree for 5/6ths share in the property, namely, the 4 annas share of the tank and its banks. He dismissed the suit as against defendant 6. The Subordinate Judge on appeal has dismissed the entire suit.

The plaintiff's first contention relates to the sufficiency of the demands. The position, so far as this matter is concerned, is this : The Subordinate Judge found the talab-i-ishtishhad was invalid inasmuch as it was not proved that when this demand was made there was a reference to the talab-i-mowasibat, and that under the law an express reference to the same is necessary. As regards the talab-i-mowasibat he was of opinion that of the three witnesses, 2, 3 and 4, who were called on behalf of the plaintiff on

this point, the first did not really prove it and the last one could not be relied on and that the second witness proved that one of the plaintiffs only offered Rs. 100; and did nothing else. An examination of the evidence of this witness, however, reveals a good deal more than what the Subordinate Judge has referred to in this way. He seems to have missed the point which is apparent on the face of the evidence of this witness, that the demand was made on the banks of the tank and immediately as the plaintiffs came to know of the fact that defendant 1 had sold to the other defendants. On this point the argument that has been advanced on behalf of the appellants is that in the circumstances disclosed there was no necessity for a second demand, and reliance was placed on their behalf in this respect on the following passage in Mr. Ameer Ali's Muhammadan Law, Edn. 4, Vol. 2 p. 727:

But the talab-i-ishtishhad may be combined with the talab-i-mowasibat, e. g., if at the time of the talab-i-mowasibat, the pre-emptor had the opportunity of invoking witnesses in the presence of the seller or the purchaser or on the premises to attest the immediate demand, it would suffice for both demands, and there would be no necessity for the second.

This proposition has received judicial recognition in the case of *Nundo Pershad Thakur v. Gopal Thakur* (1), in which Garth, C. J., Beverley, J., concurring, quoted in support of it Futawa Alamgiri, (V 268) and said:

The talab-i-ishtishhad is only necessary if at the time of making the talab-i-mowasibat or immediate demand there was no opportunity of invoking witnesses; as for instance, when the pre-emptor, at the time of the hearing of the sale was absent from the seller, the purchaser and the premises. But if he heard it in the presence of any of these and had called on witnesses to attest the immediate demand it would suffice for both demands, and there would be no necessity for the other.

This decision was overruled, but on a different point by a Full Bench of this Court in the case of *Rujjub Ali v. Chundi Churn* (2). In that case the question referred to the Full Bench was when the person claiming a right of pre-emption has performed the talab-i-mowasibat in the presence of witnesses, but not in the presence either of the seller or of the purchaser, or on the premises, is it necessary, when performing the talab-i-ishtishhad that he should declare that he has made the talab-i-mowasibat, and at the same time should invoke witnesses to attest it?

This question was answered in the affirmative, but the correctness of the proposition referred to above does not appear to have been in any way shaken. Amongst the formalities necessary for the talab-i-ishtishhad, however, is that of invocation of witnesses. If this has been done in the first demand, no second demand, according to the proposition above mentioned would be necessary. The right is *strictissimi juris* and failure to perform the demands in accordance with the requirements of the Mahomedan law would defeat the plaintiff's claim. This invoking of witnesses, as far as may be gathered from the authorities, is no mere matter of form; it imparts to the demand a solemnity clothed in which the demand becomes not a casual one but on the other hand assumes the nature of a serious transaction. No particular form of words is necessary for the invocation of witnesses, but the claimant in the presence of witnesses must say to the following effect:

Such a person bought such a property (sufficiently indicating the same) of which I am the shafi; I have already claimed my right of shufa and now again claim it, be, therefore, witness thereof: Ameer Ali on Muhomedan law, Edn. 4 Vol. 2, p. 725.

The last word or words to that effect must be said even where the two demands are combined into one. The importance of this invocation as an essential part of the ceremony has been impliedly recognized in several cases amongst which reference may be made to *Jadu Singh v. Rajkumar* (3), *Ramdular Misser v. Jhumack Lal Misser* (4). This part of the ceremony being admittedly absent even in respect of the demand that has been proved in plaintiffs' favour by their witness 3, the plaintiffs cannot possibly succeed under the Mahomedan law on which they rely.

The second contention urged on behalf of the appellants is that they are entitled to succeed on the basis of the contract embodied in the sale-deed, to which reference has already been made. There was an issue framed by the trial Court which was to the effect as to whether there was such a contract with the defendant 1 to re-sell and whether defendants 2 to 5 were aware of it. This issue was decided in plaintiffs' favour by the trial Court, but there has been no

(1) [1884] 10 Cal. 1008.

(2) [1890] 17 Cal. 543 (F. B.).

(3) 4 B. L. R. A. C. 171=13 W. R. 177.

(4) 8 B. L. R. 455=17 W. R. 265.

reference to it in the judgment of the lower appellate Court. It would have been necessary for us to send the case back to the lower appellate Court for the determination of the facts in connexion with that issue and also to express our opinion as regards the validity of this contract. This has been rendered unnecessary by reason of the failure of the plaintiffs to have defendant 6 properly represented in the suit. I am not pressed by the appellants' arguments which have been directed to re open the decree of the Munsif dismissing the suit as against the said defendant. The result is that even if the plaintiffs succeed on the footing of the contract they cannot, in any event, get a decree for the one-sixth share which belongs to that defendant. Now in a suit for specific performance on a contract of this kind the principle on which the Court will proceed is that a contract for the sale of property in one lot will generally be considered indivisible, and the Court will not, as a general rule, compel specific performance of the contract, unless it can execute the whole contract. Or as Lord Romilly, M. R. expressed it :

This Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all; *Merchants Trading Co. v. Banner* (5).

It is true that there are exceptions to this rule which may be justly made in view of the circumstances of any particular case. Even in cases where the contract is plain and certain in its terms and obligatory on both parties, which cannot readily be said of the contract in the present case, the right to specific execution is not absolute and its enforcement must rest on the sound discretion of the Court, a judicial discretion, to be exercised according to the established principles of equity. In the present case the plaintiffs by their conduct have made it impossible for the Court to give effect to the contract in its entirety. The practical result of it is that defendant 6, a stranger, will have his title to one-sixth share and that both cannot be interfered with. He certainly, and the other defendants through or under him possibly, will always be able to defeat the very object which the law of pre-emption aims at. What reason is there then to give preference to the plaintiffs

over the defendants in the matter of the share in suit? I am accordingly of opinion after giving my best consideration to the case that the second contention of the appellant should not be entertained.

The result, in my opinion, is that this appeal should be dismissed with costs.

Cuming, J.—I agree. The appeal is dismissed with costs.

D.R./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 586

CAMMIADE AND S. K. GHOSE, JJ.

Dudu Bhuiya—Plaintiff—Appellant.
v.

Duman Bhuiya and another—Defendants—Respondents.

Appeal No. 364 of 1926, Decided on 21st June 1928, from appellate decree of 2nd Dist. Judge, Dacca, D/- 12th September 1925.

Bengal Tenancy Act, Sch. 3, Art. 3—If at the time of actual taking possession the person so taking possession occupies position of landlord the article applies—Whether he occupied that position when he purchased interest of which he dispossessed the tenant is immaterial.

All that Art. 3 says is that the special period of limitation of two years is laid down for suits for recovery of possession by a raiyat or an under-raiyat where the dispossessor is a landlord, and that the date from which the limitation runs is the date of dispossession. If at the time of the actual taking of possession, the person so taking possession occupied the position of landlord, the article applies. It is perfectly immaterial whether or not that person occupied that position at the time he purchased or purported to purchase the interest of which he dispossessed the tenant.

[P 586 C 2]

Jatish Chandra Guha and Suresh Chandra Talukdar—for Appellant.

Sarat Chandra Basak and Charu Chandra Choudhury—for Respondents.

Judgment.—This appeal is by the plaintiff against the dismissal by the Courts below of his suit, which was for declaration of his raiyati interest in five plots of land and for recovery of possession. The plaintiff was a cosharer in a certain taluk and in addition to this he acquired the raiyati interest in the five plots of land in suit. One Peari Poddar sued the plaintiff for money, and obtained a decree, in execution of which he brought the plaintiff's taluki interest to sale. That interest was sold in execution of the decree and was purchased by Peari Poddar. Defendant 1 is a trans-

ferree from Peari Poddar. Possession was taken some time in the year 1917. The Court of first instance decreed the plaintiff's suit; but the learned Court of appeal below dismissed the suit, holding that it was barred by the special rule of limitation laid down in Art. 3, Sch. 3, Ben. Ten. Act. In appeal it is contended that the rule of limitation applied by the learned Additional Judge is not applicable;...because it is contended that the person who dispossessed the plaintiffs had not occupied the position of landlord, both at the time of dispossession and at the time of his purchase of the interest of the plaintiff.

Reference has been made to the sale certificate which describes the property sold as a share in the taluk and as being in the khas possession of the judgment-debtor. From this it is contended that Peari Poddar purported to purchase not merely the landlord's interest but also the right to khas possession and that, therefore, the article in the schedule of the Bengal Tenancy Act does not apply. There is no force in the argument. All that the article says is that the special period of limitation of two years is laid down for suits for recovery of possession by a raiyat or an under-raiyat where the disposessor is a landlord and that the date from which the limitation runs is the date of dispossession. The only thing with which we are concerned is whether or not at the time of the actual taking of possession, the person so taking possession occupied the position of landlord. If he did so, the article applies. It is perfectly immaterial whether or not that person occupied that position at the time he purchased or purported to purchase the interest of which he dispossessed the tenant.

The suit has been rightly decided and the appeal fails and is dismissed with costs.

D.R./R K.

Appeal dismissed.

A. I. R. 1928 Calcutta 587

Special Bench

RANKIN, C. J., AND C. C. GHOSE AND
BUCKLAND, JJ.

In the matter of Harmukhrai Dulichand.

Income-tax Reference made by the Commissioner of Income-tax, Bengal, Decided on 26th March 1928.

(a) *Income-tax Act, Ss. 22 (4) and 23 (2)—Notice.*

The notices under Ss. 22 (4) and S. 23 (2) may be comprised in one document without committing any illegality. *A. I. R. 1928 All. 288 Rel. on.* [P588 C 2]

(b) *Income-tax Act (1922) Ss. 23 (4) & 22 (4)—Return made by assessee—Notice under Ss. 23 (2) and 22 (4) served—Notice under S. 23 (2) complied with but not under S. 22 (4)—Assessment can be made under S. 23 (4).*

Where an assessee has made a return in compliance with a notice under S. 22 (2) and thereafter a notice has been served upon him under S. 23 (2) and also a notice under S. 22 (4) and the assessee has complied with the notice under S. 23 (2) by producing the evidence upon which he relies but has failed to comply with the notice under S. 22 (4) the Income-tax Officer is entitled to make an assessment under S. 23 (4) for failure to comply with notice under S. 22 (4): *A. I. R. 1927 Pat. 390, Diss. A. I. R. 1926 Lah. 161, Expl.: A. I. R. 1925 Cal 890, Foll.* [P 590 C 1]

Rankin, C. J.—In this case the Commissioner of Income-tax has referred two points of law to this Court for its opinion under S. 66, Income-tax Act (11 of 1922). Before setting out the form of the question it may be as well to premise that the assessees in this case are a firm called Messrs. Harmukhrai Dulichand.

It appears that on 4th May 1926, an ordinary notice was served upon them under Cl. (2), S. 22, requiring them to render a return of their income for the purpose of income-tax. It appears that the year by which this firm goes in maintaining its books of account is the Dewali year and the year of assessment was 1982-83, the previous year or the year of accounting being, therefore, 1981-82. On 22nd July 1926 a notice under S. 22 (4) was served upon them asking that they should produce their books of account for the Dewali year 1980-81 and 1981-82 and on 6th August 1926, the assessee submitted a return. The return which they submitted consists of the words and figures "Loss Rs. 26,000" under the heading "Business." A notice was then issued upon them being a combined notice purporting to be under Cl. (2), S. 23 and also Cl. (4), S. 22. That required them to produce the accounts for 1980-81 and 1981-82 and also gave them an opportunity to call any other evidence on which they might rely in support of their return. On the date fixed by the notice the books of 1981-82 were examined and

various adjournments were taken for the production of the books of 1980-81. There was a hearing on appointment on 26th August 1926, on 10th January 1927 and on 16th February 1927, and the final order of assessment was not made till the 26th February 1927. Although, therefore, these books for 1980-81 were called for, at all events, on 6th August 1926, they were not produced by the following February at the time when the assessment was made. The income-tax authorities have held that ample time was given for their production and that their non-production was wilful, as indeed it is reasonably obvious from the dates and also from the inconsistent stories told by these assesseees to the effect that their books for the year in question were sent to Bikaner because of the Calcutta riots and also because of settling some disputes. The finding of fact is that these accounts are still deliberately withheld. There can be no question that for the purpose of finding what was the profit or loss for the year 1981-82 it is necessary to get the books of the year previous to that because on any question of loss caused by fall in the value of stock it is most necessary to see on what basis the valuation has been taken. The result, therefore, was that the assesseees had deliberately withheld the best evidence—indeed the only evidence—that would enable one to test the accuracy of the return.

It is in these circumstances that the assesseees, having failed before the income-tax authorities requested that two points of law should be referred to this High Court by the Commissioner of Income-tax. The first question is:

Was the notice under S. 22 (4) which was issued in the case so defective as to be legally null and void?

The second question is this:

If an assessee has made a return in compliance with a notice under S. 22 (2) and thereafter a notice has been served upon him under S. 23 (2) and also a notice under S. 22 (4), and the assessee has complied with the terms of the notice under S. 23 (2) by producing the evidence upon which he relies, but has failed to comply with the notice under S. 22 (4) is the Income-tax Officer entitled to make an assessment under S. 23 (4), for failure to comply with the notice under S. 22 (4), or is he bound to proceed under S. 23 (3)?

In my opinion both of these questions must be answered against the assesseees.

The first question is whether there is anything illegal in the issue of a notice under S. 23 (2) and S. 22 (4). I am of opinion that there is no reason why these two notices should not be comprised in one document. The position is that the assessee is given one date on which he is first of all to produce certain accounts or documents required by the Income-tax Officer and he is also told that on that same date he will get an opportunity of producing any further evidence upon which he relies. I can see no objection at all to that procedure and I observe that in the case cited to us from the Allahabad High Court decided on 4th January of this year [*Chandra Sen Jaini, In the matter of* (1)] a Division Bench of that Court was of the same opinion. In my judgment there is no difficulty upon the answer to the first question.

The second question depends upon the construction to be put upon Ss. 22 and 23 of the Income-tax Act. By S. 22 provision is made to the effect, in the case of companies, that the principal officer shall before 15th June in each year furnish a return of income without being asked. Provision is also made, in the case of other persons whose total income is, in the Income-tax Officer's opinion, such as to render such persons liable to income-tax, that the Income-tax Officer may serve a notice requiring a return to be made. The concluding paragraph of that section then provides that the Income-tax Officer may serve on the principal officer of any Company or on any person upon whom a notice has been served under sub-S. (2) a notice requiring him, on a date, to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require provided that he shall not require the production of any accounts relating to a period more than three years prior to the previous year. That provision which enables the Income-tax Officer to require the production of accounts or documents is in the case of persons other than companies a power given on condition that a notice has been served requiring the making of a return. There is no sign in that clause of any further condition.

(1) A. I. R. 1928 All. 288.

When we come to the next section we find that the section begins by dealing with the case of a return as to which the Income-tax Officer is satisfied. In that case he assesses on the basis of the return. It then goes on to deal with a case where the Income-tax Officer has a reason to believe that a return made is incorrect or incomplete, and the language of the statute imposes upon the Income-tax Officer the duty of serving upon the assessee a notice requiring him either to attend at the Income-tax Officer's office or to produce any evidence on which such person may rely in support of the return. The meaning of that clause is that when a return is made the Income-tax Officer shall not reject it and take some other basis as the basis of assessment without giving the assessee an opportunity to appear before him and give any evidence which he may desire to give. The power under Cl. (4), S. 22, is power to the Income-tax Officer which has reference to accounts and documents and to no other form of evidence. The right under S. 23 (2) is a right to call any evidence that the assessee may desire to call.

The last clause of S. 23 deals with three different cases and for that reason perhaps the section is not so clearly drafted as it might be. It begins by taking the case of an assessee who makes no return at all and it says that the Income-tax Officer shall assess him to the best of his judgment. It then deals with the case of a person who has been ordered to produce accounts or documents and has failed to comply with the requirement. His is the same fate; the Income-tax Officer makes the assessment to the best of his judgment. It then deals with the third case—the case of a person who having made a return fails to comply with all the terms of a notice issued under sub-S. (2) of S. 23. Upon that the contentions that are raised are, first, that no notice to produce accounts or documents can validly issue after the return is filed; and secondly, that if in fact a notice is issued under S. 23 (2) it is impossible for the assessee to be penalized for the mere non-production of accounts; in other words, the second case contemplated by Cl. (4), S. 23 is no longer a case of which the assessee can be deemed to be an instance.

In my judgment, the exposition which the Commissioner of Income-tax has given is correct. He points out that the sub-section contemplates three distinct cases and, to my mind, it is abundantly shown by him that there is no warrant in the statute for saying that after a return is made the power given by Cl. (4), S. 22 is gone. The only ground which I have discovered for that opinion is the insertion of the harmless words "having made a return" into Cl. (4), S. 23. It seems paradoxical and improbable that the making of a return should put an end to the power of the Income-tax Officer to require the production of accounts. One would naturally suppose that the Income-tax Officer having seen a return may in some cases be in a better position than he would otherwise have been to say whether he thinks it necessary to inspect books of accounts or other documents or not. But apart from that question it is at least extraordinary that a limit upon the power given by Cl. (4), S. 22 should be made in the dubious and inferential manner which is suggested, namely, by the words "having made a return" being inserted in Cl. (4), S. 23. In my judgment, there is no basis either as a matter of business or as a matter of construction for the opinion that the moment a return is filed the right of the Income-tax Officer to require the production of accounts under S. 22 (4) is gone.

If that be so the next question is whether it can be contended that because in fact a notice under Cl. (2), S. 23 was served upon this firm the power provided by Cl. (4) of that section to meet a case of withholding of accounts can no longer be exercised. In my judgment there is no ground for that contention either. The Income-tax Officer in this case had asked the assessee first of all, to produce their books; secondly to attend upon him; and thirdly, at the same time, to produce any other evidence they like. If the assessee is not in default, if they produce their books and attend, then, whether they produce other evidence or not, it will no doubt be for the Income-tax Officer to proceed against the assessee under sub-S. (3) of that section. But if when the date comes it turns out that the assessee is withholding their books of account but want to produce some other evidence

it seems to me reasonably plain that the Income-tax Officer may well say :

You are in default for withholding your accounts ; you will be dealt with on that basis. In the absence of available accounts neither argument nor other evidence is anything but a waste of time. It is *mera palpatis*. You will be treated as defaulters and in no other way.

In my judgment that is what the statute intends. The statute intends that persons who deliberately make default in producing their accounts when asked to do so under Cl. (4), S. 22, shall be treated as defaulters and that the Income-tax Officer shall make the assessment to the best of his judgment.

It has been said that the Income-tax Officer must proceed in a judicial manner and S. 37 has been mentioned in this connexion. Fundamentally no doubt the Income-tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts ; though I would point out that the Income-tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party and Judge in his own case. However true it be and for whatever purpose it be true that the assessment to income-tax is to be done in a judicial manner, the first thing which must be laid down as a condition before a person can complain of any departure from this principle is this : that he too must produce the evidence which the law requires him to produce. It is idle and absurd for a person who has books of account and deliberately withholds them to complain of not being treated in a judicial manner. The judicial manner is a manner which proceeds upon evidence, and the basis of the statute is to see that available evidence is produced. It is then, and only then, that the assessment is to be made upon a judicial consideration of the evidence. Otherwise it is to be made "to the best of his judgment" and *brevi manu*.

In my judgment, there is no foundation for the assessee's contention on either of the points that have been referred to us. It seems to me, therefore, that the answer to these two questions should be as I have indicated, to the first "No" to the second "Yes."

It only remains to mention certain cases which have been drawn to our attention. One is a decision of the High Court of Patna which is said to be reported in the Eighth Volume of the

*Patna Law Times** and a report from the *All India Reporter* has been allowed to be used. In that case it would appear that the learned Judges were not satisfied that a notice under S. 22 (4) has been issued at all. They seem to think on the basis of the words "having made a return" under S. 23 (4) that the power to call for books and documents is limited to the period prior to the filing of the return. But they say that even if we assume that notice under S. 22 (4) can be issued after a return has been filed and notice not having been issued in this case summary assessment was illegal.

It appears to me, therefore, that the view that the right to issue a notice under Cl. (4), S. 22, comes to an end on the making of a return was not essential to the decision in that case ; but, in any event, I disagree with that opinion. It seems to me to have no merits whether as a matter of business or of construction of the statute.

The next case to which we were referred was the case of *Duni Chand Dhani Ram v. Commissioner of Income-tax* (2) decided by Mr. Justice LeRosaignol and Mr. Justice Martineau. That was a case where, it seems to me, that no law was laid down which is not in harmony with the view which I have endeavoured to express. That was a case where an assessee had made a return of his income. He was called upon to produce his books of account and he did produce his books of account. That being so he was in the position of a man who must under Cl. (2), S. 23, be given a proper opportunity to support his own return by such evidence as he desires and whether his return was supported by further evidence or not the Commissioner was bound to assess him not on the footing that he was a defaulter but on the footing that his return ought to be accepted save in so far as there might be good reasons for criticizing it. The learned Judges in that case, so far as I can see, have laid down no law to the effect that a person who is in default by wilful failure to produce accounts is not within the summary power given by Cl. (4), S. 23.

Another case to which we have been referred is a decision of Mr. Justice

[* *Vide Brij Raj Rang Lal v. Commissioner of Income-tax*, A. I. R. 1927 Pat. 390=8 P. L. T. 686.]

(2) A. I. R. 1926 Lah. 161=7 Lah. 201.

Greaves and Mr. Justice Mukerji of this Court in the case of *Nirmal Kumar Singh v. The Secretary of State* (3). There, again, we have a case of an assessee who made a return and produced his accounts. At the time when he produced his accounts various matters were gone into between his gomasta and the Income-tax Officer. Without giving a proper notice requiring him to produce such evidence as he might desire in support of his return the Income-tax Officer assessed him upon a basis inconsistent with his return and in these circumstances one learned Judge thought that the statute had been substantially complied with and the other learned Judge (Mr. Justice Mukerji) took the view that the informality was one which had not been waived and could not safely be ignored. In the course of that judgment there is not only nothing to the effect that the power to call for accounts must be exercised before the making of the return, but that judgment supports what the Income-tax Officer has done in this case.

Two cases have been drawn to our attention on the part of the Advocate-General. One contains some expressions in a judgment of my own in an Income-tax Reference heard on the 18th January 1927; in the matter of *Ram Kissen Das Bagri* and the other is a judgment of Mr. Justice Walsh and Mr. Justice Banerji of the Allahabad High Court in *Chandra Sen Jaini In the matter of* (1). There, too, the dictum in the Patna case to which I have referred was dissented from and there, too, it was held that a combined notice under S. 22 (4) and S. 23 (2) was a proper notice.

In these circumstances it appears to me that the questions put to us must be answered against the assessee and that the assessee must pay the costs of this Reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

D B./R.K.

Reference answered.

A. I. R. 1928 Calcutta 591

MITTER, J.

Prodip Singh Jamadar and another—
Defendants—Petitioners.

v.

Ramani Mohan Sen—Plaintiff—Opposite Party

Civil Rule No. 280 of 1928, Decided on 22nd June 1928, from decree of Sm. C. C. 2nd Sub-Judge, Mymensingh.

(a) *Bengal Municipal Act* (3 of 1884), S. 85 (a)—*Defendants holding ijara of a market place within Municipality and issuing licenses to others to sell wares on the land—Ijaradars are the persons who really occupy holding within Municipality.*

The petitioners were ijaradars of a certain place, described as a cattle market, within the Municipality and they made their collection of rent and carried on their business on the holding in respect of which the assessment had been made although they resided elsewhere. On that holding a cattle market was held on *hat* days, and the holding remained vacant on other days. The persons who sold their wares in the market were sort of licensees under petitioners. Municipality brought a suit against the petitioners to recover tax under S. 85 (a). It was contended that this personal tax could not be levied as they were not occupiers of the holding.

Held: that the ijaradars were the persons who really occupied the holding within the Municipality. [P 592 C 1]

(b) *Bengal Municipal Act* (3 of 1884), S. 85 Cl. (a)—*Holding claimed jointly—Tax is to be assessed on each separately according to circumstances and property of each within Municipality.*

Whether the holding is claimed jointly by two or more persons Cl. (a) suggests that a tax is to be assessed on each separately according to the circumstances and property of each within the Municipality: *A. I. R. 1922 Cal. 46, Foll.*

[P 592 C 1]

Birendra Kumar De—for Petitioners.

Kali Kinkar Chakravarti and Probodh Nath Sanyal—for Opposite Party.

Judgment.—This Rule was issued on the Chairman of the Muktagacha Municipality to show cause why the decree of the Small Cause Court of the Second Subordinate Judge of Mymensingh for recovery of Rs. 105 from the defendants who are petitioners before me should not be set aside. Two grounds are urged in support of this rule. It is said that the Municipality had no right to levy this personal tax as the defendants were not persons who were occupiers of holdings within the meaning of S. 85, Bengal Municipal Act. It is argued in the second place that, in any event, the assessment of the Municipality is *ultra vires* seeing

that the assessment was a joint assessment against both the defendants who are petitioners before me. It appears that the petitioners who are the servants of the Maharaja, obtained an ijara of a certain place which is described as a cattle market within the Municipality and they make their collection of rent and carry on their business on holding No. 282 in respect of which the assessment has been made although they reside elsewhere. It appears that on this holding a cattle market is held on *hat* days and the holding remains vacant on other days. The persons who sell their wares in the market are sort of licensees under the ijaradars i. e., the defendants and the ijaradars are the persons who really occupy the holding within the Municipality. The first contention, therefore, that the Municipality had no authority to assess tax on the defendants because they did not occupy the holding within the Municipality must fail.

The second ground taken is one of substance and must prevail. It appears that there has been a joint assessment under S. 85, Cl. (a), Bengal Municipal Act, against both the defendants. S. 85 (a) reads as follows: I need only quote the material portion:

The Commissioners may, from time to time, at a meeting convened expressly for the purpose, of which due notice shall have been given, and with the sanction of the Local Government impose within the limits of the Municipality one or other, 'or' both of the following taxes :
(a) a tax upon persons occupying holdings "within the Municipality according to their circumstances and property within the Municipality."

Whether the holding is claimed jointly by two or more persons, Cl. (a) suggests to my mind that a tax is to be assessed on each separately according to the circumstances and property of each within the Municipality. The contention raised by the learned vakil for the opposite party, that these persons should be treated as one person, seems to me not to be tenable. For to accept that construction would be to take a view inconsistent with the language of Cl. (a) which suggests that each person must be taxed personally according to the circumstances and property of each within the Municipality. The circumstances and the property of two joint occupiers must of necessity vary and two persons occupying holdings could not be regarded either as a corporation consisting of several members as one person

in the eye of the law or as one Company consisting of several members. This view receives support from a decision of this Court in the case of *Chairman of the Jalpaiguri Municipality v. Jalpaiguri Tea Co. Ltd.* (1). Mr. Justice Mookerjee in dealing with the question as to what is the proper interpretation which is to be put upon S. 85 (a) observed as follows:

The language does not justify such a restricted interpretation; and there is no good reason why in places where the personal tax is in operation, several persons occupying the same holding should not each be subject to assessment, according to their respective circumstances and property within the Municipality.

Mr. Justice Buckland concurred with Mr. Justice Mookerjee and observed that in his judgment

the tax under S. 85 (a) was in the nature of a poll-tax leviable on persons. Not however merely as persons, but according to their circumstances and the property within the Municipality;

and he held that there were two Companies in that case who were occupying the holding though joint occupiers of holding and each of them was liable to be taxed under S. 85 (a). In that case separate tax was assessed on each of the Companies and the contention was that they should have been jointly assessed. That contention, however, was not accepted and the view was taken that each person occupying the holding should be assessed separately. The Municipality of Muktagacha, by assessing a joint personal tax on each of the two defendants, has contravened the provisions of S. 85 (a), Bengal Municipal Act. Their action must consequently be regarded as ultra vires and the suit based on such an action which was beyond the powers of the Municipality must be dismissed.

The Rule is made absolute and the judgment and decree of the lower appellate Court must be set aside. There will be order no as to costs.

D.B./R.K

Rule made absolute.

A. I. R. 1928 Calcutta 593

CUMING AND MUKHERJI, JJ.

Mahendra Nath Kamilya—Plaintiff—Appellant.

v.

Khetra Mohan Bera and another—Defendants—Respondents.

Appeal No. 597 of 1925, Decided on 30th January 1928, from appellate decree of 2nd Sub-Judge, Midnapur, D/- 19th December 1924.

(a) *Provincial Small Cause Courts Act, Sch. 2, Art. 11—Suit framed as money suit—General prayer in plaint for relief to which plaintiff may be entitled—Suit cannot be treated as one under Art. 11.*

To bring suit with Art. 11 it must be one brought expressly for determination or enforcement of right to or, interest in immovable property.

Where a suit is framed by the charge-holder as a suit for money, the fact that there is a general prayer in the plaint asking for such other or further reliefs as the Court may in justice and equity consider the plaintiff to be entitled to the suit cannot convert the suit into one under Art. 11. [P 594 C 2]

(b) *Provincial Small Cause Courts Act, Sch. 2, Arts. 41, 42, 44—Suit for contribution not cognizable by Small Cause Court must fall within either Art. 41 or Art. 42 or Art. 44.*

A suit for contribution is ordinarily cognizable by a Small Cause Court. The suits for contribution over which the Small Cause Court has no jurisdiction are those specified in Arts. 41 and 42, or possibly under Art. 44 : 15 Cal. 713, *Foll.* [P 594 C 1]

(c) *Civil P. C., O. 41, R. 33—Decree passed against some sets of defendants being really a combination of several decrees against several sets of defendants—Only one set of defendants appealing—Decree cannot be set aside in appeal against all defendants.*

Per Mukherji, J.—Where the decree passed by the trial Court against some sets of defendants is really a combination of several decrees against the several sets of defendants, and only one set of defendants appeals, the appellate Court cannot set aside the decree in whole. [P 595 C 2]

(d) *Transfer of Property Act, S. 100—Person paying off existing charge or mortgage debt is allowed to stand in the shoes of the mortgagee and given a charge on the property.*

Per Mukherji, J.—When the act in respect of the doing of which compensation is sought consists in paying off an existing charge or mortgage debt the Courts have never found any difficulty in allowing the person making the payment to stand in the shoes of the mortgagee and in giving him a charge on the property : 2 I. A. 131 ; 10 Cal. 1035 (P. C.) ; 15 All. 304 (P. C.) ; 26 Mad. 686 (F. B.) ; 31 Mad. 439 ; and 40 Bom. 646 ; *Foll.* [P 595 C 2]

(e) *Provincial Small Cause Courts Act, Sch. 2, Art. 41 (Per Mukherji, J.)—Common liability is essence of right of contribution—Action*

for contribution is suit by one of several parties who discharges common liability—Words “sharer” and “joint property” in Art. 41 are to be understood with reference to common liability and not in sense of “undivided sharer in property” and “property in which shares are undivided.” (contra Cuming, J.)

A common liability is the essence of a right of contribution, and an action for contribution is a suit brought by one of several parties who has discharged a liability common to all of them to compel the others to make good their shares. The words “sharer” and “joint property” are to be understood with reference to this common liability that has been discharged and not in the sense of an “undivided sharer in the property” and “property in which the sharers are undivided” : 13 A. L. J. 452, *Rel. on.* [P 596 C 1]

(f) *Provincial Small Cause Courts Act, Sch. 2, Art. 42 (Per Mukherji, J.) Purchaser redeeming mortgage is in the position of joint mortgagor—Fact that decree had been obtained on mortgage is immaterial as decree does not extinguish security though security may be merged in decree—(contra. Cuming, J.)—Transfer of Property Act, S. 95.*

A purchaser who redeems the mortgage is in the same position as if he were a joint mortgagor and the fact that a decree had been obtained on the mortgage is also immaterial because the decree on the mortgage does not extinguish the security though the security may be merged in the decree : 13 A. L. J. 694 and 21 C. L. J. 104, *Foll.* [P 596 C 2]

Sarada Charan Maiti and Apurba Charan Mukherji—for Appellant.

Panchanan Ghose and Bhupendra Narayan Bera—for Respondents.

Cuming, J.—This appeal arises out of a suit for contribution. A mortgage was executed by one Joy Jana, father of defendant 8, in 1305 in respect of a certain property. Portions of this property were sold at various times to various persons among them being plaintiff and defendants 1 and 2. The mortgagee brought a suit for the realization of the money and the property was put to sale. The plaintiff deposited the mortgage money, saved the property and brought this suit for contribution.

The defendants adduced various pleas in defence. The first Court decreed the suit for various amounts against defendants 1 to 6. On appeal to the District Court it was held that the suit was barred by limitation, that the suit was bad for nonjoinder of one Akhil Seal and, that further there was no evidence to show the value of the different pieces of land, and so the plaintiff could not succeed. That Court allowed the appeal and dismissed the suit. The plaintiff has appealed to this Court. The respondent has

raised a preliminary objection that no appeal lies. His contention is that S. 102, Civil P. C., is a bar as the suit is of the nature cognizable by the Court of Small Causes, etc., below the value of Rs. 500. Admittedly the suit is below the value of Rs 500 and the only question then to be decided is whether the present suit is a suit of the nature cognizable by a Court of Small Causes. S. 15, Small Cause Courts Act, provides that a Court of Small Causes shall not take cognizance of the suits specified in Sch. 2 of the Act and that all other suits of which the value shall not exceed Rs 500 shall be cognizable by such Courts.

A suit for contribution is ordinarily cognizable by a Small Cause Court. The suits for contribution over which the Small Cause Court has no jurisdiction are those specified in Arts. 41 and 42, Sch. 2, or possibly under Art. 44. *Bisva Nath Shah v. Naba Kumar Chowdhury* (1). The present suit does not, as far as I can see, fall under Art. 41.

These persons, plaintiff and defendants, are not cosharers in a joint property. They are specific owners of specific portions having purchased them at various times from defendant 8. Neither does it fall under Art. 42 for none of these persons were mortgagors and the money was not paid by one of several joint mortgagors for redemption of the mortgaged property. It has not been contended that it falls under Art. 44. It has been urged that it is a suit for the determination or enforcement of a charge on immovable property and so falls under Art. 11. The argument is this that the plaintiff having paid up the whole of the mortgage decree and so saved the property from sale has acquired a charge on the properties which he has saved from sale for the amount due from the other owners of the property.

"Charge" is defined in S. 100, T. P. Act, in the following words :

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property

It is perhaps difficult to see how the present case can fall within this definition of a charge. Reliance has however been placed on the case of *Dhakeswar Prosad Singh v. Harihar Prosad Narain*

Singh (2), for holding that the purchaser of one of two properties mortgaged satisfying the mortgage decree has a charge for such sum as the purchasers of the other properties be called upon to contribute. In that decision Mukherji, J. seems to have applied the principles of S. 95, T. P. Act, to the case of purchasers of the mortgaged property. Assuming, without admitting, the correctness of this decision it still remains to be seen whether the present case falls within Art 11, Sch. 2, Small Cause Courts Act. It does not follow that because a person has a right to contribution from another person that he has necessarily a charge over some property in that person's possession.

Therefore, a suit for contribution is not necessarily a suit for the enforcement of a charge. The plaintiff may well be content with merely a personal decree against the defendants without desiring to enforce his remedy by a declaration that he has a charge on some specific property of the defendant against which he desires to enforce his remedy. The mere fact that the plaintiff might perhaps have framed his suit as one for a declaration of a charge on the part of the mortgaged property in the hands of the defendant with all the necessary formalities of such a suit under O. 34 does not make a suit, which is clearly simply one for contribution without a declaration that he had any charge on any property, one for the enforcement of a charge.

A party may have a debt secured by a mortgage. He may be content to bring a simple suit for the money lent without relying on his mortgage. The fact that he concluded his plaint by asking for any other relief to which he might be entitled would not convert his suit into a mortgage suit. In considering whether the plaintiff's suit falls within Art. 11 we must, therefore, look at the suit itself and see what it really was, not what it might have been. As far as I can see from the plaint it was simply a suit for contribution, only for money paid on behalf of another person. The plaintiff did not ask that his charge on the property should be declared and neither does the decree give him any charge on the properties. It is a simple decree for money. The plaintiff's suit does not fall within

(1) [1888] 15 Cal. 713.

(2) [1915] 21 C. L. J. 104=27 I. C. 780.

Art. 11, Sch. 2, per Small Cause Courts Act.

It clearly comes within the purview of S 102 and no second appeal lies.

The result is the appeal stands dismissed with costs.

Mukherji, J.—I regret I take a different view.

This appeal arises out of a suit for contribution. One Joy Jana mortgaged some lands in favour of one Baidyanath Shit. He then sold parts of the lands to the plaintiff, defendants 1 and 2, defendant 3 and defendants 4 to 6, in separate parcels. Shit instituted a suit on the mortgage making all these transferees parties thereto, obtained a decree and put up the lands to sale in execution thereof. The plaintiff paid off the mortgage debt due on the decree to avert the sale, and then instituted the present suit, claiming contribution of separate amounts representing the proportionate shares of the aforesaid three sets of defendants.

The three sets of defendants contested the suit separately. They conceded their liability to contribute, but disputed the amounts claimed.

The Munsif held that the defendants 1 and 2 were liable for Rs. 33-8-0 and the defendant 3 for Rs. 16-12 and defendants 4 to 6 for Rs. 18-3-6. He passed a decree in plaintiff's favour for the said amounts together with interest for three years at the rate of 3 pies per rupee per month and costs in proportion.

This decree was appealed from only by defendants 1 and 2. The Subordinate Judge was able to find reasons for dismissing the entire suit, and he did so with costs and interest. His grounds for dismissal of the suit were: 1st that the suit was barred by limitation; 2nd that one Akhil who was in possession of a portion of the lands was not made a party to the suit, and 3rd that the liability of the defendants was ascertained by the trial Court in a way not supported by the evidence, or that the plaintiff had not placed sufficient evidence before the Court to arrive at a satisfactory conclusion.

In the appeal before the lower appellate Court defendants 1 and 2 were the appellants and the plaintiff the only respondent. In the appeal here, the plaintiff is the appellant and defendants 1 and 2 the only respondents. Notwithstanding the wide words of O. 41,

R. 33, which rule has always been advised to be cautiously used, I do not think that the Subordinate Judge was at all competent in a case where the decree passed by the trial Court was not really one decree but a combination of three several decrees against three sets of defendants to interfere with the whole decree as he has done, the more so as two of those sets, namely, defendant 3 and defendants 4 to 6 were not parties to the appeal before him. But with the dismissal of the suit as against these two sets of defendants I am not concerned here, as, however erroneous the same may have been, they have not been made parties to the appeal here and I do not see how the said dismissal which is in their favour can be disturbed in their absence. The only matter that need be considered, therefore, is the portion of the plaintiff's claim as against defendants 1 and 2.

These defendants, as respondents to this appeal, have challenged its competency on the ground that the appeal is barred by reason of the provisions of S 102, Civil P. C. This objection is sought to be met by reference to Arts. 11, 41 and 42, of Sch. 2, Provincial Small Cause Courts Act. On mature consideration I have come to the conclusion that Art. 11 will not help the appellant. It is true that if the plaintiff's allegations are established, he would perhaps be entitled in equity to get against the defendants a declaration of a charge on the lands that may belong to them, separately as against the three sets and for the amounts at which their respective liabilities are assessed. When the act in respect of the doing of which compensation is sought consists in paying off an existing charge or mortgage debt the Courts have never found any difficulty in allowing the person making the payment to stand in the shoes of the mortgagee and in giving him a charge on the property. Cases of this kind are numerous and I give only a few: *Ram Tuhul Singh v. Biseswar Lal Sahoo* (3), *Gokaldas Gopaldas v. Puranmal Premsukh Das* (4), *Bhagwati Prasad v. Radha Kishen* (5), *Rajah of*

(3) [1874] 2 I. A. 131=23 W. R. 305=15 B.L.R. 208=3 Sutherland=3 Sar. 477 (P.C.)

(4) [1884] 10 Cal. 1035=11 I. A. 126=1 Sar. 543 (P.C.).

(5) [1893] 15 All. 304=20 I. A. 108=6 Sar. 7 (P.C.).

Vizianagram v. Raja Setrucherla Somasekararaz (6), per Benson and Bhashyam Ayyangar, JJ., *Chama Swami v. Padala Anande* (7), and *Tangya Fala v. Trimbak Daga* (8). But although there is the general prayer in the plaint asking for such other or further reliefs as the Court may in justice and equity consider the plaintiff to be entitled to, the suit as framed is a suit for money. To bring the suit within Art. 11, it must be one brought expressly for the determination or enforcement of a right to, or interest in immovable property. It is not possible to construe the plaint as a plaint made for that purpose; and I do not, therefore, think that this article can help the plaintiff. Art. 41, so far as it is relevant runs in these words:

A suit for contribution by a sharer in joint property in respect of a payment made by him of money due from a co-sharer.

At first sight it might seem that the plaintiff and the three sets of defendants being separately in possession of separate parcels of land the article would have no application. This view, however, in my opinion is not right. A common liability is the essence of a right of contribution, and an action for contribution is a suit brought by one of several parties who has discharged a liability common to all of them to compel the others to make good their shares: e.g., if *A* and *B* are jointly liable for a sum of money and *A* alone satisfies the whole debt, he is entitled to call upon *B* to contribute to the extent of his proportionate share, and conversely, if *B* alone pays the whole debt, he is entitled to call upon *A* to contribute in similar proportion. The words "sharer" and "joint property," in my opinion, are to be understood with reference to this common liability that has been discharged and not in the sense of an "undivided share in the property" and "property in which the sharers are undivided." The plaintiff and the three sets of defendants were, it is true, owners of separate parcels in the lands, but the mortgage was one and for the purpose of the decree which was satisfied their liability was common to all of them. The mortgagee decree-holder would not take any notice of this division. The parties, therefore, were all sharers in the lands and

the lands taken as a whole were joint amongst them; it is difficult to see how else their interest can be described looked at in view of the character of the payment that was made. It is not the rights of the parties inter se which, in my opinion, determine the question. The view I take receives support from the decision in *Fatima Bibi v. Hamida Bibi* (9), where in respect of parties who had divided the lands of a tenancy amongst themselves, and one of them discharged the rent of the tenancy, and then instituted a suit against the other for recovery of the proportionate share of the latter it was said that as regards the zamindar they were still joint. The same may be said of the parties in this case as regards the mortgage-decree-holder, because the transfers made by the original mortgagor, so far as against the mortgagee created only a joint interest in the lands. The view that some Courts have taken, namely, that when a decree has been passed on the basis of a joint liability under a mortgage the rights of the co-mortgagors merge in the decree and Art. 41 would not, therefore, apply to co-judgment debtors has never been recognized by this Court. I am, therefore, of opinion that the suit was excepted by Art. 41. I am also of opinion that the case is covered by Art. 42. The mortgage was one and indivisible and the plaintiff and the three sets of defendants are in the position of co-mortgagors. Art. 42 says:

A suit by one of several joint mortgagors of immovable property for contribution in respect of money paid by him for the redemption of the mortgaged property.

In a suit for contribution instituted by one of two joint mortgagors, a decree was obtained against them for sale of the mortgaged property, and one of them paid off the decree to save the property from sale, and then sued the other for contribution. It was held that the suit in substance was one falling under Art. 42, as the effect of the payment was to redeem the property from the mortgage under which it was ordered to be sold: *Talaismand Singh v. Gobind Singh* (10). I entirely agree in the principle of this decision which I think applies fully to the present case. A purchaser who redeems the mortgage is in the same position as if he were a joint mortgagor and the fact that a decree had

(6) [1903] 26 Mad. 686=13 M. L. J. 83 (F. B.).

(7) [1908] 31 Mad. 439=18 M. L. J. 306.

(8) [1916] 40 Bom. 646=35 I. C. 794=18 Bom. L. R. 700.

(9) [1915] 13 A. L. J. 452=28 I. C. 587.

(10) [1915] 13 A. L. J. 694=29 I. C. 247.

been obtained on the mortgage is also immaterial because the decree on the mortgage does not extinguish the security though the security may be merged in the decree. *Dhakeswar Prosad v. Harihar Prosad* (2). For those reasons I am of opinion that the preliminary objection must be overruled.

To turn now to the merits of the appeal; of the three grounds on which the judgment of the Subordinate Judge proceeds, the first relates to the question of limitation. The last day for filing the plaint was the 16th July 1923, which was a holiday. The plaint was filed on 17th July 1923, on which date the Court allowed five days time to put in the deficit Court-fees. The deficit Court-fees were paid on 22nd July 1923. The Subordinate Judge held that the five days expired on the 21st and that in computing the five days 16th was to be taken into account. This view is unsupportable and indeed the respondent declines to justify it. The second ground relates to the omission on the part of the plaintiff to implead one Akhil as a defendant. Akhil, however, is in possession of a part of the plot which belongs to defendants 4 to 6 and has no concern with the portion belonging to defendants 1 and 2. The Subordinate Judge says:

In order to avoid multiplicity of suits the man ought to have been made a party to this suit

and in this he is right. He says further that the defect is fatal; but why this should be so I fail to understand. He seems to have overlooked the distinction between proper and necessary parties to an action. It is quite open to the plaintiff not to proceed against Akhil Seal, and if Akhil is not a party to the suit any decision therein will not affect him, but I do not understand why the proportionate liability of defendants 1 and 2 could not be determined in Akhil Seal's absence so long as the necessary materials are before the Court. As regards the third ground: the Subordinate Judge seems to be of opinion that as the plaintiff has not been able to give satisfactory evidence as regards the values of the paddy lands and dhosa lands, as they were in 1305, the date of the mortgage, the proportionate liabilities of the different parties cannot be calculated and so the plaintiff's suit must fail for want of evidence. The mode of calculation ad-

opted by the Munsif, it is true, is not right and it is also true that the values as in 1305 have to be ascertained, but it is obvious that direct evidence thereof it is impossible to give and unreasonable to expect. There is some evidence on the plaintiff's side as well as on the side of the defendants from which the relative value of the paddy lands and dhosa lands at the present time may be arrived at, and this relative value of to-day would perhaps, in the absence of anything to the contrary, represent the relative value in 1305, or, it may be that some allowance will have to be made to ascertain the relative value in 1305. It is only this relative value that is necessary to enable one to determine the proportionate liabilities of the parties. In dealing with this matter I cannot help thinking that the Subordinate Judge has not made a reasonable attempt to arrive at a decision and has set up for his guidance much too exacting a standard. None of the grounds, therefore, upon which the Subordinate Judge has thought fit to dismiss the suit is sound.

The appeal, therefore, in my opinion should be allowed, the decree of the Subordinate Judge dismissing the suit as against defendants 1 and 2 should be set aside and the case should go back to the lower appellate Court so that the appeal of the said defendants may now be reheard and disposed of in the light of the observations contained in this judgment. The costs of this appeal will abide the result.

D.B./R K.

Case remanded.

A. I. R. 1928 Calcutta 597

PAGE AND MALLIK, JJ.

Nibaran Chandra Dhara Modak and another—Plaintiffs—Appellants.

v.

Kristo Mohan Kundu — Defendant — Respondent.

Appeal No. 2027 of 1925, Decided on 18th January 1928, from appellate decree of 2nd Sub-Judge, Zillah Hooghly, D/-1st May 1925.

(a) *Landlord and Tenant*—Origin of tenancy unknown—Tenant must prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy.

Where tenancy is alleged to be permanent and the origin of the tenancy is taken to be unknown, the tenant must needs prove such

facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy: *A. I. R. 1924 P. C. 65*; *16 Cal. 223 (P. C.)*; and *A. I. R. 1920 P. C. 67, Rel. on.* [P 599 C 1]

(b) *Landlord and Tenant — Permanent tenure*—Court must decide whether a tenancy is permanent or not as an inference of law — *Civil P. C., S. 100.*

The Court must decide whether the tenancy is a permanent one or not as an inference of law to be drawn from a consideration of all the relevant matters of facts that are proved in evidence before it: *A. I. R. 1925 Cal. 309* and *30 C. W. N. 709, Con.* [P 599 C 2]

Bijan Kumar Mukherji — for Appellants

R. K. Mitter—for Respondents.

Page, J.—This is a suit to recover possession of premises let for residential purposes. Notice to quit was served upon the tenant, and if the tenant was liable to be ejected after notice to quit it is not contended that the notice was not duly served according to law. The defence set up was that the tenancy was governed by the Bengal Tenancy Act; that it was of an agricultural nature, and that the tenant had acquired a permanent right of occupancy. That defence was negatived by the lower appellate Court, and it was held that the tenancy was not of an agricultural nature but one for residential purposes, and that it was, therefore, outside the ambit of the Bengal Tenancy Act, and governed by the general law. Certain facts have been found, and must be taken to have been correctly found, by the lower appellate Court. The learned Subordinate Judge in the course of his judgment stated that we come to the conclusion that the defendant's tenancy is governed by the general law that prevailed before 1882. The defendant can claim a permanent tenancy only by a contract with his landlord. The relationship (i. e., of landlord and tenant) is established by the decree filed before me. I find that the origin of the defendant's tenancy is not known. I find that it has been inherited by defendant 2 from his father. I find that it has been held for over 50 years, and that a uniform rent of Rs. 7 has been all along paid. I find further that this tenancy was taken for residential purposes. I find there is no brick-built structure of the defendant on the land, and that the structure that is there was built after objection by the plaintiff and after the failure of the plaintiff in the previous suit.

It was also found or admitted that the defendant held a permanent tenure, but that such tenure was not for agricultural purposes or governed by the Bengal Tenancy Act; that before 1920 there was no structure upon the land; that there

has been no transfer inter vivos during the currency of the tenancy; and that in 1920, when the defendant was proceeding to erect a building on the land, the plaintiff brought a suit for an injunction to prevent him from putting up a pucca structure on the land without the consent of the landlord. That suit was dismissed upon the ground that the structure which the defendant was erecting was katcha, and not a pucca building. In that case the Court further expressed the opinion that the defendant did not possess any permanent right of occupation. I mention this last fact as part of the narrative, but for the purpose of my judgment I have not relied upon it. The question that falls for determination is whether the proper inference of law to be drawn from these facts is, that the tenancy is a permanent one. Now, the onus of proving that a defendant is in occupation under a tenancy which is not subject to a notice to quit is upon the tenant who sets up that his tenancy is of a permanent nature. The duty of the Court as I apprehend the law, is to take into consideration all the facts proved that are relevant for the determination of the issue, and to decide as a matter of law whether from the facts proved the legitimate inference is that the tenancy was a permanent one. The law upon this subject has been laid down by the Judicial Committee of the Privy Council in the case of *Nainapillai Marakayar v. Ramanathan Chettiar* (1). In the course of delivering the judgment of the Board Sir John Edge observed :

It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State v. Luchmeswar Singh* (2), it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus and in *Seturatnam Aiyar v. Venkatachala Goundan* (3) in a suit by landlords for the ejectment of the defendants from lands in a ryotwari district in Madras, the giving of notice to quit not being disputed, it was held that the onus of proving that the defendants had rights of permanent occupancy was

(1) *A. I. R. 1924 P. C. 65=17 Mad. 337=51 I. A. 83 (P. C.).*

(2) [1889] *16 Cal. 223=16 I. A. 6=5 Sar. 275 (P. C.).*

(3) *A. I. R. 1920 P. C. 67=43 Mad. 567=47 I. A. 76 (P. C.).*

upon them that permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the legislature.

In this case it is not contended that the tenant obtained a permanent right of occupancy by custom, or by an act of the legislature. It was, therefore, incumbent upon him to prove that he had obtained it by an express grant from the owner of the land. Now, how can a tenant prove the existence of such a grant? If the origin of the tenure is known *cadit questio*, for then it is possible to ascertain from the terms of the agreement whether the tenancy was a permanent one or not. But where, as in this case, the origin of the tenancy is taken to be unknown, the tenant must needs prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy.

A large number of cases have been canvassed before us, but I confess (though I speak with all due deference), that it appears to me that in some of the cases the real issue has been clouded by confounding two different things, an inference to be drawn from facts and a presumption of law. In this country those who are employed in administering the law for the most part are occupied with cases in which presumptions created by statute play a large part in the argument, and it seems to me that from time to time certain facts, if proved, have been treated as raising a presumption of law that a particular tenancy is of a permanent nature rather than as evidence from which an inference that a permanent tenancy has been created may reasonably be drawn. Indeed, in some cases the decisions have gone so far as to state that there can be no legal presumption of permanency unless certain specific facts are proved; for instance, in the case of *Abdul Hakim Khan Choudhuri v. Elahi Baksha Sha* (4) Chakravarti, J., in the course of delivering a judgment, in which Greaves, J., concurred, stated that an analysis of the cases cited before, in which presumption of permanency was made, shows that the following elements existed in these cases, viz., first, the origin of a tenancy for residential purpose must be unknown; secondly, existence of permanent pucca buildings on the lands built long before any controversy arises and that to the knowledge of the landlord; thirdly, uniform payment of rent,

fourthly, recognition of successions and transfers by the landlord It seems to us that the absence of either of the elements Nos. 1 and 2, as stated above, would be ordinarily fatal to any claim of permanency on the theory of lost grant.

No doubt if the origin of the tenancy was known there would be no room for a discussion of the mode in which the tenancy was created, but the absence of permanent pucca buildings on the land built long before any controversy arose to the knowledge of the landlord with all due deference appears to me, although an important element for the Court to take into consideration, in itself not necessarily conclusive against the tenant. In my opinion the true rule is that the Court must decide whether the tenancy is a permanent one or not as an inference of law to be drawn from a consideration of all the relevant matters of facts that are proved in evidence before it. It would not be difficult to imagine cases in which, notwithstanding that no pucca structure had been erected on the land, the evidence might be such that from it the existence of a permanent tenure might reasonably be inferred. In my opinion in each case the Court must take into consideration all the relevant evidence that has been adduced. In this case, no doubt, there are elements which point to the tenancy being a permanent one, for instance, its origin is unknown, the land has been held in occupation for over fifty years by the present occupant or his father, and the rent has always been paid at a uniform rate. But those are not the only facts that have been found. The mere fact that there has been a transmission on death from father to son without objection from the landlord is not conclusive of the matter; for, as was pointed out by Chakravarti, J. in *Abdul Hakim Khan's* case, the fact that the tenant is allowed to continue in possession of lands for generations without alteration of the rent is of common occurrence in this country, and is usually attributable to the reluctance of a landlord to eject a tenant from his home so long as he does not make himself objectionable, and regularly pays his rent.

But it is an element which must be taken into consideration. Another important fact is that the defendant himself did not claim in his defence that he was the holder of a permanent tenancy under the general law by reason of a lost grant of a permanent tenancy. That fact is not conclusive against the tenant, but

it is an element in the case which cannot be ignored. Again, there is the fact that no structure was upon the land until 1920. If this was a permanent tenancy that had been created at least fifty years ago for residential purpose it is strange that no building was erected upon the land until eight years ago. That fact, in my opinion, militates, but is not necessarily conclusive, against the permanent nature of the tenancy. Further, it is sometimes found that a tenant has put up a substantial structure upon the land without objection from the landlord. In my opinion, that is evidence of considerable weight that the parties intended and agreed that the tenancy should be a permanent one, for in this country landlords are not wont to allow ticca tenants to put up substantial structures on the land. But, in my opinion, such a fact is not conclusive against the landlord, nor in itself does it necessarily give rise to a praesumptio juris that the tenancy is of a permanent nature. On the other hand the landlord sometimes is found to have objected to a structure being erected on the land by the tenant. If he has failed to raise any objection until the structure has been in existence for a considerable period the landlord may be met in a proper case by the equitable doctrine of acquiescence. But if the landlord has objected forthwith or while the work upon the structure was proceeding, that circumstance, no doubt, is evidence that the tenancy was not a permanent one; a fortiori, if, as in this case, while the building was in process of construction he brought a suit for an injunction to prevent the tenant from building a pucca structure upon the land. In short, each case must turn upon its own facts (*Bireswar Mookerji v. Troilochin Dasi* (5) and, in my opinion, taking into consideration all the facts that have been found in the present case, the proper inference of law to be drawn therefrom is that the defendant has failed to establish that his tenancy of the land is a permanent tenure under the general law.

The result is, that the decrees of the lower Courts must be set aside, and a decree for possession passed in favour of the plaintiffs. The plaintiffs are entitled to their costs in all the Courts

Mallik, J.—I agree.

N.K.

Appeal allowed.

(5) [1926] 30 C. W. N. 709.

A I. R. 1928 Calcutta 600

MUKHERJI AND GRAHAM, JJ.

Victor Justin Walter—Appellant.

v.

Marie Josephine Walter—Respondent.

Appeal No. 123 of 1927, Decided on 15th June 1927, from original order of Addl. Dist. Judge, Alipore, D/- 17th January 1927.

(a) *Contract Act, S. 23—Agreement by father to give up entirely the control and custody of his child to the mother is illegal.*

An agreement by a father to give up entirely the custody and control of his child to the mother is opposed to public policy and is therefore illegal: *Hope v. Hope*, (1857) 8 De. G. M. & G. 731 and *St. John v. St. John*, (1805) 11 Ves. 531, Ref. [P 601 C 2]

(b) *Guardians and Wards Act, S. 7—Court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property.*

Court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property. It is the duty of the father to maintain and educate his children who are incapable of supporting themselves and although the law has always recognized this duty, the civil Courts have no direct means of enforcing this obligation, so as to compel him to maintain them out of property in which they have no interest: 19 Bom. 96, Rel. on. [P 603 C 2]

(c) *Guardians and Wards Act, S. 26—Leave for the permanent residence of the child abroad and out of the Court's jurisdiction is not permitted except where it is manifestly advantageous to the child as regards the health and the like.*

While, leave for permanent residence outside the jurisdiction of the Court may be granted for good and sufficient grounds and under sufficient safeguards, leave for the permanent residence of the child abroad and out of the Court's jurisdiction is not permitted except where it is manifestly advantageous to the child as regards health and the like. [P 604 C 2; P 605 C 1]

(d) *Guardians and Wards Act, S. 7—Parents found unfit to be guardian—Court will interfere and deprive them of the custody of their children and appoint a suitable person as guardian to take care of them and to superintend their education.*

Although in general, parents are entrusted with the custody and education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion and they will be treated with kindness and affection. But whenever the presumption is removed, whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or he is in constant habit of drunkenness and blasphemy or low and gross debauchery; or he professes atheistical or irreligious principles; or

that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian and take care of them and to superintend their education. [P 605 C 1]

(c) *Guardians and Wards Act, S. 17, Cl. (1)*—*Welfare of the minor—Court must look to child's welfare generally, as regards moral, religious and physical well being.*

In considering the matter from the point of view of the welfare of the minor the Court should with advantage look to the circumstances which may possibly stand in the way of the child being properly looked after. The first and paramount consideration of the Court is the welfare of the child which is not to be measured by money only or by physical comfort only but is to be taken in its widest sense. The moral and religious welfare of the child must be considered, as well as its physical well being, nor are the ties of affection to be disregarded though they are not conclusive. [P 603 C 1]

N. Barwell and Sudhansu Sekhar Kar—for Appellant.

J. W. Chippendale and Hari Prosanna Mukerji—for Respondent 1.

Mukherji, J.—The appellant, Victor Justin Walter, is the husband of the respondent 1, Marie Josephine Walter. They are European British subjects within the meaning of the Guardians and Wards Act 8 of 1890, and are Roman Catholics by religion. They were married in 1921 and the child, Leon Walter, born on 27th September 1923, is the only issue of that marriage.

On 16th June 1926, respondent 1 applied to be appointed guardian of the person of the child under circumstances which have been set out in detail in the order from which this appeal has been preferred. This application was opposed by the appellant. The Second Additional District Judge, by an order dated 17th January 1927, allowed the application of respondent 1 with costs and also made an order on the appellant to pay a sum of Rs. 100 a month to respondent 1 for the maintenance of the child. Hence this appeal.

The marriage, it seems, has not been quite a happy one. The appellant is a purser in the employ of the British India Steam Navigation Company drawing a pay of Rs. 250 or so. His duties keep him away from his home for nearly nine months in the year, if not more, and he can only be at home for a few days at

the end of every two months or so. Respondent 1 suffers badly from severe filarial troubles and, as far as we can gather, is a young woman somewhat sick of her environments, with a feeling of deep-rooted disgust for what she considers to be neglect on the part of her husband; and a vein of utter dissatisfaction runs through all her utterances, which sometimes border on hysterics. For a few months after the marriage, she she was left by the appellant with his sister with whom she could not agree and thereafter she returned to her mother, Mrs. Bridget Katherin Antonio, to Lucknow, where the latter lived at the time. The mother is a trained nurse, and her husband is fairly well-off and in service.

When respondent 1 thus went to Lucknow, the appellant issued an advertisement in the Statesman that she had left his protection. About the end of 1922 a reconciliation was brought about by the parish priest. Respondent 1 remained in Calcutta or at Lucknow from time to time. The child was born in Calcutta and, when it was about five weeks old, she again went to Lucknow to her mother, as the child was ill. When the child was about 18 months old she came down to Calcutta with the child and Mrs. Antonio at the appellant's request. This was in February 1925. A temporary lull was sought to be brought about by an agreement (Ex. D) which she executed or was made to execute. The two essential conditions in this agreement were that she was to look after the home and the child for a round sum of Rs. 170 a month and that if she again left her husband she was to leave the child with the husband's sister-in-law and waive all claims for maintenance and support. We do not think much of this agreement and shall not refer to it again beyond stating that, apart from the circumstances under which it was executed and which would make us hesitate to act on it, it is somewhat like an agreement by a father to give up entirely the custody and control of his child to the mother and is therefore opposed to public policy: *Hope v. Hope* (1), *St. John v. St. John* (2). A house, 16 Crooked Lane, was taken on rent, and this was shared by the appellant and his

(1) [1857] 8 De. G. M. & G. 731=5 W.R. 387=26 L.J. Ch. 417=3 Jur. (N.S.) 454.

(2) [1805] 11 Ves. 531.

wife and child, and by the appellant's brother and sister-in-law. On 1st June 1925 the wife was obliged to go to the Medical College Hospital on account of filarial troubles. She returned home on 16th June but found that the child had disappeared. The appellant had in the meantime put it into St Vincent's Home at Kidderpore. He tried to make her believe that it had been sent to Rangoon as he apprehended that if she knew that it had been put into the Home, she would go and worry the nuns there. He tried to send her again to the hospital, but either she was refused admission or she refused to be admitted and remained at 16 Crooked Lane. At the end of the year Mrs. Antonio was able to discover where the child was. Owing to the strict injunctions of the appellant, respondent 1 was allowed to see the child at the Home only once in January and again in May 1926. Thereafter, the present proceedings were commenced, on the application of respondent 1, filed on 16th June 1926. Since the order of the learned Judge passed on 17th January 1927, the child was taken from the Home to Lucknow. The mother and the child lived with Mrs Antonio at Lucknow for some time. Since some date in April, they were putting up at Nainital. The appellant, respondent 1, the child and Mrs. Antonio were present in Court when this appeal was heard. During the hearing of the appeal an endeavour was made to arrive at a satisfactory arrangement with the mutual consent of the parties. It was all but concluded when it failed. We are nevertheless thankful to Mr. Barwell and Mr Chippendale for the generous assistance we received from them in this respect.

One of the complaints made by the appellant against the order passed by the Judge is that the case was heard in his absence, no proper orders having been passed on the application for adjournment that was filed by him, asking the Court to fix a date on which he would be in a position to attend. The order fixing the date of hearing on receipt of this application does not appear to have taken due note of the appellant's difficulties, but as no further representation was made to the Judge when the case was taken up for hearing, we are not inclined to hold that the appellant really desired to be present. On the merits the validity of

the order has been assailed or sought to be supported by the parties before us, much on the same lines on which the proceedings were fought out in the Court below. The appellant has sought to make out that respondent 1, by reason of her lack of education, and her temperament, mental faculties and conduct, is unfit to look after the child, that she has on occasions showed symptoms of insanity, more particularly in threatening to destroy her own life and that of the child, also that she is not likely to be helped by her parents who are dissatisfied with her and that her mother had already expressed much dissatisfaction on more occasions than one. On his own behalf, he says he has done nothing which can justify the removal of the child to the custody of somebody else, that he has provided his wife with Rs. 170 out of his pay of Rs 250 and that it is beyond his means to do anything more, and that he removed the child to St. Vincent's Home at Kidderpore with the very best of motives. Respondent 1, on the other hand, charges the appellant with callousness and neglect, nay even cruelty and ill-treatment, in respect of herself, and also drunkenness and incapacity to take care of himself and far greater incapacity to look after the child. We have heard all that has been argued at the Bar on their respective cases thus presented by the parties and we have taken into consideration all the materials that are on the record as bearing on these matters. It will serve no useful purpose discussing these materials. It is sufficient to say that the charges levelled against respondent 1 are baseless and the explanation that has been offered on her behalf as to her conduct or utterances fits in with the probabilities and we agree generally in the estimate that the learned Judge has formed of her. With regard to the opinion that the learned Judge appears to have formed of the appellant himself as regards his character and the sufficiency of his resources, we may say we are not quite in agreement with him. The learned Judge on this question observes thus in his judgment :

Objector (meaning the appellant) is a purser on board a steamer living free and practically free of cost and even if his income be limited to his pay it cannot be denied that under the circumstances he took a considerable share of it for himself. His wife had to pay rent, servant and maintenance for two or roughly

double what her husband kept back for his luxuries. From the evidence of his own witnesses it is clear that he always had money for drink and this probably accounts for his neglect to provide his wife with proper medical attention.

We do not think that the evidence quite supports this conclusion and this appraisal of the appellant's conduct, in our opinion, is somewhat harsh. There is very little to suggest that the appellant is given to luxuries and the evidence that he is a habitual drunkard is not very convincing. Bearing the conclusions of the learned Judge in mind and also the dissent we have expressed above, it has to be considered whether the appointment of respondent 1 as guardian of the child is one that should be disturbed.

The parties are European British subjects within the meaning of the Act. Cl. (4), S. 17 of the Act provides that as between parents who are European British subjects adversely claiming the guardianship of the person neither parent is entitled to it as a right, but other things being equal, if the minor is a male of tender years, or a female, the minor should be given to the mother, and if the minor is a male of an age to require education and preparation for labour and business, then to the father. According to this principle, if other things were equal, the child in the present case should be given to the mother. But are other things equal? In considering the matter from the point of view of the welfare of the minor, as we must under general principles, as also in view of the express provisions of S. 17, Cl. (1), read with the other clauses of the section, we may with advantage look to the circumstances which may possibly stand in the way of the child being properly looked after. The first and paramount matter for the consideration of the Court is the welfare of the child, which is not to be measured by money only or by physical comfort only, but is to be taken in its widest sense. The moral and religious welfare of the child must be considered, as well as its physical well-being, nor are the ties of affection to be disregarded, though they are not conclusive (Eversley on Domestic Relations, 4th edn, at p. 638). So far as respondent 1 is concerned we cannot help thinking that the learned Judge ignored the disadvantages that she will

experience in discharging her duties as guardian and has overestimated her qualifications by putting to her credit the fitness of Mrs. Antonio to look after her and her child. He says that Mrs. Antonio is a fit and proper person for mother and child to live with. Coupled with the condition that respondent 1 with her child will be able to live with Mrs. Antonio, she, in the opinion of the learned Judge, is a proper guardian. In this view we entirely agree. Mrs. Antonio, as far as can be made out, did not approve of the marriage and she was for some time very cross with her daughter for having contracted this marriage against her wishes. But there is no question that she has centred all her affections on the child since it was born and it is apparent that she will take every care of her. Other matters, however, have to be considered and they will be referred to presently.

Respondent 1 has no home or means of her own, and the child has no property. The Judge has made an order on the appellant to pay Rs. 100 monthly to her for the maintenance of the child. This order is sought to be supported by reference to S. 22, Cl. (1) of the Act, but it is plain that that clause is of no assistance; it provides for an allowance for the guardian for his care and pains in the execution of his duty. Under Act 40 of 1858, a guardian of the person could only be appointed in the case of a certificate to manage the minor's property being granted: see Ss. 7 and 11 of that Act and also Act 20 of 1864. The older English cases show that the Court of Chancery could not exercise its jurisdiction except where the minor had property but latterly the case has been different: *Barnarda v. McHugh* (3) and *In re McGrath* (4). The same power is exercisable by the High Court: *Re Jagannath Ramji* (5). Act 8 of 1890 is clear and shows that the Court can exercise its jurisdiction to appoint a guardian of the person of the minor even if he is possessed of no property. It is the duty of the father to maintain and educate his children who are incapable of supporting themselves and although the law has always recognized

(3) [1891] A. C. 388=61 L. J. Q. B. 721=55 J. P. 628=40 W. R. 97=65 L. T. 423.

(4) [1892] 1 Ch. 143.

(5) [1893] 19 Bom. 96.

this duty, the civil Courts have no direct means of enforcing this obligation, so as to compel him to maintain them out of property in which they have no interest. Lord Eldon, L.C., in *Wellesley v. Duke of Beauford* (6), remarked :

You may go to the Court of King's Bench for a habeas corpus, to restore the child to the father ; but when you have restored the child to the father, can you go to the Court of King's Bench to compel that father to subscribe even to the amount of five shillings a year for the maintenance of that child ? A Magistrate may compel a trifling allowance, but I cannot believe that there was ever a mandamus from the Court of King's Bench upon the subject. Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere ; if it be not in this Court where does it exist ? The Courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father. Those duties have been acknowledged in His Majesty's Courts for centuries past.

There can be no doubt as to the full jurisdiction of the Court in all questions relating to maintenance ; it is a jurisdiction that can only be exercised where there is some property belonging to the infant: Simpson on Infants, fourth edition, p 189 ; Macpherson on Infants, p 24 Lord Eldon in *Wellesley v. Beauford* (6), remarked :

It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise that jurisdiction ; because the Court cannot take on itself the maintenance of all the children in the kingdom. It can exercise the jurisdiction usefully and practically only when it has the means of doing so ; that is to say, by its having the means of applying property for the use and maintenance of the infants.

The act is silent in this respect. The Code of Criminal Procedure provides a mode of compelling a father to maintain his infant children, but under that Act he cannot be compelled to educate them or even to support them according to his own position. It is true that where there is no specific provision in the statute the Court has to act in accordance with the principles of justice, equity and good conscience, and the rules of the Court of Chancery in England may form a safe and useful guide ; but the power of allowing maintenance to minors such as is exercised by the Court of Chancery in England is exercised upon certain well-settled rules, and an order cannot be made unless the minor possesses a clear fund or income appli-

cable to the purpose ; the minor must have a vested interest in the fund : see Trevelyan on Minors, edn. 5 p. 216. The broad proposition that under general principles the father of a child is bound to provide for its maintenance such as was suggested in the case of *Ghana Kanta v. Gereli* (7) has hardly any foundation.

Respondent 1 has no house of her own and the place where she is expected to take the minor to is Lucknow or some other place where Mrs. Antonio may be putting up. Mrs. Antonio's evidence, upon which the learned Judge has relied is that she is willing to have respondent 1 and the child and look after them. The learned Judge says :

If this were not so it does not appear to be likely that she would have spent a year in Calcutta with her daughter trying to get the custody of the child.

So far so it is all right, but is this not a precarious assurance ? Complaint has been made before us that the child has been removed from the limits of the Court's jurisdiction without its leave and reference has been made to S 31 of the Act. It may be said in answer, and has been so said, that though there is no express leave, the learned Judge was perfectly aware of the fact that in all probability, the child will be taken to the place where Mrs Antonio might be living, and that was what was intended by the order of the learned Judge. The section is based upon the English law. Under the law in England where the persons of infants are, by due and proper course of law, brought before the Court, it will take special care that they remain within its jurisdiction, and obey its directions therein, and will not in general, whether they be actual wards or not, be permitted to be taken or to go out. Under special circumstances, the Court has permitted infants to go out of the jurisdiction for the purpose of temporary or even permanent residence there, or when already abroad, to remain there under restrictions whereby their property and their education and marriage will remain within its control, and this must be on the ground of advantage to the infants (*Daniell's Chancery Practice*, 8th Edn, p. 982). While, therefore, leave for permanent residence outside the jurisdiction of the Court may be granted for

(6) [1827] 2 Russ. 1=5 L. J. Ch. 85=38 E. R. 236.

(7) [1904] 32 Cal. 479=2 I.C. 550=13 C.W.N. 150.

good and sufficient grounds and under sufficient safeguards, leave for the permanent residence of the child abroad and out of the Court's jurisdiction is not permitted except where it is manifestly advantageous to the child as regards health and the like. *Eversely on Domestic Relations*, 4th Edn., p. 639. It may be doubted whether the present case fulfils these requirements, as it is merely because Mrs. Antonio is willing to let respondent 1 and the child to remain with them that the order should be taken to have been made, if it can be said to have been made at all. Respondent 1 herself is in indifferent health and it may be necessary for her to go to other places or to hospital. How then should she be able to look after the child?

If for the above reasons the respondent 1 be not considered a suitable person to act as guardian of the person of the child, the appellant may say that he should be declared guardian in view of the provisions of S. 17, Cl. (4) of the Act. Story in his *Equity Jurisprudence*, 14th edn., S. 1757, says:

Although in general parents are entrusted with the custody and education of their children, yet this is done upon the natural presumption that the children will be properly taken care of, and will be brought up with a due education in literature and morals and religion and that they will be treated with kindness and affection. But whenever the presumption is removed, whenever (for example) it is found that a father is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habit of drunkenness and blasphemy or low and gross debauchery, or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children, in every such case the Court of Chancery will interfere and deprive him of the custody of his children and appoint a suitable person to act as guardian and take care of them and to superintend their education.

The appellant may not have lost his right, but the fact that he remains away from home for nine months in the year or more and will be able to look after the child personally for a few days only at the end of every two or three months cannot be lost sight of in considering the question of the child's welfare. The fact that he sent the child to the Home makes him stand self-condemned in this respect. The Home is an excellent insti-

tution but the care of the nuns is a poor substitute for parental affection.

From what has been stated above it will appear that, in our opinion, neither the father nor the mother by himself or herself, is, in view of the circumstances to which we have referred, fit to be entrusted with the guardianship of the child and that a decidedly better arrangement will be to appoint the grandmother as its guardian should she consent to be appointed as such in view of those circumstances. We shall certainly have to pass such final orders as we consider suitable and proper in the circumstances, but before we proceed to do so we hope the parties interested in the welfare of the child will enable us to make the very best arrangement that we can think of. We accordingly defer passing final orders till the 13th June 1927. In the meantime we give Mr. and Mrs. Walter another chance to make an application to be appointed joint guardians of their child on such terms, if any, as they may be able to arrange between them amicably. We also give leave to Mrs. Antonio to make an application, if she so desires, for her own appointment as such guardian, on the understanding that any allowance for the maintenance, etc., of the child, cannot be made in these proceedings, and that for that purpose she or Mrs. Walter have to look to such other remedy or remedies as may be available to them under the law.

Any such application, as aforesaid, will have to be filed by Wednesday next. Final orders in the case will be passed on the 13th June 1927, when the parties, as well as the child, are expected to be present before us.

Graham, J.—I agree with the order that my learned brother proposes to make in this case. On the materials which have been placed before us I think it is clear that neither the appellant, the father of the minor, nor the respondent, the minor's mother, is a fit person to be appointed guardian of the minor. So far as the father is concerned nothing has in my opinion been satisfactorily proved which would in any way unfit him to be appointed the guardian of his son. No substantive application has, however, been filed by the father to be appointed guardian. As a matter of fact he could not in any case be appointed as guardian inasmuch as he goes to sea and is absent.

from Calcutta for long periods and only occasionally comes into port. He could not therefore in the circumstances properly look after the minor. In the case of the mother the reasons why she is ineligible as guardian are quite different. The evidence shows that she is unbalanced, hysterical and wholly incompetent, and therefore the welfare of the minor would certainly not be secured by entrusting him to her charge. No one else has come forward to apply to be appointed as guardian although notices were issued. In the circumstances it is difficult to know what order the Court should make. The only course seems to be, as proposed by my learned brother, to allow the parties an opportunity either to submit a joint application for guardianship, or for the grandmother of the minor, Mrs Antonio, to make such an application (After an application was filed in pursuance of the judgment their Lordships delivered the following judgments.)

Mukherji, J.—In pursuance of our order of the 2nd June 1927, an application has been filed for the guardianship of the child's person by Mrs Bridget Katherin Antonio. There has been no joint application for such guardianship filed by Mrs. and Mr. Walter, but Mr. Walter alone has filed an application for himself. He has also filed an affidavit objecting to the appointment of Mrs. Antonio.

We expected that good sense would prevail with the parties and the matter would be allowed to end in this Court for the benefit of all concerned, but evidently the parties are inclined to take a different view. Under the circumstances, we proceed to pass suitable orders.

In view of the remarks made by us in our judgments, dated the 2nd June 1927, the appeal must be allowed and the order passed by the Court below must be set aside, but there will be no order as to costs. For the reasons we have given in these judgments, we do not consider that the appointment of Mr. Walter will be for the welfare of the child and we, accordingly, reject his application filed before us since then and disallow the prayer contained therein. We send down the petition of Mrs. B. Antonio filed before us as aforesaid to the trial Court so that it may be registered as an application for her own appointment as such

guardian. Mrs. B. Antonio was putting up at Nainital and she had to come down with the child for the purposes of these proceedings. It is, therefore, extremely important that the proceedings should be terminated as quickly as possible. As the learned vakil for Mrs. Walter does not object to and on the contrary supports Mrs. B. Antonio's application, it will be enough for the Court below to give notice of the proceedings to Mr. Walter alone.

The material question for the consideration of the Court below will be the truth or otherwise of the allegations of Mr. Walter in the affidavit that he has filed in this Court in opposition to Mrs. Antonio's appointment. The Court below will proceed to pass final orders on the application as soon as this investigation is finished.

As regards interim custody we direct that Mrs. B. Antonio do continue to be in custody of the child until final orders are passed on her application. She will be at liberty to keep the child anywhere she likes, the parents, of course, having liberty to see the child at such place where it may be kept. She will be at liberty to take the child to Nainital or any other place that she may desire during this period, and unless the Court below makes a specific order to the contrary it will not be necessary for her to produce the child before that Court during the continuance of the proceedings.

The records, together with the petition of Mrs. B. Antonio and the affidavit of Mr. Walter, will be sent down to the Court below (copies thereof being kept with the High Court file of this appeal) as early as possible.

Graham, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 606

MITTER AND MALLIK, JJ.

Mahommad Hossein Choudhury —
Plaintiff—Appellant.

v.

Khana Kazi and others—Defendants—
Respondents.

Appeal No. 2266 of 1925, Decided on 10th February 1928, from appellate decree of 4th Sub-Judge, Zillah Dacca, D/- 9th April 1925.

(a) *Bengal Tenancy Act, S. 29*—A compromise decree passed in contravention of provisions of S. 29 is operative and binding until vacated by appropriate proceedings.

A compromise decree passed in contravention of the provisions of S. 29, cannot be treated in a subsequent suit between the parties as without jurisdiction and a nullity, but is operative and binding until vacated by appropriate proceedings: *A. I. R. 1926 Cal. 1101*; *A. I. R. 1921 Cal. 34 (F.B.)*; and *A.I.R. 1925 Cal. 907 (F.B.)*; *Rel. on, 17 C. W. N. 496, held no longer good law.*

[P 603 C 1]

(b) *Jurisdiction*—It is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction—*Civil P. C., S. 9.*

It is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction. Jurisdiction is the power to hear and determine and it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. An irregular exercise of jurisdiction does not render the order made in the case without jurisdiction and such orders regularly made must be set aside and cannot be challenged in a collateral proceeding: *A. I. R. 1921 Cal. 31 and 25 Bom. 337, Rel. on.*

[P 608 C 1, 2]

Satindra Nath Roy Choudhury—for Appellant.

Uppendra Lal Roy—for Respondent.

Biraj Mohan Majumdar—for Dy. Registrar.

Mitter, J.—This is a plaintiff landlord's appeal against the decision of the Subordinate Judge of Dacca dated 9th April 1925 affirming the decision of the Munsif of Manikgunj dated 2nd October 1923. The plaintiff commenced the suit in which this appeal arises for rent and claimed arrears of rent at the rate of Rs. 17-1-3½ gandas. Defendant 2, now respondent, who alone contested the suit pleaded that the rental was Rs. 10-0-15 gds. and that the rent was liable to be suspended on the ground of partial dis-possession. So far as the defence of suspension of rent is concerned, both the lower Courts overruled the objection taken by the defendant, but gave effect to the plea that the plaintiff was not entitled to more than Rs. 10-0-15 gds. The ground on which the defendant rested his defence which had prevailed in both the Courts below that the plaintiff is not entitled to a higher rent than Rs. 10-0-15 gds. is that the previous compromise decree between the plaintiff and the defendant was in contravention of the provisions of S. 29, Ben. Ten.

Act, and could not be given effect to. The facts which have led to this litigation may be shortly stated thus: The lands in respect of which this rent suit has been instituted along with other lands form certain *chur* lands and they were recorded in the finally published Record-of-Rights as khas lands in possession of the landlord. But the defendants went on possessing the lands after they had re-formed in situ and claimed them as appertaining to their original holding. In 1919 a suit was instituted by the present plaintiff for declaration of title to and recovery of possession in respect of certain *chur* lands including the disputed lands. The suit was compromised between the plaintiff and the defendants. By the compromise the plaintiff admitted that the disputed lands were the defendant's raiyati jote lands with occupancy right and the defendants admitted that the disputed plots and the yearly rent payable for the said plots were correctly specified against the names of the respective tenants-defendants in the schedule to the solenama and with regard to the disputed lands the quantity of which is stated to be 29 bighas odd, the yearly rent was shown to be Rs 17-1-3 gds. 1 kara. Both the Courts held that this compromise which was made under O. 23, R. 3, Civil P. C., and which was embodied in a decree could not be given effect to as the rental mentioned in the compromise exceeded more than two annas in the rupee, the rental which had previously been paid in respect of these lands, and consequently contravened the provisions of S. 29, Ben. Ten. Act, as admittedly the disputed lands were raiyati holdings. The Munsif, accordingly, gave a decree to the plaintiff at the rate of Rs 10 odd. On appeal to the Subordinate Judge, he affirmed the decision of the Munsif. A second appeal has been taken to this Court by the plaintiff and two points have been urged before us by the learned vakil for the appellant.

It is argued in the first place that the compromise should be given effect to, even if it contravened the provisions of S. 29, Ben. Ten. Act, for the compromise decree was binding unless the same was set aside and it was admitted in this case that the compromise decree stands.

It is argued in the second place that S. 29, Ben. Ten. Act has no application, because there was a bona fide dispute prior to the institution of the previous title suit which was settled by the compromise arrived at therein.

In support of the first ground, reliance has been placed on the case of *Romesh Chandra Banikya v. Moomraj Khan* (1), where the learned Judges held that a decree passed in contravention of the provisions of S. 147-A, Ben. Ten. Act, as applicable to Eastern Bengal and Assam, cannot be treated in a subsequent suit between the parties as without jurisdiction and a nullity but is operative and binding until vacated by appropriate proceedings. This decision, it was pointed out in that case, received support from two Full Bench decisions of this Court in the cases of *Hriday Nath Roy v. Ram Chandra Barna* (2), and *Gora Chand Halder v. Prafulla Kumar Roy* (3). There can be no doubt that the decision in *Romesh Chandra v. Moomraj Khan* (1) cited above, supports the first ground on which the learned vakil for the appellant rests his appeal. But it has been argued by the learned vakil for the respondent that the view taken in the case in *Romesh Chandra v. Moomraj Khan* (1), is contrary to the view taken by Coxe and N. R. Chatterjee, JJ., in the case of *Sharjug Sharam Lal v. Rukhit Mahto* (4). There the learned Judge held that a decree for rent passed in accordance with a compromise in contravention of the provisions of S. 147-A, Ben. Ten. Act, i. e., without recording evidence to show what the amount of rent was before the dispute arose, is made without jurisdiction, and the tenant is not bound to have it set aside, for, according to the learned Judges, the decree was a nullity. No doubt this case supports the contention of the respondent. But it seems to me extremely doubtful whether the view taken in this case can be regarded as sound, having regard to the decisions in the Full Bench cases to which I have just referred. As was pointed out in the Full Bench case in *Hriday Nath Roy v. Ram Chandra Barna* (2) it is the authority to decide a case at all and not the decision given therein which constitutes jurisdiction.

Jurisdiction is the power to hear and determine and it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly. In this connexion, reference may be made to the observations of Lord Hobhouse in the case of *Malkarjan v. Narhari* (5), where it is pointed out that a Court has jurisdiction to decide wrongly as well as rightly and that the irregular exercise of jurisdiction does not render the order made in the case without jurisdiction and that such orders regularly made must be set aside and cannot be challenged in a collateral proceeding. Chatterjee, J., who was a party to the decision in the case in *Sharjug Sharan v. Rukhit Mahto* (4) had to consider in a later case the soundness of his own decision. In the case of *Hem Ch. Choudhury v. Chandra Mohan Namadas* (6) Chatterjee J. observed with reference to the case in 17 C. W. Notes as follows :

The question whether a non-compliance with a particular provision of the law constitutes an irregularity or renders an order a nullity, has been considered in the recent Full Bench decision in the case of *Hriday Nath v. Ram Chandra* (2). It is unnecessary, however, to discuss how far (if any) the principle laid down by the Full Bench affects the decision in the case of *Sharjug Sharan Lal v. Rukhit Mahto* (4), because we think that the present case is distinguishable from that case.

We think that in view of the Full Bench decisions to which we have referred and to the observations of the Judicial Committee in *Malkarjan's* case, it cannot be said that the compromise decree in this case was passed without jurisdiction. The result is that the first ground prevails.

We also think that the second ground taken is a good ground. It seems to us that there was bona fide dispute with regard to the title to the lands in respect of which the present rent suit was instituted. In the Record-of-Rights these lands were shown to be in the khas possession of the plaintiff. The entry in the finally published Record-of-Rights must be presumed to be correct until the contrary was shown and that gave the landlord a just reason to institute the suit for recovery of possession of these lands which

(1) A. I. R. 1926 Cal. 1101.

(2) A. I. R. 1921 Cal. 34=48 Cal. 138 (F. B.).

(3) A. I. R. 1925 Cal. 907=53 Cal. 166 (F. B.).

(4) [1913] 17 C. W. N. 496=18 I. C. 809.

(5) [1901] 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=7 Sar. 739 (P. C.).

(6) [1920] 24 C. W. N. 1070=60 I. C. 204.

were recored in his khas possession as the tenant-defendants had not abandoned the possession of those lands. The lands had recently come out of water and, as naturally happens in these cases, there is a sort of dispute between persons to whose holdings the lands were annexed and the proprietor of the land. There was such a dispute and a bona fide dispute by reason of the entry in the Record of Rights in favour of the plaintiff landlord and it was in settlement of that dispute that this compromise was arrived at. Both the parties realized, as the compromise petition shows, that if the said title suit continued, they would both be ruined on account of useless expenditure, and neither party would gain much. Therefore, both the plaintiff and the defendant in that suit without any reference to the plaint and the written statement compromised the suit in the manner namely, that for 29½ bighas of land the defendant was to pay an yearly rent of Rs. 17 odd. The second ground is a substantial ground and must also prevail.

The result, accordingly, is that the decrees of the Courts below are set aside and in lieu thereof, we direct that the plaintiff do get rent from the defendant at the rate of Rs. 17-1-3½ gandas for the period in suit. The plaintiff-appellant is entitled to his costs both here and in the Courts below.

Mallik, J.—I agree.

N.K. *Appeal allowed*

A. I. R. 1928 Calcutta 609

SUHRAWARDY AND GRAHAM, JJ.
Luxmi Industrial Bank Ltd.—Appelt.

v.

Dinesh Chandra Roy Choudhury — Respondent

Appeal No. 313 of 1926, Decided on 6th January 1928.

(a) *Provincial Insolvency Act, S. 4*—Court has jurisdiction to require proof of claim by a creditor to be a secured creditor.

The Court has in insolvency proceedings jurisdiction to require from a creditor of the insolvent claiming to be secured creditor, proof of such a claim. It is not imperative that the Receiver should file a regular petition in the nature of plaint or there must be at first an enquiry under Ss. 53 or 54. The *ipse dixit* of a creditor that he is a secured creditor cannot have the effect of precluding the Court from judicially determining the matter. [P 610 C 1]

Gunada Charan Sen and *Prakash Chandra Mazumdar*—for Appellant.

Ramesh Chandra Paul—for Respdt.

1928 C/77 & 78

Graham, J.—This appeal is against an order of the District Judge, 24 Parganas and arises out of insolvency proceedings. The facts shortly stated are that on 27th January 1926, one Jewraj Khariwalla made an application before the District Judge to be declared an insolvent and a Receiver was appointed. Subsequently an order of adjudication was recorded on 3rd May 1926. One of the creditors of the insolvent, the Luxmi Industrial Bank (creditor No. 4) is the present appellant before us. It appears that this bank had advanced, or at all events claim to have advanced various sums of money to the insolvent upon the security of certain ornaments which were deposited with the bank. The Receiver wanted inspection of these articles and of the bank's accounts. The bank objected to produce them on the ground that it was a secured creditor. The learned Judge, however, considered that it was desirable that the articles should be inspected by the Receiver and he accordingly recorded an order directing the bank to grant facilities to the Receiver for the purpose of inspecting and valuing the ornaments. In making the order he observed that the bank had not yet proved that they were actually secured creditors in respect of the articles, and in his opinion it was necessary that this should be done as there were certain allegations in the report of the Receiver which raised some doubt as to the position of the bank in the matter. He accordingly directed the bank to prove that they were secured creditors in respect of the articles and issued an interim injunction restraining the bank from selling the ornaments. It is this order which forms the subject-matter of the present appeal and more particularly that portion of it which restrained the bank from selling the jewellery.

On behalf of the appellants two points have been argued. Firstly, it has been contended that the question whether the appellants are secured creditors or not cannot be gone into in insolvency proceedings; and, secondly, it has been urged that, even assuming that the appellants have to prove their right as secured creditors, the proper procedure was not adopted by the Court below. In my judgment there is no substance in these contentions. With regard to the first point the learned advocate for the

appellants was constrained to concede that S. 4 of the Act, as it now stands, confers the widest possible powers upon the Court; but he laid stress on the opening words of the section "subject to the provisions of this Act" and then went on to argue that, as no enquiry or proceeding under S. 53 or S. 54 was started against the bank, the Court below had no jurisdiction to call upon the bank to prove that they are secured creditors, or to issue the injunction. In my opinion this contention is without substance. The appellants, if secured creditors, have their rights. But they must first satisfy the Court that they have the right which they claim, and the Court below certainly had jurisdiction under S. 4, of the Act to require proof that they have that right. If such proof is not forthcoming, the properties in question will be available for distribution among the general body of creditors. The ipse dixit of a creditor that he is a secured creditor cannot have the effect of precluding the Court from judicially determining the matter. The adoption of such a view would render the Court powerless in cases of collusion between the insolvent and a favoured creditor. In my judgment both the order directing an enquiry, and the order of injunction were proper orders to make in the circumstances of this case.

With regard to the second point: it is to be observed in the first place that this has not been included in the grounds of appeal. Apart however from that, it has in my opinion no merits. It was argued that the Receiver should have filed a regular petition in the nature of a plaint so as to enable the appellants to put in a written statement in reply. I do not think that this procedure was imperative. All that was necessary was an enquiry directing to the determination of the question whether the bank were secured creditors or not. In my opinion the appeal fails and should be dismissed with costs: three gold mohurs.

Suhrawardy, J.—In my opinion there is no appeal against the order appealed from in this case. It is not necessary to discuss this matter as I agree with my learned brother in dismissing the appeal'

D.B./R.K.

Appeal dismissed.

** A. I. R. 1928 Calcutta 610

Full Bench

RANKIN, C. J., AND SUHRAWARDY,
B. B. GHOSE, MUKHERJI AND
CAMMIADÉ, JJ.

Agni Kumar Das — 1st Party — Petitioner.

v.

Mantazaddin and another—2nd Party
—Opposite Party.

Full Bench Reference No. 1 of 1928 in Criminal Revn. No. 1254 of 1927, Decided on 13th July 1928, from order of Dy. Magistrate, Comilla, D/- 13th August 1927.

** *Criminal P. C.*, S. 145 (1)—(*Per Full Bench*)—"Actual possession" means actual physical possession though wrongful — "Dispute" means actual disagreement at the time though the question is previously decided by civil Court (Mukherji, J., differing.)

Per Full Bench.—The words "actual possession" in sub-S. (1), S. 145, mean actual physical possession even though wrongful, e. g., that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145, and the word "dispute" in the same sub-section means actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to the right to possession has already been decided by a civil Court: 6 W. R. Cr. 10; 16 W. R. Cr. 24; 23 W. R. Cr. 17; 5 C. L. R. 200, 6 Cal. 835; 26 Cal. 625; 29 Cal. 208; 5 C. W. N. 563; 20 C. W. N. 793; and *Graham, J.*, in A. I. R. 1928 Cal. 344; *Disapproved: Cumming, J.*, in: A. I. R. 1928 Cal. 344, *Appr.* [P 611 C 1, P 619 C 1]

Per Mukherji, J.—The word "dispute" in sub-S. (1), S. 145, means actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to right to possession has already been decided by a civil Court, if the decision of the civil Court amounts only to a determination of the right to possession, except in cases where such right and a consequent claim to possession have been negatived by a decree which is either inter partes or may be treated as such, as also in cases in which khas or actual possession has been delivered by the civil Court either inter partes or between parties who may, in effect, be regarded as parties to the proceedings. The words "actual possession" in sub-S. (1), S. 145, mean actual physical possession even though wrongful, i. e., that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145, provided the dispute as to possession has not been determined by a civil Court as explained above.

[P 639 C 1]

Akhil Chander Dutt—for Petitioner.

Anil Chandra Roy Chowdhury and
Bankim Chandra Banerji—for Opposite Party.

Rankin, C. J.—In this case an application in revision under S. 439, Criminal

P. C., has been made to the Court against an order of 13th August 1927, made by the Deputy Magistrate of Comilla under S. 145 of that Code in proceedings instituted on 9th May 1927. A rule having issued and cause being shown before the Division Bench, a reference has been made to this Full Bench. Three points are formulated in the order of reference, viz.—

(1) Do the words "actual possession" in sub-3. (1), S. 145, Civil P. C., mean actual personal physical possession even though wrongful, e. g., that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145.

(2) Does the word "dispute" in the same subsection mean actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to the right to possession has already been decided by a civil Court.

(3) Has the law been correctly laid down in the case of *Ambar Ali v. Piran Ali* (1) or in the case of *Atul Hazra v. Uma Charan* (2) and *Akroy Mandal v. Basir Rai* (3).

By the rules of this Court (Ch. 7, R. 5, Appellate Sides Rules) the case itself is referred to us and we have not merely to answer the specified points of law.

In these circumstances it is necessary to set out the facts. The applicant before us was the 1st party before the Magistrate. It appears that he took a mortgage in 1906 from Moktar and his wife Arjatannessa, that he sued upon it and after the wife's death recovered a mortgage decree on 15th September 1919, for sale against Moktar and the heirs of the wife. On 16th September 1923, he applied to execute the decree alleging that limitation was saved by an arrangement by which in 1920 he was put in possession of certain portions of the land in lieu of interest. In the end this question was concluded by a decree of this Court on 11th December 1925. The finding was that as against the minor heirs of the wife the decree was no longer capable of execution as the arrangement relied upon to save limitation was not so made as to bind the minors. Thereafter the property was sold as against Moktar and purchased by the decree-holder, an application to set aside the sale for non-service of notices, etc., was prosecuted to the High Court and was dismissed, but this Court on 11th May 1925, made it clear that no decision was arrived at, or could in those proceedings be arrived at, on the question

whether the original owner was Moktar or his wife or on the question of their shares. On 8th February 1926, the applicant, i. e., decree-holder first party, was put in possession pursuant to his purchase. It is quite clear that he was not put into actual possession of the homestead and the finding is that he was given possession of the scattered plots of agricultural land by the planting of a bamboo.

The Magistrate has found possession to be with Montazaddin and Afajaddin of the 2nd party. These are sons of Moktar. Afajaddin is the minor or one of the minors against whom the decree was held to be barred in execution. He is an admitted heir of his mother Arjatannessa. It is clear enough therefore that as against his right to possession or as regards the extent of his share there has been no decision of any Court of law.

The applicant contends that the Magistrate had no jurisdiction to take action under S. 145; and, alternatively, that if he did take such action he was bound in law to find that the applicant was in possession by reason of the delivery of possession given by the civil Court on 8th February 1926, some 15 months before the date of the Magistrate's proceedings. This argument proceeds upon the view: (1) that the section refers only to bona fide disputes and not to cases in which the claim on one side is without any rational ground or is made without any real belief in its validity; (2) that the section is intended to make interim provision until disputes are determined by the civil Court and that once the civil Court has determined the matter any dispute is at an end, or at all events [to use the words of Glover, J., *Raniganj Coal Ass. v. Hem Lall* (4)].

There is no more place for a summary order which proceeds not upon title but on mere possession.

In support of this line of reasoning the following cases are relied upon: *Shama Sundary v. Jardine Skinner & Co.* (5), *Rai Mohun Roy v. Wise* (6), *Raniganj Coal Ass. v. Hem Lall* (4), *In re. Chutraput Singh* (7), *Bhola Nath Ghosh v. Mathoor Mundle* (8), *Gobind v. Abdool* (9),

(4) [1879] 24 W.R. Cr. 17.

(5) [1866] 6 W.R. Cr. 10.

(6) [1871] 16 W.R. Cr. 24.

(7) [1879] 5 C.L.R. 200.

(8) [1880] 7 C.L.R. 516.

(9) [1881] 6 Cal. 835=8 C.L.R. 217.

(1) A.I.R. 1928 Cal. 344.

(2) [1916] 20 C.W.N. 796=33 I.C. 822=23 C.L.J. 555.

(3) A.I.R. 1923 Cal. 176.

Doulat Koer v. Rameswari (10), *Kunja Behari v. Khetra Pal* (11), *Atul Hazra v. Uma Charan* (2), *Abhoy v. Basu Rai* (3), *Behari Gir v. Rani Bhubaneswari* (12).

The principle or practical necessity which appears to be at the root of the appellants' contention, and which in not a few of the cases cited has been held to govern the construction of S. 145 and the enactments which preceded it has been stated as follows : That the Magistrate is not competent to interfere with the execution of a decree of the civil Court. That he is bound to maintain the party in possession who has obtained a decree and recovered possession in execution of that decree. That there would never be an end to litigation if the Magistrate will not keep in force the decision of a civil Court regarding lands. These expressions will all be found in the judgment in *Rai Mohun Roy v. Wise* (6) which is the leading case among those relied on by the applicant. In some of the cases, particularly when the decree in question has been passed or affirmed by the High Court, there is a certain amount of embroidery upon this theme which may well be ignored. But there is a reference to Indian conditions in the *Ranigunj Coal Ass. v. Hem Lall* (4), which may usefully be recalled :

If the law were otherwise it would be worth no one's while to go to the trouble and expense of proving title in a regular suit, for the effect of a decree might be to a great extent nullified by parties contriving to get into some kind of possession (which they could easily do in forest lands like those now in question) and then demanding to be retained in possession till a second suit was brought and decided : *Per Glover, J.*, in *Ranigunj Coal Ass. v. Hemhall* (4).

Now I cannot find that this point, that he had no jurisdiction, was taken before the Magistrate. It appears to me that the applicant contended that he was entitled to an order declaring his possession under sub-S (4) and although I appreciate that the Magistrate took action on a police report and not on the applicant's complaint, I think the applicant has waited and taken the chance of a judgment in his favour. In these circumstances I should have great difficulty in giving effect to his contention at this

stage : *Kulada Kinkar Roy v. Danesh Mir* (13), *Basanta Kumari v. Mohesh Chandra* (14).

Secondly, the principle appealed to is not applicable to the facts of this case. It is not true that the applicant has obtained any decision from a civil Court establishing as against Afajaddin his right to possession of these plots. The whole question of the latter's right has been kept open. It has not been held that the mortgage decree can be executed against him or that he can be ejected on the strength of the sale held thereunder. The first party has been claiming to be entitled to, and to have obtained, exclusive possession. It has not been determined what the share of Mantajuddin is. How in these circumstances it can be contended that the case is outside the jurisdiction given to the Magistrate by S. 145 is not intelligible to me.

However, as the Magistrate has found in favour of Mantajaddin also, I will deal in the third place, with the question whether the jurisdiction given by the section is limited in the manner contended for by the applicant. This raises the second of the three questions stated for our decision by the Division Bench. Does the word "dispute" in sub-S (1) of S. 145 refer only to a "bona fide" dispute, or to a dispute which has not already been decided inter partes by a competent Court? If so does the Magistrate's jurisdiction depend upon a finding of fact that both parties to the dispute have an honest belief in the validity of their claim to be entitled to possession or has the Magistrate to examine the respective claims as to the right to possession to see whether on both sides there is some reason in the claim. In *Gobinda Chunder Moitra's case* (9), at 841, Field, J., said :

I take it that the term dispute . . . means a reasonable dispute, a bona fide dispute, a dispute between parties who have each some semblance of right or supposed right.

What exactly is this test?

Again, where there has been a decree inter partes determining the question of right but no delivery of possession in execution thereunder, is the jurisdiction under S. 145 ousted? In point of logic it would seem that a decree deciding the

(10) [1899] 26 Cal. 625=3 C.W.N. 461.

(11) [1901] 29 Cal. 208=6 C.W.N. 38.

(12) [1919] 5 Pat. L.J. 104=1 P.L.T. 9=54 I.C. 934=(1920) P.H.O.C. 79.

(13) [1906] 33 Cal. 33=10 C. W. N. 257=2 C. L. J. 271.

(14) [1918] 40 Cal. 982=19 I. C. 541=17 C. W. N. 944.

right would be enough, and the language of the judgments in *Rai Mohun Roy's* case (6) and the *Raniganj Coal* case (4) is to this effect. Though in the former case there had been delivery of possession, in the latter case no such fact appears from the report. On the other hand the principle involved cannot be said on the authorities to be applicable in the absence of delivery of possession or its equivalent.

Again, in holding the principle to be applicable reliance has in several cases been placed on the fact that the decree or delivery of possession thereunder has been recent or "within a time not remote" (per Prinsep, J. in *Doulat Koor's* case (10) or within a very short time, that is within three months: *Kunja Behari's* case (11).

The question arises whether it is for the Magistrate to enquire whether the claim of one of the parties is based on a reasonable case consistent with the decree, e. g., on subsequent transactions between the parties and whether in the absence of such a case any decree however old will oust his jurisdiction.

Other questions arise: as regards decrees which on a complicated narrative and argument are said to be wholly without jurisdiction and a nullity whether because minors were not duly represented or for other reasons; as regards decrees to set aside which proceedings have been taken or are threatened, as regards decrees which are statute-barred for execution purposes. If in any such case the person who recently, or whose predecessor in-title years ago, failed before the civil Court claims to be in actual possession or is found to be in actual possession is the Magistrate's jurisdiction under S. 145 ousted altogether or dependent upon his being satisfied by an examination of the claim to title that it is consistent with the civil Court's decree? In *Abhoj Mondal's* case (3) A had obtained symbolical possession in a suit against B before a Court which on the Magistrate's view had no jurisdiction. The Magistrate acting on a prior entry in the Record-of-Rights held B to be in possession. The High Court held that it was not for the Magistrate to question the validity of a decree that had not been set aside by a competent Court. His order was set aside as being grossly irregular, but it was not said to be without jurisdiction.

The difficulties to which I have referred arise from the doctrine that because a decree has at some time been passed inter partes and possession has at some time been delivered thereunder there is no dispute or no bona fide dispute or no such dispute as is contemplated by S. 145. In my opinion the doctrine itself and much of the reason upon which it has been rested are erroneous and I much regret in the interests of the public peace and of the Magistrate whose duty is to preserve the peace that these questions have not long ago been brought before a Full Bench in order that the jungle of decisions might be reduced to order. In *Syed Ambar Ali v. Teran Ali* (1) may be found lists of contradictory decisions and that the contentions advanced before us by the applicant have failed after over fifty years to establish themselves in our case law may be shown by a reference to that case and to such cases as *Kuloda Kinkar Roy v. Danesh Mir* (13) and *Shahabaj Mandal v. Bhajahari Nath* (15). In my judgment they have failed so to do: (1) because they are wholly without warrant in the statute and represent an unworkable and unreasonable attempt to thrust into the section qualifications and conditions which are rejected by its letter no less than by its general intention; (2) because these qualifications and conditions have their sources in misapprehension of certain principles of law.

In exhibiting the law as I find it in the Code I will take note first of the fact that S. 145 is not the only weapon with which a Magistrate is entrusted for the maintenance of the peace in connexion with dispute over land. He has a power specially adopted to cases of urgency under S. 144 and he has a power under S. 107 which in some cases will suffice. It is clear enough that whatever force be given to the word "shall" in sub-S. 1, S. 145, it need in no way embarrass any Magistrate in exercising his discretion. If he is of opinion that an order under S. 107 will meet the case and proposes to make one he has only to make it to justify himself in holding that the dispute no longer is likely to cause a breach of the peace; he can do this either without taking action under S. 145 or at any stage of proceedings under that section. If he thinks that the case calls for action under S. 144 he can take such

(15) A. I. R. 1922 Cal. 364=49 Cal. 177.

action and if he thinks this sufficient to prevent the likelihood of a breach of the peace he can postpone all action under S. 145. Whether in the midst of S. 145 proceedings he can on making an order under S. 144 drop such proceedings is a particular question on which I say nothing. In exercising his discretion the Magistrate will regard as supreme the necessity of maintaining the public peace. The attempt to classify cases as appropriate to one section or another can be carried only a little way and it is not to be wondered at if the decided cases contain little general advice of practical utility. The discretion is to be exercised on the particular facts of each case considered as a whole and by an officer with knowledge of the local conditions. I am not saying that under the present Code it cannot be controlled or corrected in revision. But I do say first that it is an error to suppose that decree-holders are a class of men so favoured by the law that in any conflict between their convenience and maintenance of the public peace the latter must give way under S. 145, and secondly, that the conditions of jurisdiction are reasonably plain and complete under each section of the statute.

Where the express conditions are satisfied and the Magistrate has acted under S. 145, according to its terms, it is still possible that for special reasons the result of his action may give just cause of complaint. Thus in *Aran Sardar v. Hara Sundar* (16) the Magistrate had made a previous order under S. 145 between the same parties in interest declaring the first party to be in possession. The second party's successor-in-interest disobeyed this order and secured a footing on the land. Instead of taking steps to enforce his previous order the Magistrate drew up a new proceeding under S. 145 and made an interim attachment of the land. The High Court held this to be an abuse of his powers.

Where orders are made under more than one section the Magistrate must be careful that his action as a whole does not operate to defeat the rights of the party in possession. It would be obviously wrong to use S. 144 to forbid a party in possession to exercise any rights of possession and then later on to hold under S. 145 that no one is in possession (16) A. I. R. 1923 Cal. 95.

and attach the land: cf. *Joyanti v. Middleton* (17). Nor could a Magistrate properly so use his power as to defeat revisional jurisdiction, e. g., by commencing a fresh proceeding under S. 145 pending the decision of a rule granted by the High Court to set aside a previous order of the same character: cf. *Pran Ballav Mitter v. Rash Behari Mitter* (18). Nor can the section be applied to disputes between parties who are in joint possession as a matter of fact as distinct from actual exclusive possession of separate plots, *Basanta v. Mohesh* (14). These illustrations will serve to show that it is not always enough for a Magistrate to be within the letter of the section. He must be within the true construction of it and even then he must not abuse his power. The contentions of the applicant before us, however, are not justified by these considerations.

I dissent altogether from the doctrine that the words "dispute likely to cause a breach of the peace" refer only to bona fide disputes or only to reasonable disputes. The first sub-section is concerned with the maintenance of the public peace and with the reality of disputes, the danger of disputes. It matters little to a broken head whether it be broken in good faith or in bad and the Magistrate can have no preference. When he finds from a police report that he must take action, he can hardly be in a position to enter into such question. The section requires him to call for written statements and to enquire only as to the fact of actual possession. The nature of the claim to title may affect the question of fact as to possession, but he is expressly debarred from enquiring into the merits of the claims. It has been contended before us that he may and must enquire into the bona fides and the reasonableness of claims under sub-S. 5, but it is clear to me that this provision is made with no such object. I do not know that it is generally true in India or elsewhere that unreasonable or mala fide disputes are less dangerous than others or more readily accommodated. A Court of law might as well commit itself to the proposition that family disputes are always the mildest. The section is based upon the notion that whether a man has the best

(17) [1900] 27 Cal. 785=4 C. W. N. 562.

(18) [1903] 4 C. L. J. 418.

or the worst claim in the world he must not take the law into his own hand and so disturb the public peace.

Nor, on the other hand, is it clear to me that disputants with mala fide or unreasonable claims are specially amenable to orders for security under S. 107. The Magistrate's discretion in such matters must be determined by the facts as a whole. In particular everything depends upon the question which party is now in actual possession? To say that where the claim of one party is mala fide or is unreasonable the Magistrate cannot act under S. 145 and should act under S. 107 is both bad advice and bad law. If the party who seems to have no case on title is out of possession there can be no reason why the other party's possession should not be declared. But if he is really and actually in possession what then? Let us suppose that the case cannot be brought under Pro., sub-S 4, S. 145 or under S. 522. Is a Magistrate whose power to restore possession so strictly limited to say to one party that he may take possession at his own hand and to the other party that if he does not withdraw or let himself be evicted peaceably he will have committed an offence (what offence?) and forfeited his security. I cannot think it at all clear that the words in S. 107 "or to do any wrongful act that may probably occasion a breach of the peace" can reasonably or legally be pushed so far; and, if want of bona fides in one party is to justify an indirect order for recovery of possession. I fear that Magistrates will be busy and that the public peace will suffer even more than civil justice from this magisterial form of title suit. While a Magistrate acting under S. 145 is under no duty to enquire into the question of right there may be some rare cases in which both parties being out of possession the right of one party is so very clear as to make it more just and reasonable that he should act against the other under S. 107 than that he should attach the property so as to compel the former party to bring a suit. But there is great danger in inviting Magistrates to act upon their view as to the right of parties, and jurisdiction under S. 145 or S. 146 cannot possibly be affected by any consideration of this character. Even in clear cases of this character the maintenance of the peace

may make it wiser to attach under S. 146 than to order security under S. 107.

It is not a proposition of law, but I think it is a sound opinion, that when the Magistrate cannot after due enquiry decide as to which party is in possession, he will almost always act wisely in attaching the property under S. 146, and unwisely in attempting to deal with the matter under S. 107. As to S. 144 it is sufficient to point out that it is intended for cases requiring an "immediate prevention or speedy remedy": S. 145 is an ordinary measure of precaution when breach of the peace is "likely." How little substance there is in this part of the appellant's contention may be seen from the definition of "criminal trespass" in S. 441, I. P. C. This shows the importance which the substantive criminal law attaches to possession. For the rightful owner to enter upon land in the possession of a mala fide claimant with intent to intimidate or annoy him would be an act of criminal trespass. Finally, upon this part of the argument I would observe that the supposed need for bona fides and reasonableness has no special reference to the rights of decree-holders.

But the main ground upon which the appellant's contention rests and has not seldom been put, is a notion that it is the duty of the Magistrate "to maintain the civil Court's decree." There are senses in which a true meaning may be given to such a phrase, but for the present purpose and in the sense required by the argument it is the statement not of a principle but of an error.

In civil suits there is a limited class of cases in which the plaintiff is allowed to ask for no relief beyond a declaration of his rights. It is common in this province for a plaintiff who claims to be in possession to ask for "confirmation of possession," an ambiguous phrase which may cover several forms of relief which might be more accurately described. Again, it is a common—much too common—practice to ask for ancillary declarations in addition to the ordinary relief. Now where a plaintiff stands in need of relief other than a declaration it is for him to ask for it and to see that he gets it by execution of the Court's decree. Suits for ejectment are important examples of this principle. It is only in the case of decrees for joint possession or for

delivery of immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy that the Civil Procedure Code knows anything of "symbolical possession." That is to be given by affixing a copy of the warrant and proclaiming the substance of the decree.

In other cases the Code directs that possession of immovable property is to be delivered to the party or to such person as he may appoint and if necessary by removing any person bound by the decree who refuses to vacate the property. It may or may not be useful to signalize the event, e g., by planting a bamboo; but it is the business of the Court's officer to give actual possession to the party under O. 21, R. 35 (1) and to the purchaser under R. 95. Rule 97 et seq of the same order make provision enabling any resistance to be overcome. The judgment-debtor or his creatures may be sent to jail; bona fide claimants are protected. A decree-holder or purchaser who is entitled to possession can get it and if the Court's officer does not give it the Court will make him give it if applied to at the time. Once he is put into possession and the officer has effected the delivery the decree-holder has had his remedy. For purposes of further litigation he has incidental advantages in that partly or wholly he has cleared his title in a way readily proved and is entitled to the benefit of the doctrine of *res judicata*. But otherwise he is in no different position from that of a person who has come by the possession of land by inheritance from his grandfather or by purchase at a private sale. There are cases in which an injunction to restrain trespassers may be obtained but a previous decree is no necessary condition. The decree-holder, like any one else must maintain his own possession once he has obtained it. The law gives him the same assistance in this behalf as it gives to others and on the same terms in all material respects. It leaves to him the same liberty to part with his possession. Indeed he may be a decree-holder as against *A* and a trespasser as against *B*.

Now for the present purpose the duty of the Magistrate is to obtain possession; not to "maintain the decree." The terms upon which the Magistrate is to maintain any man's possession are laid

down in the Criminal Procedure Code and in the Penal Code which have no separate law for decree-holders as a class. Against forcible and wrongful entry within two months of the proceedings the Magistrate can maintain possession under S. 145 by restoring it even after it has been lost: he can act after a conviction for criminal trespass under S. 522 in cases of a certain character and without any limit as to the date of the trespass. Whether he can restore possession indirectly under any other of his powers may be a question. But the substance of the matter is clear enough. It is the civil Court's duty to give possession on the ground of right: it is the Magistrate's duty to maintain possession against force or show of force. To say that when a Magistrate twelve months after a civil Court peon has delivered possession, finds that the judgment-debtor is back in possession of the land, he is interrupting or interfering with the execution proceedings of the civil Court, if he acts under S. 145, is a violent abuse of language. On the other hand it is true that if on a given date the plaintiff has been put into possession by the civil Court, however inefficiently or irregularly, then on that date the plaintiff got possession as against the defendant. The defendant's actual possession has been broken as a matter of fact even if only for the moment. This is as true of symbolical possession improperly so called as of any other possession though what happened at the time of delivery may well be important on the question whether the plaintiff continued in possession very long or was ousted in the following week. Still it is an error to hold in such cases that the decree-holder was never in possession [cf *Atul Hazra's case* (2)] or to ignore the delivery to him. This is a particularly grievous error in cases of boundary disputes or disputes as to outlying portions of the land delivered. Cases in which it has been said that the Magistrate has interfered with or nullified the civil Court's decree will on examination be found to be cases where the Magistrate has come to a wrong finding on the fact of possession by reason of this error: e. g., *Shama Sundery's case* (5), *Rai Mohun Roy's case* (6), *Chutraput Singh's case* (7), *Bhola Nath Ghose's* (8).

When large tracts of forest land or churs or inaccessible areas are recovered

in ejectment it may well be true that the owner may find it difficult to look after his property or even to come to the Magistrate while dispossession is recent. This, however, does not show that it will be almost idle to appeal to a civil Court if S. 145 be applied to the actual facts of a case when breach of the peace is likely, in spite of the civil Court's decree. Still less does it justify a Magistrate in allowing breaches of the peace to take place when he can obviate them. It shows that certain kinds of property are somewhat inconvenient possessions.

The same considerations seem to me to afford an answer to the contention that once the civil Court has pronounced upon the right of one party as against another there is no place for an order under S. 145 which proceeds upon mere possession. If the party is out of possession and is attempting to retake possession at his own hand forcibly so as to disturb the public peace, I am at a loss to know why the Magistrate should not require him to assert his right in the proper way. A civil Court by its decree can give possession. It does not attempt in the same suit to keep the plaintiff in perfect peace because this is impracticable; new causes of action require a fresh consideration of the facts. The Magistrate is not there to give a form of execution that the civil Courts cannot give. His duty in substance is to maintain possession because the forcible disturbance of possession is contrary to the criminal law. This is clear enough from the words "until evicted therefrom in due course of law" which contrast with the words used in S. 146. Where possession cannot be shown in spite of a previous decree, and cannot be taken without a breach of the peace, the Magistrate is to take the land into his own possession by attachment and to hand it over not to the person whom he thinks to be entitled but to the person whom the civil Court decides to be entitled. A breach of the peace requires the Magistrate to act: necessarily it makes place for an order which proceeds on "mere possession" because it makes place for a Magistrate who is not the judge of titles or the bailiff of a civil Court.

On this question of jurisdiction to act under S. 145 I have discussed the principles involved in view of dicta in the decided cases. I do not propose to

discuss all the cases, but there are a few old cases which have done much to introduce false doctrine on this subject. *Shama Sundery's* case (5) may possibly have been one in which the Magistrate's order literally and not as a matter of hyperbole interfered with the execution of a civil Court's decree. The dates are not given nor is it quite clear what case was then pending in the miscellaneous department. But it is no authority on the question of jurisdiction to act under S. 145 if only for the reason that the Judges suggest that the Magistrate might have made an order under S. 319 of the Code of 1861 i. e., under the present S. 146. The same may be said of *Ram Mohun Roy's* case (6), where it is said that the decree should have been maintained under S. 319.

In this case the delivery of possession would seem to have been given several years before the Magistrate's order but it was said that the Magistrate was not competent under S. 318 to "interfere with the execution." Both these were cases of disputed possession and the ruling seems to be: (1) that the Magistrate should have decided that neither party was in possession or that he could not satisfy himself as to which was in possession, (2) that then the previous decree of the civil Court would have under S. 319 enabled him to give possession to the decree-holder. This latter proposition seems to be highly questionable. These views do not seem to have been adopted in later cases but dicta in the judgments are often quoted. In the *Raneegunj Coal* case (4), which was an undefended case, Glover, J. arrives for the first time at the full doctrine that once a civil decree is passed Magistrate's duty is to "maintain the decree," that he cannot institute proceedings under the present S. 145 and that he must cope with any breach of the peace by taking security. *Chatraput Singh's* case (7) is no authority on the question of jurisdiction to act under S. 145 because the order made by the High Court was to declare him entitled to retain possession until ousted in due course of law. Possession of a *hat* had been given by the Nazir in March or April 1879. The Magistrate's final order was on 10th July of the same year, so the dispute followed close upon the delivery of possession. It appeared that the Nazir

gave possession by a proclamation at the hat and by planting a bamboo elsewhere. The decree-holder maintained his possession by trying to collect his dues but the old proprietor also collected dues, and with more success. The Magistrate ignored the delivery of possession and went solely upon actual receipt of dues. The case was one in which the Magistrate came to a wrong finding as to the fact of possession. It was said that the Magistrate was not competent to nullify the action of a civil Court. *Bhola Nath Ghose's* case (8) was exactly similar; it was a case of a wrong finding of fact that a person evicted from possession was still in possession on the ground that the landlord decree-holder had done no acts of cultivation. Here too the case arose immediately after the eviction and by his wrong notions as to possession the Magistrate had nullified the civil Court's decree by failing to recognize and maintain existing possession thereunder.

There is nothing in this case that can be questioned save for the approval of dicta in *Rai Mohan Roy's* case (6) and in the *Raneegunj Coal* case (4). In *Gobind Chunder's* case (9) the same Magistrate had found under the Land Registration Act, that A was in possession and under S. 530, Criminal P. C., 1872 that B was in possession and not A. This latter proceeding was instituted while the former proceedings were still pending before the Commissioner. The case was a wretched instance of mishandling, and it appeared that there were no reasons for supposing that either A or B would commit a breach of the peace. There is nothing in the judgment of Pontifex, J., which can well be questioned, but Field, J., refers to the dicta in *Rai Mohan's* case (6) and elaborates them. The dispute must be bona fide and reasonable, the dispute is at an end, the Magistrate must maintain the rights of the successful party, he must not neutralize the effect of the decree, he has no power to institute proceedings under S. 530 (149) but must take security under S. 491 (107). In *Doulat Koer v. Rameswari* (10) A was given possession on 29th August under order made inter partes by the Civil Court and on 1st November initiated proceedings under S 145. The Magistrate declared that Dulin Saheba was in possession, on the strength of some rent receipts from raiyats. It was held that the Magistrate

had no jurisdiction under S 145. It is said by one Judge that he should have contented himself with declaring that the orders of the civil Court should be maintained: by the other Judge that he should have directed Dulin Saheba to assert her rights as she might be advised. Under the Code as it then stood the Court held that it could only interfere on a point of jurisdiction, and from the judgment of Prinsep, J., it would appear that the jurisdiction was ousted by reason that the decree was "within a time not remote." The same circumstance is stressed in *Kunja Behari's* case (11) where the decree was still under appeal and the Magistrate is said to have "ignored" the decree. These cases show an inclination to resile from the broad dicta of previous cases as to the effect of a decree. They also show an increasing haziness as to whether it is the final order of the Magistrate which is ultra vires if he does not "maintain the decree" or whether the whole proceedings are without jurisdiction in view of the decree.

In *S. Gordon Sims v. Johurilal* (19 and 20) both parties produced civil Court decrees and the Magistrate held that one party had decrees which applied to the land in question and made an order in his favour under S. 145. This was affirmed by the High Court as being in accordance with the case of *Doulat Koer* (10). The decree in question was not inter partes. The Court stated:

We are aware of no ruling which prescribes that the Magistrate is to maintain a party in possession in accordance with the decree of the civil Court only when the opposite party is a party to that proceeding.

Another case in which appeal was made to the principle that the Magistrate must maintain the possession given by the Civil Court though the parties are not the same

is *Kulada Kinkar Roy v. Danesh Mir* (13). In that case the language used in the cases of *Gobind Chunder* (9), *Doulat Koer* (10), and *Gordon Sims v. Johury Lal* (20) was shown to be too broad and it was laid down that while possession given previously under a decree may be presumptive evidence it has to be taken along with other circumstances and other evidence as to the fact of possession at a later date.

In *Atul Hazra's* case (2) the Magistrate found that five or six months after deli-
(19 & 20) [1901] 5 O. W. N. 563.

very of possession under a decree inter partes the party against whom the civil Court had decided was back in possession. The Court held that the party ought not to be allowed to assert this and seem to have thought that proceedings under S. 145 were improper. The same principle that a party ought not under S. 145 to be allowed to assert that he is in possession even when the fact is so, if his possession is not lawful possession but the possession of a trespasser and a wrongdoer, was affirmed by Graham, J., in *Syed Ambar Ali v. Teran Ali* (1). In my opinion this line of reasoning must be discarded for all purposes in applying S. 145 for the reason that it is plainly contrary to the express provisions of the section and inconsistent, as I have endeavoured to show, with the principles applicable to the subject. In order to maintain the peace and take effective action the Magistrate has to deal with the facts: estoppels between the disputants are only in place on a question of right as between one party and another. In this jurisdiction the interests of the public are supreme. *Suum cuique tribuendo* is not the function of the Magistrate: that object must be achieved at a later stage and by more appropriate means.

As regards the second contention of the applicant that if the Magistrate had jurisdiction to act under S. 145 at all he was bound in law to find possession according to the civil Court's decree and therefore to find that fifteen months after the delivery of possession given as against Mantazaddin that the applicant was in possession, the fallacy of this contention is in my opinion sufficiently exposed by what I have already said. If a case is within S. 145 the Magistrate acting under the section must deal with it as the section prescribes. It is clear on the facts of the present case that on 9th May 1927 the applicant was not in possession.

It remains only to deal formally with the three questions stated in the order of Reference. If the word "personal" be deleted—it is a word whose meaning in this connexion is ambiguous—I think that the first question as well as the second should be answered in the affirmative. As regards the third question I am in general agreement with the judgment of Cuming, J., in *Syed Ambar Ali v. Portal Ali* (1), but I do not think it necessary or advisable to answer this

question as framed. The application in revision should be dismissed.

Suhrawardy, J.—As I am a party to some of the decisions referred to in this connexion I should like to say a few words in defence of the position I am advised to take after giving the point raised my anxious and earnest consideration. I have had the advantage of reading the judgments of my Lord the Chief Justice and my learned brother Mukherji, J., which have lucidly presented both sides of the picture. They have given me a much desired opportunity of looking at the question from all points of view and weighing the arguments for and against. I, however, feel great diffidence in differing from a line of decisions from 1861 downwards pronounced by very high authorities, specially in view of the fact that the legislature has not yet thought fit to intervene to clear up the matter. I do not propose to discuss the cases on the point as they have been so thoroughly examined by the learned Chief Justice and Mukherji, J. But as notes of dissent have now been definitely struck, I should like to approach the question untrammelled by precedents and treat it as a case of first impression. I therefore content myself with recording my opinion on the various points raised.

The term "dispute" in S. 145 (1) has not been defined anywhere in the Code but to my mind it has been clearly and sufficiently explained in the section itself as meaning a dispute which is likely to cause breach of the peace. To add any other explanation to the term will not be, in my opinion construing the Act, but legislating. The requisites to attract the jurisdiction of the Magistrate under S. 145, Criminal P. C., are (a) dispute, (b) which is likely to cause a breach of the peace, (c) which concerns land or water etc. To say that the dispute must be bona fide or reasonable is to restrict the jurisdiction of the Magistrate given him by the statute. "Bona fide" is an expression which is extremely elastic and may depend upon the ethical, moral or equitable notion of the speaker. If two persons are fighting over possession of a piece of waste land or a newly formed chur to which both of them know they have no title, can the dispute be called bona fide or reasonable? An ordinary man with normal moral ideas will call it otherwise. I do

not see any reason why it should be supposed to be bona fide or reasonable in law and I take it that those who maintain that "dispute" in S. 145 must be bona fide or reasonable will hesitate to oust the jurisdiction of the Magistrate under that section in such a case.

Now it cannot be doubted that a decree of the civil Court must have its due force and it is not desirable that one arm of the law should fight the other. But this is a concern of the legislature and not of Courts, however just and expedient it may seem to avoid such a conflict. It is argued that once the difference between the parties on the question of title to the land has been settled by a civil Court there is no further dispute that remains to be decided under Cl. 6 of S. 145 and therefore the Magistrate cannot regard such a dispute as one within the section. The logical conclusion from this view is that if a person obtains a decree for recovery of possession in the civil Court he need only go to the land with some lathials and create a disturbance there and the Magistrate is bound to put in possession, thus acting as the Court of execution of the civil Court decree. This apparently impossible position was conceded by the learned advocate who appeared in support of the rule. But my learned brother Mukherji, J., does not go so far and maintains that in order to oust the jurisdiction of the Magistrate the decree must have been executed. I do not see, in principle, any difference between an executed and unexecuted decree so far as the meaning of "dispute" is concerned. O. 21, Rs 35, 95 and 98 give sufficient facilities to a decree-holder or auction-purchaser to obtain actual possession. If he cannot retain such possession no one but himself is to blame for it. If the decree-holder is a peaceful citizen and is dispossessed his only course is to bring a fresh suit or if he is within time, to avail himself of S. 9, Specific Relief Act. If he is a turbulent person and by recourse to criminal force threatens breach of the peace, the Magistrate, according to the petitioners' contention, is bound in law to put him in possession. This position seems to me unreasonable: it is setting a premium on lawlessness. Take for example the facts of the present case. The judgment-debtors are allowed to remain in unob-

structed and apparently peaceful possession for more than a year. The decree-holder on one day after such a long time takes it into his head to collect men and attempts to make a forcible entry. From the point of view of criminal administration of justice the decree-holder is the party against whom punitive or preventive measures should be taken as the apprehension of the breach of the peace comes from his side. Does it stand to reason that the Magistrate should tell the judgment-debtor:

You must lie low and give up your peaceful possession because the other side is armed with a civil Court decree backed up by hirelings ready to use criminal force?

In my opinion the word "dispute" is used in its ordinary sense meaning a disagreement, struggle, scramble or quarrel for possession of land, etc., which is likely to cause a breach of the peace, without reference to the respective claims of the disputants.

It is possible that the legislature has not entirely overlooked cases like the present. If the decree-holder or auction-purchaser obtains actual possession through the civil Court or such possession as in the eye of law is equivalent to actual possession and is subsequently dispossessed by the judgment-debtor he can come to the Magistrate within two months under Cl. (4) and the Magistrate will reinstate him in possession. If he does not do so and sleeps over his right his claim for reinstatement by the criminal Court, so to speak, becomes barred by limitation. For the foregoing reasons I will answer the questions referred to the Full Bench in the way the learned Chief Justice proposes to do.

B. B. Ghose, J.—The facts on which the reference was made are as follows: The first party who is the petitioner in this Court obtained a mortgage decree against the second party and in execution of his decree purchased the property in question. The judgment-debtors, second party, were in possession of the property and the petitioner as auction-purchaser was put into possession under O. 21, R. 95, Civil P. C., on 8th February 1926. The finding is that although the petitioner was entitled to obtain possession by evicting the judgment-debtors that was not done and he obtained what is called "symbolical possession." It cannot, however, be questioned that such "sym-

holical possession" as against a judgment debtor amounts to actual possession in law and it should be taken as such. In spite of such delivery of possession the judgment-debtors, opposite party, continued in possession of the lands. In May 1927 a dispute arose regarding the possession of the land and proceedings were taken by the Magistrate on 9th May 1927 under S. 145, Criminal P. C. The Magistrate having found that the opposite parties were in actual possession made an order under sub-S. (6) in their favour. The petitioner obtained the rule against that order which has occasioned this reference to the Full Bench. It should, however, be stated that it appears that the execution proceedings against one of the second party, Afazaddin, were ineffectual and so possession cannot be said to have been delivered as against him by the civil Court.

I shall now deal with the arguments advanced on behalf of the petitioner. It is argued that where the civil Court has already decided the question of title and possession between the parties in controversy there is no jurisdiction in the Magistrate to take proceedings under S. 145, Criminal P. C. It is urged that the dispute referred to in sub-S. (1) means bona fide dispute. Reference is made to sub-S. (6) and it is argued that the Magistrate's order under S. 145, is to remain in force only until the decision of the civil Court, but where a civil Court has already decided the right of a party to possession of the property and has actually put him into possession it should be held that the Magistrate has no jurisdiction to take proceedings under this section. It is further argued that to hold otherwise would be to place a person in the position of the petitioner under great difficulty as he may be dispossessed by a lawless and turbulent antagonist who has been worsted in the litigation by a decree passed against him in the civil Court and against whom possession has been delivered, if that person is retained in possession by the Magistrate. The result may be that the rightful owner would be compelled to go again and again to the civil Court and continue the process without ever getting possession of the land.

It is conceded that a construction of the section according to the ordi-

nary meaning of the words used would go against the contention of the petitioner, but it is urged that owing to the obvious inconvenience of construing the section in that manner, the construction contended for should be accepted. Further it is argued that the construction contended for has been accepted in numerous decisions of this Court and those decision should not be departed from.

In order to hold that the plain natural meaning of the words in S. 145, Criminal P. C., should not be accepted it is necessary to consider the object aimed at by orders under its provisions. It has been said by the Privy Council with reference to similar orders in the case of *Dinomon v. Brojomohini* (21) :

These orders are merely police orders made to prevent breaches of the peace. They decide no question of title ; but under S. 145, Criminal P. C., 1882 (relating to disputes as to immovable property) the Magistrate is, if possible to decide which of the parties is in possession of the land in dispute ; and if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law, and forbidding all disturbance of such possession until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect.

If the Magistrate is required to decide whether a dispute is bona fide or not it would be to require him to go into the question of the merits or the claims of a party to a right to possess the subject of dispute, which he is forbidden to do by sub-S. (4). For unless he goes into the question of the rights of the parties, how is he to decide whether the dispute is bona fide ? Bona fides does not merely depend upon the fact that one party has obtained a decree in a civil Court. A person may have as clear a right by reason of succession as on the basis of a decree. But it is not contended that the Magistrate should consider any such right. The argument therefore that the word "dispute" should be read as "bona fide dispute" cannot in my judgment be accepted. Nor does the argument that the Magistrate has no jurisdiction to take action under this section where actual possession had been delivered to one of the parties by the civil Court appear to be sound. Where there is a dispute likely to cause a breach of the peace

(21) [1902] 29 Cal. 187=29 I. A. 24=6 O.W.N. 386 (P. C.).

as contemplated under sub-S. (1) what is the Magistrate to do? He cannot sit idle and allow the contending parties to settle their dispute by a free fight. It is argued that he should proceed under S. 107. No doubt he can do so as provided in sub-S. (10), S. 145, and I think the Magistrate would take action under that section if he finds that the possession given by the civil Court is being sought to be disturbed by the unsuccessful litigant in the civil Court. But can it be said that when such a person is found to be in peaceful possession at the time of the order under S. 135 (1), notwithstanding that the other party was put into possession by the civil Court, that the person in peaceful possession should be proceeded against under S. 107 because his possession is without right? He is not going to commit a breach of the peace, but it is the other person who desires to take the law into his own hands.

It is, however, argued that he is doing a wrongful act, a continuing tortious act, by remaining in wrongful possession and so brings himself within the provisions of S. 107. I do not think that that section refers to any such act as retaining wrongful possession, as it refers to a person "likely to do any wrongful act." But even assuming that such person is ordered to execute a bond to keep the peace the rightful owner cannot be put into possession unless he himself intends to get it by force. It has not been argued that the person in possession being bound down the other would be entitled to remove him from possession by force. But the argument leads to that result. To hold that the Magistrate may by an order under S. 107 enable the rightful owner to take possession without recourse to the Court, would be to delegate the function of the civil Court to the Magistrate. Nor do I think that the Magistrate can take action in such a case as this under S. 144, as was suggested, and remove the person in possession. I do not also think that it would be right to hold that the word "dispute" in S. 145 means a dispute not decided by the civil Court. In my opinion, when two parties are quarrelling over possession, which is likely to endanger public peace there is a dispute under the section. The plain meaning of the words in the section should be adopted and there is no reason why there should be a strained and ficti-

tious meaning given to the words where the maintenance of peace is concerned.

Then with regard to the question of expediency I think that the Magistrate has ample powers to maintain the person put into possession by the civil Court in such possession if he takes prompt action. It seems to me that the distinction between an act of trespass and wrongful possession of a trespasser has not always been borne in mind. In the latter case if the person who was put into possession by the civil Court allows the judgment-debtor to remain in possession for more than 12 years he loses his right to the property altogether. He has 12 years to bring his suit for recovery of possession in the civil Court: see *Hari Mohan v. Baburahi* (22), *Bhulu Beg v. Jatindra* (23). It is conceded that after the lapse of 12 years from the delivery of possession the Magistrate may take action under this section as the right of the petitioner would then be lost. But it is argued that the Magistrate has no jurisdiction to take action under S. 145 if the dispute arises within 12 years of the delivery of possession. This brings us back again to the question of the Magistrate's exercising the functions of a civil Court. The simple way would have been to extend the period under Prov. 1, sub-S. (4) to 12 years if that was the intention of the legislature. This argument also does not seem to me logical, as the exercise of the power of the Magistrate is said to depend on the fact whether the petitioner has a subsisting right.

No doubt where the question of possession is doubtful on the evidence or where the land is not effectually in the possession of either party or the possession is by collection of rents and in cases of like nature the Magistrate would be well advised to find possession with the person who was put into possession by the civil Court as against the judgment-debtor. The Magistrate also may not take any action under S. 145 if the person who has been put into possession is sought to be proceeded against by the defeated party who seeks to raise a dispute for disturbing the possession of the former and in that case take action under S. 107. Nor should the Magistrate take action if it appears that the provisions of S. 145 are sought to be abused. The

(22) [1897] 24 Cal. 715.

(23) A. I. R. 1923 Cal. 136.

argument that it is the duty of the Magistrate to maintain the possession awarded by the civil Court presupposes that such person is in possession at the time in question. But where the judgment-debtor is found to be actually in possession, notwithstanding the possession delivered by the civil Court some time previously and the decree-holder or auction purchaser did not take appropriate steps in proper time against the judgment-debtor when his possession was disturbed but allowed the judgment-debtor to retain possession and later on seeks to take possession without recourse to law, which act is likely to cause a breach of the peace, he cannot complain if the Magistrate makes an order in favour of the judgment-debtor who is found to be in possession. In my opinion the Magistrate has jurisdiction to take action under S. 145 when the dispute is likely to cause breach of the peace in such a case.

I do not propose to discuss the cases cited during the course of the argument in detail. It seems to me if the cases are analyzed it would appear that the decisions were based upon the special facts of each case although the observations in some of the decisions taken unconnected with the facts support the contention of the petitioner about the Magistrate's power. In the case of *Rai Mohan v Wise* (6) the civil Court gave possession to the first party after settling a disputed boundary. The Magistrate fixed another boundary line. The decision was that the Magistrate should maintain the possession of the first party. It should be noticed that the Magistrate was unable to determine which party was in actual possession. In *Ranigunge Coal Association v. Hem Lall* (4) the land was forest land and the possession given by the civil Court was sought to be nullified by the defeated party by taking some sort of possession which was no real possession. The case of *In re Bholanath Ghose v. Mothoor Mandal* (8), is instructive and the circumstances of that case are now provided for under the proviso to sub-S. (4) of S. 145. There the landlord was put into actual possession in execution of a decree against the tenant. The tenant attempted to take forcible possession of the land. The landlord complained; the Magistrate did nothing. The tenant then obtained possession forcibly. The Magistrate acting under the old S. 530, Criminal P. C.,

awarded possession to the tenant. This order was set aside. In the view I take I do not think it necessary to examine the other cases. It seems to me that where the finding of the Magistrate did not appear to be justified on the facts the learned Judges interfering with the decision made use of expressions regarding the jurisdiction of the Magistrate which cannot be accepted as of general application having regard to the provisions of the section.

To conclude: when a civil Court has delivered possession to a person the Magistrate should maintain that possession as against a party to the suit if the unsuccessful party seeks to disturb such possession, as in fact the possession of every person should be protected against disturbance. If the unsuccessful party takes forcible possession the Magistrate has the power to put the rightful owner into possession under Prov. 1, sub-S (4), S. 145. If, however, the successful party in the civil Court allows the unsuccessful party to get into and retain possession for a sufficiently long period of time, precluding the application of the above proviso, it cannot be said that the Magistrate has no power to take proceedings under S. 145. In such a case he may make a declaration in favour of the unsuccessful party in the civil suit if he clearly finds possession in his favour.

As to the merits of this case there is not much to be said. One of the second party does not seem to be affected by the delivery of possession by the civil Court as the execution proceedings against him were ineffectual. No argument can therefore be put forward against the order retaining him in possession. Again, the case made by the petitioner before the lower Court was that he was actually in possession of all the lands except the homestead, which has been found to be untrue. Having fought out his case on the basis that he was in possession and lost, he cannot be allowed to come up here in revision and urge that the Magistrate ought not to have taken action under S. 145. I agree with my Lord the Chief Justice in the answers proposed by him to the questions referred to. I also agree that the rules should be discharged.

Mukherji, J.—In this reference we have, in the first place, to answer the questions that have been formulated for

the decision of the Full Bench and, nextly, to decide the case itself.

At the outset I must observe that I find it somewhat difficult to answer the questions in the form in which they have been put, because they are not capable of one set of answers only, but the answers to them would depend upon the precise circumstance of each particular case. This difficulty necessitates a consideration, in the first instance, of the points which are involved in a case of the kind contemplated by the reference, before an attempt is made to deal with the questions themselves. The reference proceeds upon a set of facts as found. Whether they are really the facts of the particular case before us need not, at the present moment be considered; it will be convenient to treat those facts as constituting a hypothetical case. In the words of the order of reference the facts are as follows:

The first party are auction-purchasers and the second party are judgment-debtors. It would seem to be the first party's case and this seems to be one of the facts found that possession was delivered to the first party by the civil Court. As far as can be seen this possession was delivered by the planting of a bamboo. But it is also found as a fact that in spite of the delivery of possession the judgment-debtors were never dispossessed but remained in possession. The Magistrate found that actual possession was with the judgment-debtors.

This statement of facts requires to be supplemented by stating a few more facts about which there is no controversy: The subject-matter of the case is a homestead and several plots of arable land. Possession was delivered under O. 21, R. 95, Civil P. C., which is the only provision that can apply to a case in which the property is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequent to the attachment of such property, and the property not having been in the occupation of a tenant or other person entitled to occupy the same in which case O. 21, R. 96, Civil P. C., would have applied. As already stated, possession was delivered by the planting of a bamboo but the judgment-debtors who were in occupation of the homestead were not removed. As regards the plots of arable land, this procedure amounted in law and in fact to delivery of khas or actual possession; while as regards the homestead, since the judgment-debtors

were not bodily removed, though in law the auction-purchasers got khas or actual possession as opposed to symbolical possession contemplated by O. 21, R. 96, Civil P. C., in point of fact the judgment-debtors continue in occupation. Delivery of possession took place on 8th February 1926. The proceedings under S. 145, Criminal P. C., that have given rise to the rule were drawn up on 9th May 1927. The referring order states that in spite of this delivery of possession the judgment-debtors continue in possession, and that thereupon proceedings under S. 145, Criminal P. C., were instituted between the auction-purchasers as the first party and the judgment-debtors as the second party and that the Magistrate declared the latter as entitled to possession as provided for in Cl. (6) of that section.

On the facts recited above upon the arguments that have been addressed to us two questions arise for consideration: 1st, Had the Magistrate jurisdiction to institute the proceedings under S. 145, Criminal P. C., or, in other words, to take action under Cl. (1) of that section? and 2nd, Had he jurisdiction to make the order that he did under Cl. (6) thereof; I use the word "jurisdiction" in formulating these questions, as the word has been used in the course of the arguments and also because it finds place in some of the decisions to which our attention has been called. In using this word I wish it to be understood in the sense of "the authority by which judicial officers take cognizance of and decide cases" and to restrict its meaning further with reference to the nature of the subject-matter over which authority is to be exercised as distinguished from the territorial or pecuniary limits of that authority. As pointed out in the Full Bench decision of this Court in the case of *Hridoy Nath Roy v. Ram Chandra Barna Sarma* (24), an examination of the cases in the books discloses numerous attempts to define the term "jurisdiction" and that although there is a clear distinction between jurisdiction and the exercise of it,

the extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraint attaching to the mode of exercise of that jurisdiction that should be included

(24) [1920] 24 C. W. N. 728=5; I. C. 80;=31 C. L. J. 492(F. B.).

in the conception of jurisdiction itself is sometimes a question of great nicety.

If there is authority to entertain and decide the cause, jurisdiction would not depend either upon the regularity of the exercise of the authority or upon the correctness of the decision pronounced, for to quote the celebrated dictum of Lord Hobhouse in *Malkarjun v. Narahari* (25), "a Court has jurisdiction to decide wrongly as well as rightly." It is from the point of view of this restricted, and I may also say true, significance of the word that I propose to consider the two questions aforesaid. Looked at from this point of view the matter is purely one of construction.

Legislation regarding disputes concerning land likely to cause a breach of the peace and for the adjustment of those disputes and by such adjustment preventing them from culminating in a breach of the peace began with Reg. 49 of 1793 and continued practically on the same lines down to the current Act, viz., Act 5 of 1898. The tribunal by which the adjustment was to be made was changed by Reg. 15 of 1824, but the method as laid down by Reg. 49 of 1793 has continued without a break in all subsequent legislations: see Reg. 14 of 1793, Reg. 32 of 1803, Reg. 6 of 1813, Reg. 15 of 1824, Reg. 2 of 1829, Act 4 of 1840, Act 25 of 1861, and the more recent enactments of the Code of Criminal Procedure. That method was to bring before the Court the disputing parties, to ascertain, if possible, which of them was in actual possession irrespective of any consideration as to which of them was entitled to possession, and to say to all the other disputants that the person found in actual possession was to be left in such possession and that such possession was not to be disturbed until that person was evicted in due course of law. The prescribed method was to be resorted to, if the dispute related to land and was of such a character that there was a likelihood of a breach of the peace resulting therefrom. The object to be attained was the prevention of the dispute from culminating in a breach of the peace. The object and the method have remained the same all through. Apart from any cases and upon the plain words of the statute, the

conclusion that I come to, I can express in no better words than in those of Hill, J., in the Full Bench case of *Krishna Kamini v. Abdul Jabbar* (26), whose judgment was concurred in by Prinsep, Ag. C. J., and Brett and Henderson, J.J., and, so far as this matter was concerned, was not dissented from by Banerjee, J., who differed in that case on other points from the rest of his colleagues. He said:

Then as to the question of jurisdiction: On being satisfied of the existence of a dispute likely to cause a breach of the peace concerning land, etc., within his local jurisdiction, the duty, which is imperative, is cast upon the Magistrate of taking action under S. 145. The two essentials are that there should be a dispute likely to cause a breach of the peace, and that the dispute concerns land, etc. The section does not primarily contemplate cases in which there have already been acts of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely, having regard to the known conditions of society, to lead to a breach of the peace, that is enough to warrant the Magistrate's intervention and to give him jurisdiction over the subject of dispute. Upon the existence of these conditions and these conditions only, is the jurisdiction of the Magistrate in my opinion dependent. The object, I think, is to take the subject of dispute out of the hands of the disputants, and to constitute one of them, whose possession the law will protect, its custodian until the other has established his right (if any) to possession in a civil Court;

or, to be more correct, until the other has been evicted therefrom in due course of law if the order is one under S. 145, Cl. (6), or until a competent Court has determined the rights of the parties thereto or the persons entitled to possession thereof, if the order is under S. 146. As regards the decision: for it to be in excess of the Magistrate's jurisdiction, it must be in violation of some express direction of the law, e.g., where the law says that the decision shall be one way or that it shall not be that way and he has decided otherwise. These are the fundamental principles that have to be borne in mind in an attempt to answer the two questions that I have set forth above, read with reference to the case as recited in the reference. That there was an apprehension of a breach of the peace is admitted on all hands. That there is no provision of the law which forbids an order under Cl. (6), S. 145, being made against the auction-purchaser who has been put in

(25) [1900] 25 Bom. 337=27 I.A. 216=2 Bom. L. R. 927=7 Sar. 739 (P. C.).

(26) [1903] 30 Cal. 155=6 C. W. N. 737 (F.B.).

possession in execution of a decree is also not challenged. The law only says, except as to a case of dispossession coming under the first proviso to Cl. (4) that

if the Magistrate decides that one of the parties was in such (meaning, actual) possession of the subject he shall issue an order, etc.

It is clear, therefore, that to consider the question of jurisdiction, as regards the first question the true meaning of the word "dispute" and as regards the second question that of the expressive words "possession" and "actual possession" will have to be investigated and it will have to be seen whether in the circumstances of the case recited above and in the eye of the law there was a "dispute" between the parties, or the second party were in "actual possession." It will be convenient at this stage to deal with the relevant cases that are to be found in the books.

In the case of *Shama Soondery Debya v. Messrs. Jardine Skinner & Co.* (5) the petitioner Rani Shama Soondery had been put in possession of a share in certain lands under a decree of a civil Court which had been confirmed by the High Court, the amin having given her khas possession of that share. The opposite party, Messrs. Jardine Skinner & Co., who were parties to the suit, raised a dispute alleging that they were in actual and tangible possession of certain lands which had not been actually defined or interfered with by the amin.

They set up a right of occupancy as tenants in those lands. They contended that the word "khas" as used in giving possession was "an error." Their objection to the delivery of possession was pending in appeal. The Magistrate finding that there was an apprehension of a breach of the peace made an order in favour of the opposite party. Seton-Karr and Markby, J.J., said :

"We are clear that the order of the Magistrate is illegal and cannot be permitted to stand We hold that it was not competent to the Magistrate to interfere under S. 318, Criminal P. C., with the execution of a decree of the civil Court, affirmed as it has been by the highest Court of the country, and to say that the word "khas" as used in giving possession must be an error, or to lay it down that the petitioner had no right to come on the lands "except as collector of rent." Moreover, we are informed that the case giving the Rani possession is pending in appeal in the miscellaneous department, and if there had been any doubt as to the exact meaning, intent

and object of the decree the matter was one which ought to be adjudicated on in that department and not in the criminal Court. In fact, looking to the possession of the parties and to the state of the dispute the Magistrate, if called in to interfere under Ch. 22, Criminal P. C., because he was apprehensive of a breach of the peace, should have kept the Rani in possession under S. 319, as the party who had been actually placed in possession by a decree of the civil Court. We quash the proceedings of the Magistrate under S. 318 and declare them null and void.

The word "jurisdiction" does not appear in the decision, but the competency—which is more or less the same thing—of the Magistrate to take action under S. 318, was held against and the proceedings instituted and decided under that section were quashed and declared null and void ; but it was also held that if by reason of the apprehension of a breach of the peace the Magistrate was called upon to interfere at all under Ch. 22, he should have kept the Rani in possession under S. 319. The decision was not a clear authority on the question of jurisdiction. The learned Judges further observed that in passing the aforesaid order they were acting in strict accordance with a previous decision of the High Court (Loch & L. S. Jackson, J.J.,) dated 27th July 1864, in the case of *Kali Soondery Chowdhurani*.

In the case of *Rai Mohan Roy v. J. P. Wise* (6) the facts were as follows: There was in 1848 a proceeding under Act 4 of 1840 which was decided in favour of the predecessors of Wise. The Roys brought a suit to set aside the possessory order passed by the criminal authorities, obtained a decree and got possession through the Court in execution of the decree. There was a dispute on which proceedings under S. 318, Criminal P. C., were started. The Roys contended before the Magistrate that Wise was attempting to take possession of a portion of the land decreed to them by the civil Court and prayed that the Magistrate would be pleased to maintain them in the possession given to them in execution. Wise on the other hand urged that the land in dispute was outside the decree and belonged to his estate and that he had all along been and still was in possession of it. The Magistrate went to the locale and after enquiry decided that the Roys should be maintained in possession of the land on the east of a line drawn by him, and that Wise should

remain in possession of the land to the west of that line. Onocool Chunder Mookerjee, J., said :

The Magistrate is not competent to interfere under S. 318 with the execution of a decree of the civil Court. He is bound to maintain the party in possession who has obtained a decree from the highest Court of the country and recovered possession in execution of that decree The point, therefore, for his decision was, in the first instance, whether the decree covers the land which is the subject of the dispute in the present case. If he finds that point in favour of the Roys he should, under S. 319, maintain them in possession, but if he finds that the lands are not the lands decreed in 1865 he should try to find out who is in de facto possession.

H. Jackson, J., observed :

I think that it is the duty of the Magistrate in proceedings taken under S. 318 when it appears that a civil Court decree has been passed regarding the whole or any portion of the disputed land, to maintain that decree. The Magistrate's powers under S. 318 relate to land regarding which there is a dispute which has not been decided by a civil Court, and his order for possession remains in force only until such decree is passed. When such decree has been given the Magistrate has no power again to institute a S. 318 proceedings regarding the land covered by it. The dispute regarding the land has been finally determined and it is then the Magistrate's duty to treat the decree-holder in the civil Court as the owner of that land and give him every protection and enjoyment of it. If after making every enquiry, the Magistrate cannot ascertain where the boundary line is, he must act under S. 319. There would never be an end to litigation if the Magistrate will not keep in force the decision of the civil Court regarding lands.

Reading the judgment of Mookerjee, J., it would appear that all that he meant to lay down was that it was not competent for a criminal Court to upset by proceedings taken under S. 318, Criminal P. C., the result of delivery of possession in execution of a decree passed by a civil Court and that the criminal Court is bound to maintain in possession a party who has obtained such possession in execution of decree. E. Jackson, J., appears to have gone very much further. His judgment, in the first place, indicates that if in such a case proceedings are taken under S. 318, the duty of the Magistrate is to try and find out what the civil Court has done and, if he succeeds in doing so, to maintain the same, and if he is unable to find that out then to act under S. 319. To this extent, the view of E. Jackson, J., was very similar to, if not quite in agreement with, that of Mookerjee, J., quoted above. E. Jackson, J., went a good deal further because

his judgment indicates that in such a case, namely, when a dispute has been determined by the civil Court—the criminal Court should regard the dispute at an end. He, however, did not say that for that reason or on that account the Magistrate has no jurisdiction or is not competent to take proceedings under S. 318, while on the other hand, he pointed out how the Magistrate should proceed and what decision he should make and under what circumstances in those proceedings. Nextly, his judgment speaks of the decree of the civil Court as having finally determined the dispute; but it may be that in reality he was thinking of the dispute as to possession having been determined by the delivery of possession in execution, because towards the end of his judgment he said :

That line (namely, the line drawn by the Magistrate) has not been drawn as being the boundary in the civil Court decree and execution proceedings.

In *Rancegunj Coal Association Ltd. v. Hem Lall Ghatwal* (4), the Ghatwal was unsuccessful in a civil suit which he had instituted against the Coal Company and thereafter obtained an order from and was put in possession by the Magistrate under S. 530 of Act 10, 1872. It was thus said by Glover and Mitter, JJ. :

When a civil Court decree is once passed the right as between the litigants is decided; and there is no more place for a summary order which proceeds not upon title, but on mere possession. It having been once declared by a competent Court that the parties now represented by the Ranigunge Coal Company were the owners of the disputed land no further proceedings could be taken. If the law were otherwise, it would be worth no man's while to go to the trouble and expense of proving title in a regular suit, for the effect of a decree might be to a great extent nullified by parties contriving to get into some kind of possession (which they could easily do in forest lands like these now in question), and then demanding to be retained in possession till the second suit was brought and decided We therefore quash the Assistant Magistrate's order passed under S. 530, Criminal P. C., and direct him to abstain from interference with what he admits to be the Coal Company's property. If he is apprehensive of a breach of the peace between the parties he can proceed in the usual way under Chap. 37 of the Code.

This judgment, it will be observed, says that in the circumstances no further proceedings could be taken under S. 530. It is noteworthy also that the dispute, that there was between the parties, was of a nature that could be determined by the decree itself by which the Ghatwal's suit was dismissed—presumably a suit

for possession on declaration of title—and it was not necessary for any execution proceedings to settle the dispute any further.

In *Nobin Chandra Koondoo v. Jogandra Nath Bhattacharjya* (27) the auction-purchaser had taken possession in execution of a decree against a third party. Glover and Mitter, JJ., said thus:

If it had appeared that in a final decree binding between the parties before him the question of title had been conclusively determined he would have been justified in refusing to proceed under S. 530. The proceeding, namely, of the peon in execution against a third party does not take away the power of the Deputy Magistrate to enquire into the disputed question of possession between parties before him under S. 530, Act 10, 1872.

The decision seems to be an authority not on the question of jurisdiction but rather on the question of propriety, the word used being "would have been justified in refusing to proceed." The case was not one of delivery of possession inter partes, but the decree-holder had been put in possession against a third party not a party to the decree.

The case of *Sheikh Mungloo v. Durga Narain Nag* (28), in which the contest as to possession was between the auction-purchaser, the judgment-debtor and the auction-purchaser's gomastha on the one hand, and certain persons who, on the other hand, claimed to be ijaradars and so entitled as against the judgment-debtor to collect the rents from the tenants in occupation, Garth, C. J., said:

Now it is quite true that as against a party (namely, the ijaradar) who is proved to be in such actual possession of the rents from the ryots the fact of such symbolical possession would not be entitled to much weight, but it is impossible to say that it is not some legal evidence of possession which the Magistrate was bound to take into consideration.

Kemp, J, expressed the view that such symbolical possession would be no evidence against the ijaradar upon which the Magistrate could proceed in enquiring and deciding which party is in actual possession of the subject of dispute. The case has very little relevancy for our present purposes.

In the matter of *Ram Soondaree Debee* (29) was a very important case decided by White and Mitter, JJ., In that case, the applicant was, so far back as

1866, by an order of the Magistrate, put in possession of the land, which was the subject-matter of the proceedings under consideration, as against one B. B. then instituted a suit for establishment of title in which he succeeded as regards part of the land and failed as regards the remainder. He, however, did not have execution of the decree. Then there was, nearly ten years later than the Magistrate's order, a fresh proceedings under S. 530, Act 10, 1872 and an order of attachment was made under S. 531 of the Act. White, J., attached no importance to the decree inter partes, obviously for the reason that it had not been executed, but as regards the previous order of the Magistrate passed ten years back he observed:

Taking it that possession of the land was in 1866 awarded to the applicant, it is clear that she is entitled to retain possession of it until ousted by law and the only fact that could give the Magistrate jurisdiction to entertain an application under S. 530 would be if it is shown that the applicant had lost possession of the land and a new dispute had arisen out of the fact of actual possession.

The case may be treated as an authority for the proposition that a decree for possession, even if inter partes if not executed by delivery of possession, does not conclude the question of actual possession that a Magistrate has to determine, and also for the proposition that a previous magisterial order of possession would deprive the criminal Court of jurisdiction to take similar proceedings even ten years after unless in the meantime two conditions have come into existence, viz., the party put or declared in possession by the previous order had lost his possession and a new dispute has arisen.

The view expressed by E. Jackson, J, in *Rani Mohan Roy v. Wise* (6) was entirely concurred in by Morris and Prinsep, JJ., in *In the matter of Chutraput Singh* (7), in which case the plea of a judgment-debtor questioning the fact of delivery of possession in respect of some property as also the fact of the property being included in the decree, was overruled, the learned Judges observing as follows:

The sole object of a Magistrate in taking action under S. 530 is to prevent a breach of the peace between rival claimants to a particular property. For that purpose he satisfied himself as to the party actually in possession at the time that the proceedings were instituted, and declares such party entitled to retain possession until ousted in due course of

(27) [1876] 25 W. R. Cr. 18.

(28) [1876] 25 W. R. Cr. 74.

(29) [1877] 1 C. L. R. 86.

law. In other words he declares one party entitled to retain possession until the civil Court declares which party has the better right, and puts such party in possession. Here the Nazir, acting under the authority of the civil Court had in due course of law, put Chutraput Singh into possession of the land in dispute, and yet in the view taken by the Magistrate he cannot be allowed to retain the possession which the Nazir gave him, until a fresh order has emanated from the civil Court and another Nazir has put him in possession. Such a course of proceeding seems to us manifestly improper, as it defeats the objects for which S. 530 was framed.

In this case a purchaser claimed that a certain *haut* which appertained to a mouzah in respect of which he had obtained a decree on a mortgage and that he had been put in possession of the *haut* as well in execution of the said decree. The judgment-debtor after the delivery of possession had refused to give up actual possession of the *haut* maintaining that it was debutter property of which he was the Shebait and had remained in such possession. Proceedings under S. 530, Act 10, 1872 were started. The Nazir had delivered possession by planting a bamboo, though not in the *haut* itself and by proclaiming by beat of drum mentioning the *haut* in his proclamation. The Magistrate held that actual possession of the *haut* had remained with the judgment-debtor and made an order in his favour. In the result the learned Judges declared the auction-purchaser entitled to retain the possession that he purported to have obtained through the civil Court. The decision of the High Court, broadly stated, is an authority for the proposition that whatever may be the nature of the delivery of possession, if the delivery purports to be of actual possession against a judgment-debtor, actual possession retained by the latter against such delivery does not count in proceedings under S. 145, Criminal P. C.

Bhola Nath Ghose v. Mothur Mundle (8) is a very important decision. It was a case in which the tenant of a *jote* having failed to pay his rent the landlord brought a suit, obtained a decree in ejectment and got possession delivered to him under S. 263, Civil P. C., then in force. The tenant applied for setting aside the execution, failed, and then somehow or other regained possession, grew crops on the land (vide at p. 520) and there was a dispute. The Magistrate took proceedings under S. 530, and awarded pos-

session to the tenant. Garth, C. J., (Maclean, J., concurring) observed thus :

Thus the latter (i. e., the tenant) was directly rewarded by the Magistrate for persistently disregarding the process and the authority of the civil Court..... The case certainly illustrates in a very remarkable way how grievously the powers given to Magistrates by S. 530 may be misapplied, and how useless it is for suitors in this country to establish and enforce their rights in the civil Courts unless the Magistracy will lend their aid with vigour and good will to protect those rights when they are once established. But in this case the landlord had already not only established but enforced his right in the civil Court. He had been placed in possession of the 13 bighas of land by the only process which the law provides for that purpose..... He (i. e., the Magistrate) seems to imagine that when a party to a suit is placed in possession of land by a civil Court, unless he at once begins to cultivate, or to exercise some acts of ownership over it, he must be taken after a reasonable time, to have relinquished his rights, and that, if the other party, against whom he has recovered his decree, re-enters upon the land under such circumstances and a quarrel consequently ensues a Magistrate has a right to proceed under S. 530, to try the question of possession between the parties with regard to the decree and execution of the civil Court. If this were the law, it is difficult to see how the right to land could ever be finally determined. It is clear that the Magistrate is quite in error; and if anything were required to show that he is so the cases referred to by the District Judge are directly in point [*Rai Mohan Roy v. E. Wise* (6) and the *Raneegunj Coal Association v. Hem Lal Ghatwal* (4)]. In both these cases it is clearly laid down that when a civil Court decree has once been passed, determining the rights of parties to disputed land, it is the Magistrate's duty to uphold that decree, and he cannot (as between the parties) proceed under S. 530 to decide afresh upon the question of possession.

In another part of the decision the learned Chief Justice commenting on the error made by the Magistrate in appreciating the nature of the possession that had been given by the civil Court observed :

The Magistrate seems to have been under the impression that what is symbolical possession was given to the landlord; but this is a mistake. Symbolical possession is given under S. 264 (O. 21, R. 36) and is only applicable to cases where the party entitled to execution does not obtain actual possession of the land, but only the right to receive the rent of it. Here under S. 263 (O. 21, R. 36) the landlord obtained actual possession; and from that time the possession of the tenant was at an end.

In considering the effect of this decision, one should not lose sight of the fact that the case itself was one in which the decree was inter partes and that the decree was executed and possession was taken under it

under the usual process available under S. 263 of the then Civil P. C., Leaving aside the concluding words of the former of the two passages quoted above, which merely repeated the principle which *Rai Mohan Roy* case (6) and the *Raneegunge Coal Association* case (4) laid down as regards the conclusive character of decree in relation to S. 145, proceedings inter partes, two propositions definitely emerge from the decision : 1st, that possession taken by a decree-holder against a judgment-debtor under S. 263 (O. 21, R. 35), which in the case of a purchaser would correspond to the kind of possession taken under Or. 21, R. 95, is actual and not symbolical in the eye of the law ; and 2nd, that where there has not only been an adjustment of rights but also an enforcement thereof by the process of the civil Court, it is the clear duty of the Magistrate to uphold the effect of such enforcement.

In the matter of the petition of *Govind Moitra* (9), the facts were that in proceedings under the Land Registration Act the Deputy Collector decided in the presence of one party that the other party, Govinda Chandra Moitra, had proved his possession. While the said proceedings were pending certain ryots submitted a petition of complaint alleging that certain other ryots at the instigation of Govinda Chandra Moitra were going to do certain acts which tended to a breach of the peace. On that a police report was called for. This report showed that there was a dispute inasmuch as it stated that two persons claimed to be rival landlords and certain of the ryots took the part of the one side and others of the other side. The Magistrate took proceedings under S. 530, and though he happened in his capacity as Deputy Collector to have decided the land registration proceedings a short while ago—a fact on which, in my opinion, nothing turns—declared the other party, namely, the party antagonistic to Govinda Chandra Moitra, to be in possession. Pontifex, J. said :

Now in my opinion the fact, that these registration proceedings were pending at the time the application was made for interference under the Criminal Procedure Code, should have made the Deputy Magistrate extremely careful not to make any order as to possession under S. 530 unless he was quite satisfied

that a bona fide dispute existed, and that a breach of the peace was imminent.

Field, J., said :

There is another ground upon which it appears to me that the order of the Deputy Magistrate in this case should be set aside ; and that is because there was no such dispute as is contemplated by S. 530. When once a Magistrate has recorded the preliminary proceeding under the section, and has called upon the parties concerned in the dispute to appear before him, the express language of the section does not provide for any further inquiry into the fact of the existence of a dispute likely to induce a breach of the peace. When the parties appear before the Magistrate the law expressly requires only that the fact of actual possession be inquired into. It appears to me that the essence and basis of the jurisdiction, which a Magistrate can exercise under S. 530, depends upon there being a dispute likely to create a breach of the peace ; and that when the parties appear before the Magistrate if they are able to show, or if it otherwise appears to the Magistrate, that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further. I take it that the term "dispute" in S. 530 means a reasonable dispute, a bona fide dispute, a dispute between parties who have each some semblance of right or supposed right. It has been decided by this Court, in the case of *Rai Mohan Roy v. Wise* (6), that when a decree has been passed by a civil Court regarding the land in dispute, it is the duty of a Magistrate to maintain it, and he has no power again to institute proceedings regarding such land under this section of the Criminal Procedure Code. The principle of this decision is this that when the rights of parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistrate to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the criminal Court, and alleging the existence of a dispute, invoke the aid of the Magistrate and the police to neutralize the effect of the decree of a competent civil Court. When the rights of the parties have been determined, there is no longer a "dispute" within the meaning of S. 530 ; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under S. 491, Criminal P. C., and require from such person security to keep the peace. In the case of *Rai Mohan Roy v. Wise* (6), the question of title had been definitively determined by the civil Court, and no case has, so far as I am aware, as yet arisen in which the principle of that decision has been carried further, or extended to cases in which there has been merely assuming adjudication upon the question of possession. I think, however, that the proceedings under the Land Registration Act, are proceedings to which the same principle should be extended.

I have carefully considered the terms of the police report to which reference was made in the judgment of Pontifex, J., and I have no doubt whatever that there

was a dispute between the two landlords each claiming the property for himself and a number of men siding with one landlord and a number again siding with the other. It was, therefore, a dispute that existed in fact. The terms of the police report, so far as they may be gathered, however, do not appear to be sufficiently specific as regards the likelihood of a breach of the peace. But the absence of an apprehension of a breach of the peace as emanating from the dispute is not the only ground upon which either of the learned Judges proceeded. Apart from that circumstance, they examined the nature of the dispute and both of them dealt with its bona fides as dependent upon the circumstance that it had already been decided by the civil Court. I understand the judgment of both the learned Judges as meaning in substance, that when the dispute as to possession has already been determined by a civil Court, it can no longer be regarded as a bona fide dispute which the criminal Court will take notice of. The defining words

a dispute between parties who have each some semblance of right or supposed right used by Field, J., may not be quite happy. The judgment of Field, J., it may be noted, appears to have been before the legislature when the Code was re-drafted in 1882. His complaint of the omission on the part of the legislature to provide for an inquiry into the question as to whether in fact there was a dispute, after a preliminary order was once recorded, was duly taken notice of, and his words

when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to the Magistrate that there is no dispute, or no such dispute as is likely to induce a breach of the peace the Magistrate should hold his hand and not proceed further,

were reproduced almost verbatim in para. 4 of the section as it was introduced by Act 10, 1882 which came into force on 1st January 1883, and is, in the Code of 1898, Cl. (5) of the section. If the legislature did not amend or modify the section with this judgment before them, the inference, in my opinion, is irresistible that this is the interpretation that should be put upon the section.

The decision in the case of *Doulat Koer v. Rameswari Koeri* (10), lays down very generally what the duties of a criminal Court are in relation to decrees

and orders of a civil Court. It was not a case of delivery of actual possession against a party to the proceedings. The possession, to quote the words of Prinsep, J., in his judgment in that case, was "possession of some sort" that was given by a civil Court, and for all that one can see it may have been a case of symbolic possession only. Prinsep, J., appears more to have been concerned with the evidentiary value of a decree or order declaring the rights of the parties, for he says:

It is consequently his (i. e., the Magistrate's) duty when that right has been declared within a time "not remote" from his taking proceedings under S. 145, to maintain any order which has been passed by any competent Court, and, therefore, to take proceedings which necessarily must have the effect of modifying or cancelling such order, is to assume a jurisdiction which the law does not contemplate The duty of the Magistrate was to carry out the orders of the civil Court and to maintain those orders by assisting the possession of the person whose title is found by the Court. Under such circumstances we are of opinion that the proceedings under S. 145 were without jurisdiction and that a Magistrate, on a breach of the peace being certified to him, ought to have contented himself by declaring that the orders of the civil Court should be maintained. In this view we think that the proceedings under S. 145 were without jurisdiction and must be set aside, and the possession of Doulat Koer maintained until a competent Court awards possession to some other persons.

Now with the utmost respect to the learned Judge I find it exceedingly difficult to treat this decision of his as laying down anything else than a very general proposition for the guidance of Courts in the matter of the weight to be attached to decrees or orders passed by a civil Court with reference to their age. I cannot regard it as a pronouncement of any very high value, as the word "jurisdiction" seems to have been used only in order to make out a case for interference, the Code of 1898 having only recently taken away the ordinary revisional powers of the High Court in respect of cases under S. 145, and I cannot understand how, if the proceedings were to be set aside as being without jurisdiction, any order could again be passed under that section maintaining the possession of one of the parties. Wilkins, J., said that he generally concurred in what was said by Prinsep, J. His own judgment, however, raises points of difficulty into which it is not necessary to enter, for, as I read it, it suggests that when a person

who gets into possession is a trespasser there is no question of possession within the power of the Magistrate to decide—a proposition which, in the form in which it has been put, is not supportable.

Doulat Koer v. Rameswari Koeri (10), was followed in *Kunja Behari Das v. Khetra Pal Singh* (11), and symbolical possession given as against one of the opposite parties, at least to the proceedings, was held to determine possession in favour of the decree-holder auction-purchaser against all the opposite parties. The learned Judges, Ghose and Taylor, JJ., emphasized, on the lines of the case of *Doulat Koer v. Rameswari Koeri* (10), the fact that the delivery of possession by the civil Court was "recent" having taken place only three months before the proceedings, and purported to give effect to the decree of the civil Court as well as to maintain the possession that had been taken under it. It may be mentioned in connexion with this case that there is no very intelligible ground why the possession delivered by the civil Court was considered "symbolical" only.

Shortly after there was another case decided, namely, that of *Gordon Sims v. Johuri Lal* (20), which purported to go far beyond any other case and professing to follow *Doulat Koer v. Rameswari Koeri* (10), but really taking it a step further, laid down that

the duty of a criminal Court in a case under S. 145, Criminal P. C., where there is a decree of a civil Court for possession in respect of the disputed land is to find which party held such civil Court decree, and then to maintain that party in possession; it is not necessary that such decree should be a decree for possession as between the parties to the proceeding under S. 145, Criminal P. C.

It was followed in the case of *Krishna Alhadini Dasi v. Radha Syam Panday* (30) and in that case the possession given by a civil Court was maintained, though it was a case in which, unlike the case of *Gordon Sims v. Johuri Lal* (20), the decree was inter partes. *Gordon Sims v. Johuri Lal* (20), however, was soon dis-sented from, and not being founded on any good reason or principle, need not be further discussed.

A definite note of dissent was struck in the case of *Lowsen Santal v. Kali Charan Santal* (31) where a twenty-years old decree had been considered by the

Magistrate conclusive on the question of possession.

In *Guljar Marwari v. Sheikh Bhatu* (32). Henderson and Geidt, JJ., reversed an order of attachment that had been made by the Magistrate under S. 146, Criminal P. C., in spite of a delivery of possession by the civil Court by which one party had obtained possession in execution of a decree against a person, under or in collusion with whom the other parties claimed, only eight days before the initiation of the proceedings under S. 145, Criminal P. C. It was held that the order under S. 146 was passed without jurisdiction and an order was made in favour of the party who had been put in possession by the civil Court, presumably because the proceedings themselves were not without jurisdiction. The same learned Judges in *Kedar Prosonna Lahiri v. Lalit Mondal* (33), while holding that possession found by a criminal Court is not such as can be treated in the manner in which recent possession given under the decree of a civil Court is treated in cases under S. 145, Criminal P. C., very clearly laid down that in proceedings under S. 145, Criminal P. C., the Magistrate should uphold possession given by a civil Court, so that a person who has obtained a decree declaring his right to possession and had been put in possession might not find himself again forced to litigate his title. There is little doubt that the learned Judges were speaking of delivery of possession inter partes.

Some of the above cases were considered in the case of *Kuloda Kinkar Roy v. Danesh Mir* (13) by Rampini and Mookherjee, JJ. That was a case in which what the Court was concerned with was a previous order under S. 530, Act 10 (?) of 1872 made 2½ years, and the civil Court decree 17 years, before the date of the proceedings then under consideration, and the lands, to which the said order and the decree related had been washed away in the meantime. It was held that there is no inflexible rule of law that a Magistrate in deciding the question of possession under S. 145 is concluded by every previous order of a civil Court or criminal Court relating to the subject of dispute, and the weight to be attached to any such previous

(30) [1902] 7 C. W. N. 117.

(31) [1904] 8 C. W. N. 719.

(32) [1905] 32 Cal. 796.

(33) [1905] 2 C. L. J. 147.

order depends on the facts and circumstances of the particular case. It should be noted that this decision does not purport to consider the effect of delivery of possession in execution of a decree in relation to proceedings under S. 145 inter partes subsequently instituted.

Leaving aside cases of lesser importance we come to the case of *Atul Hazra v. Uma Charan Chongdar* (2), in which a clear cut proposition was laid down by Chitty and Walmsley, JJ. In that case one of the parties to a proceeding under S. 145, had obtained a decree against a member of the other party and a stranger, and purchased in execution the undivided one-fourth share of the said defendant in the properties which subsequently formed the subject-matter of the proceedings under S. 145 and obtained delivery of possession of that share through Court. The Magistrate finding that the other party to the proceeding was in actual possession of the property notwithstanding the said delivery of possession and had grown the crops made an order in their favour. The learned Judges set aside the order observing:

It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against the decree-holder who has actually been given possession against him by a civil Court and, in a criminal proceeding, to assert that possession and by force of the order of the Magistrate drive the decree-holder and auction-purchaser for a further declaration of his rights.

The learned Judges expressed their full accord with the principles laid down in *Basanta Kumari Das v. Mohesh Chandra Saha* (14), but held that that case was distinguishable.

In the case of a decree inter partes, when one party was put in execution in possession against the other, the possession delivered was held to be "symbolical" and the Magistrate disregarded that possession and made an order in favour of the other party. *Newbould and Suhrawardy*, JJ., set aside the order observing as follows:

The Magistrate here has erred in thinking that the decree can be ignored because the Subordinate Judge of Purulia had no jurisdiction over this land and because the delivery of possession was symbolical. It is not for the Magistrate to question the validity of the decree that has been passed by a competent Court. Also when the decree is inter partes it is immaterial whether the delivery of possession is symbolical or not. We hold that in this case in disregarding this delivery of possession

the Magistrate acted with gross irregularity and in a manner that was likely to cause a failure of justice.

In *Akhoy Mondal v. Basir Rai* (3), the word "jurisdiction" was not used, but unless the order was without jurisdiction the learned Judges could not have interfered.

In the case of *Aran Sardar v. Hara Sundar Majumdar* (16) B. B. Ghose and Chotzner, JJ., held that when a declaration was made in 1919 in favour of one party under S. 145, Criminal P. C., fresh proceedings under S. 145 initiated in 1922 between the parties who were subsequently identical with those in the former proceedings were without jurisdiction. It was said:

The result of such a course would be that the binding effect of an order under S. 145, Criminal P. C., would be disregarded and any number of proceedings may be initiated by any disappointed party leading to no result whatever, a position which would be surely intolerable.

The cases of *Hazari Khan v. Nafar Chandra Pal* (34 & 35), *Atul Chandra Mondal v. Srinath Laik* (36) and *Shahabaz Mondal v. Bhajahari Nath* (15), referred to in the order of reference need not be discussed as they were cases in which the delivery of possession was not inter partes and they are authorities for the proposition that the evidentiary value of previous decree or orders of civil Courts, or of delivery of possession against third parties or of delivery of mere symbolical possession depends upon the particular circumstances of each individual case and upon a variety of factors.

The last case of this Court that I shall notice is that of *Ambar Ali v. Piran Ali* (1), the case which practically was the occasion for this reference and in which on a disagreement between Graham and Cammiade, JJ., the matter being referred to Cumming, J., he held that, except in cases coming within Prov. 1, sub-S. (4), the Magistrate is bound to declare, under S. 145, the possession of the person whom he finds to be in actual possession of the land in dispute and that he is not bound to maintain symbolical possession delivered in execution of a civil Court decree where in spite of the delivery of possession to one party actual possession

(34 & 35) [1917] 22 C. W. N. 479=40 I. C. 718=18 Cr. L. J. 718.

(36) [1919] 23 C. W. N. 982=53 I. C. 936=30 C. L. J. 123.

remained with another. The delivery of possession in this case was *inter partes*, and the use of the word "symbolical" only means that the judgment-debtor may not have been turned bodily out of the property. This comment is necessary to understand the exact import of this decision.

Turning now to the other High Courts I propose quite shortly to refer to the more important of the cases in those Courts. As regards the Patna High Court, *Puri Das v. Kahlui Behera* (37) a Bench of three Judges, Chamier, C. J., and Sharfuddin and Roe, JJ., held on a review of the authorities that when the civil Court decree is "of a very recent date" it should be followed but that there is no inflexible rule that any decree of a civil Court should be followed "blindly." Three years later Sultan Ahmed, J., in the case of *Rai Bhubaneswari Koeri* (12) held that where possession of immovable property has been delivered to an auction purchaser under O. 21, R. 25, Civil P. C., that is not symbolical but actual possession and a Magistrate acts without jurisdiction in proceeding under S. 145, Criminal P. C., and in making an order against the auction-purchaser under that section.

Indeed said he,

if a Magistrate would be permitted to start proceedings under S. 145 under the circumstances in this case I cannot conceive any finality of dispute between the decree-holder and the judgment-debtor. I cannot conceive that the legislature ever intended the multiplicity of fruitless actions which must result if an order of this character is upheld.

The Allahabad High Court is inclined to the view that when the dispute between the parties has been adjudicated upon by a competent Court proceedings under S. 145, Criminal P. C. should not be resorted to, but preventive measures under S. 107, Criminal P. C. should be taken: *Brahmanath v. Sundar Nath* (38). In *Baldeo Baksh Singh v. Raj Ballam Singh* (39) which was the case of a decree *inter partes*, and the question of jurisdiction arose by reason of the fact that the Code of 1898-1923 had excluded orders under S. 145, Criminal P. C., from the ordinary revisional powers of the High Court and such orders during that period could only be revised on the ground

of jurisdiction only Stanley, C. J., observed thus :

If the applicants were put into actual possession of the property in dispute upon the occasion of the execution of the decree in 1902, I should doubtless have no hesitation in following the decision to which I have referred in the case of *Dowlut Koer v. Rameswari Koeri* (10).

He found, however, that the decree dealt merely with the question of proprietary rights of the petitioner and that the opposite party's possession was never disturbed in execution, and on that ground he declined to interfere. The proposition that the Criminal Court acts wrongly in taking proceedings under S. 145, Criminal P. C., which may cancel or modify the effect of delivery of possession given by a civil Court has not been dissented from in later cases, though orders under S. 145, Criminal P. C., were held to be not open to revision under Statute 24 and 25 Vic. Cap. 104, S. 15 merely because they were tainted with such an error: *Maharaja Tewari v. Haricharan Rai* (40), *Jhingai Singh v. Ram Pratap* (41), *Sayedra Khatun v. Lal Singh* (42).

The Bombay High Court concurred in the view of the law enunciated in *Dowlut Koer v. Rameswari Koeri* (10) with the reservation that it applies where there is no doubt whatever as to what the civil Court has done, that is to say where it cannot be disputed that certain party has been put in possession by the civil Court: [*In re. Motilal* (43)].

The Madras High Court in the case of *Raghava Aiyangar v. Krishnasamy Aiyar* (44) made a distinction between cases in which there was delivery of possession in execution of a decree and those in which there was not and declined to interfere with a Magistrate's order by which, in a case of the latter kind, the decree had not been respected. There are other cases of that Court in which symbolical possession delivered under O. 21, R. 96, Civil P. C., was disregarded in an enquiry or to actual possession under S. 145, Criminal P. C., e.g., *Ramalingam v. Raja of Ramnad* (45) or a decree determining the question of title only was not followed in the order made

(40) [1903] 26 All. 144=(1903) A. W. N. 212.

(41) [1909] 31 All. 150=1 I. C. 762=6 A. L. J. 113.

(42) [1914] 36 All. 233=25 I. C. 324=12 A. L. J. 344.

(43) [1904] 6 Bom. L. R. 246.

(44) [1908] 31 Mad. 416.

(45) [1915] 16 Cr. L. J. 736=31 I. C. 176.

(37) [1916] 1 Pat. L. J. 536=38 I. C. 135.

(38) [1919] 17 A. L. J. 434=51 I. C. 170=20 Cr. L. J. 410.

(39) [1903] 2 A. L. J. 274.

under S. 145, Criminal P. C., e.g., *Anna Swamy v. Muthukumara* (46).

These are practically all the cases in this country since 1861 which may throw any light upon the question as to the views that have been taken with regard to the matters that are involved in the two questions which arise for consideration and which may for the sake of convenience be repeated here, viz., first. Had the Magistrate jurisdiction to institute the proceedings under S. 145, Criminal P.C., or in other words, to take action under Cl. (1) of that section; and second. Had the jurisdiction to make the order that he did under Cl. (6) thereof; the word "jurisdiction" being understood in the strict sense explained above. It must be conceded that the decisions, far from being uniform, present innumerable points of diversity. Some of these decisions, though comparatively few in number, are indefensible in principle. Others, though correct, do not profess to lay down any principle at all. Of these that purport to proceed on some principle or other, not a few state it wrongly, inaccurately or inadequately. Sitting on a Full Bench we are not handicapped by any of them, and if I have discussed them somewhat in detail I have done so only in order to appreciate their exact significance and importance. Confining the examination to those decisions only which seemingly purport to look at the matter from the point of view of jurisdiction, one finds that there are infirmities of at least four kinds which mar, or at any rate, detract from their worth. In the first place that the High Courts, during the Code of 1898-1923, when their ordinary power of revision was excluded, often used the word "jurisdiction" in order to make out a case for interference. Then there are cases in which, while holding that the initiation of the proceedings were without jurisdiction the High Courts have proceeded to pass or have advised the Magistrate to pass possessory orders on the basis of those very proceedings. Again, there are cases in which the initiation of the proceedings, though not approved, was not declared as being without jurisdiction, while the final order was held to be so. Lastly, there seems to have been another factor that influenced some of the decisions, viz., that for cases within S. 145 Judges have not

liked to hold, in view of the word "shall" in the section, that the Magistrate had any discretion and so they used the word "jurisdiction" in order to advise action under S. 107 once the case came within S. 145.

The view that the proceedings were without jurisdiction is supportable on the reasoning that when the dispute as to possession has been effectively determined there is no longer any dispute which requires adjudication and so none of which the criminal Court need take any notice. Ch 12 of the Code is headed "Disputes as to immovable property," but when one looks at the contents of the chapter one finds that S. 135 speaks of disputes.....concerning any land or water or the boundaries thereof, while S. 147 deals with "alleged right of user of any land or water." The question whether in some cases the two may wholly or partly overlap need not detain us. It is clear, however, that "dispute" in S. 145 cannot mean all kinds of dispute, but only dispute as to actual possession. To take one example out of many. Suppose A and B are quarrelling over a right of pre-emption in respect of property in the possession of C: nobody will think of S. 145 in respect of such a dispute though it may be of the worst character and fraught with immense potentialities as regards imminence of a breach of the peace. The method prescribed, namely, of calling for written statements of the respective claims of the parties as respects the fact of actual possession, and the means provided, namely, that of making an order declaring a party to be entitled to possession or attaching the property makes this perfectly clear. The words "dispute concerning land, etc." therefore have to be understood not quite literally but as a dispute relating to actual possession. For a dispute as to actual possession to be effectively determined it is not enough that there has been a decree determining the rights of the parties, unless it is a decree by which a suit for declaration of right and recovery or confirmation of possession has been dismissed thus putting an end to the plaintiff's rights and claim for possession for ever and beyond all controversy. In cases of decrees which merely determine the rights of the parties, even if they decide that one party is entitled to possession as against the other

the dispute as to possession still remains; and it is only by delivery of possession in execution of such a decree and in favour of one party as against another that the dispute can be said to be determined beyond any controversy. Such possession, however, must be actual or khas possession and not merely symbolical possession because it is actual possession and not a right to possession that S. 145 is concerned with. If all these requisites are present, there is no dispute in the eye of the law, though in point of fact there may be one.

Then again the nature of the enquiry contemplated by the section shows that the "respective claims as respects the fact of actual possession" is to be investigated. A claim when put forward before a tribunal involves an idea of its capability to be adjudicated upon. I find it exceedingly difficult to conceive how one can put forward a claim before any Court saying:

There is a serious apprehension of a breach of peace. I have been turned out of possession by the civil Court. I am still in possession by some means or other. I cannot get the civil Court to decide on my right to possession again. Please declare my possession, maintain the possession that I have, forbid my opponent to disturb it and ask him to go to the civil Court and to request that Court to reopen and reconsider the matter.

That in substance is what a claim of this character comes to. Widely different is the possession of an ordinary trespasser or wrongdoer, whose claim has never been decided by a competent Court; and between him and the rightful owner the criminal Court can hardly give any preference to either except on the footing of actual possession, because to attempt to go on any other footing would be to do the very thing that the law forbids, namely, to decide on the merits of the claim as to the right to possess. This, I understand, is what E. Jackson, J. meant by saying that a Magistrate's powers under S. 318 relate to land regarding which there is a dispute which has not been decided by a civil Court *Rai Mohan Roy v. J. P. Wise* (6), and Pontifex and Field, J.J. meant by saying that it must be a bona fide dispute, *In the matter of the petition of Govinda Chunder Moitra* (9), and Richards, J., meant by saying that it must be a bona fide or real dispute and not a bogus one: *Emperor v. Ram Baran Singh* (47) It (47) [1906] 28 All. 406=(1906) A.W.N. 61.

is this principle of finality that White, J. was thinking of when with reference to a previous order under S. 530, Criminal P. C., he said that it must be shown that the possession thereunder had been lost and a new dispute had arisen: *In the matter of Ram Soondaree Debee* (29).

It has been urged that determination of the question whether a dispute is bona fide or not involves practical difficulties and so this construction should be avoided. In the first place, it is said, S. 145 by its very terms excludes a consideration as to whether any of the parties have a right to possess, and a determination as to whether a dispute is bona fide and means a determination of a right to persons which is precluded by the section. I am not prepared to accede to this contention, because it is only a fact that will have to be ascertained, namely, whether the aforesaid conditions are satisfied or not. If on the materials on which the proceedings are sought to be found such conditions appear, the proceedings will not be taken. If after the proceedings are taken such conditions are brought to the notice of the Magistrate he will cancel the preliminary order as he is competent to do under Cl. 5 of the section. The maxim of English law that

where the title to property is in question the exercise of a summary jurisdiction by Justices of the peace is ousted,

obtained for ages in England, and as observed by Crompton, J. in *R. v. Cridland* (48), should still be applied there by every Act relating to such matters though not specifically mentioned; or as said by Blackburn, J., in *White v. Feast* (49), every statute giving summary jurisdiction has the implied restriction as to title. The doctrine, however, has not been consistently applied even in England at all times: see the Full Bench case of *Ram Sagar Mandal v. Alek Naskar* (50), per Richardson, J. In this last mentioned Full Bench case of this Court Richardson, J. also pointed out that in England the superior Courts derive their jurisdiction to decide question of right and title from the common law and may at one time have regarded encroachments with suspicion, while the jurisdiction of (49) [1857] 7 E. & B. 853=27 L. J. M. C. 28=3 Jur. (N.S.) 1213=5 W.R. 679.
(49) [1872] 7 Q. B. 353=41 L. J. M. C. 81=26 L. T. 611=20 W.R. 382.
(50) A.I.R. 1922 Cal. 59=49 Cal. 632 (F.B.).

the Indian Courts, from the highest to the lowest, depends on statute and that is one of the reasons why the old English doctrine should not be applied in this country.

All this, however, does not mean that the Magistrate cannot embark on an enquiry in order to find out whether the case would or would not attract his jurisdiction. An enquiry, however informal, into the character of the dispute has in practice to be daily made in order to find out whether action should be taken under one section rather than another, e g., under S. 107 or S. 144 or S. 145. See the cases discussed in the order of reference in the Full Bench decision in the case of *Emperor v. Abbas* (51), also *Emperor v. Ram Baran Singh* (47), *Kaniz Amina v. Emperor* (52), *Ganpat Singh v. Emperor* (53), *Mahadeo Kunwar v. Basu* (54). The word "shall" used in Cl. (1), S. 145, is no doubt mandatory but much of a mandatory meaning need not be given to it, because it is always open to a Magistrate to take other preventive action and thus put an end to an apprehension of a breach of the peace, and as soon as that element disappears the foundation is gone. I do not see why it should be said, as was said in the arguments, that a trespasser who is continuing in possession cannot be removed from possession by an order against him under S. 107, Criminal P. C., in my opinion the words "doing a wrongful act" in S. 107, Criminal P. C. are sufficiently wide to include a continuing act of trespass, and although the bond that the trespasser will give under S. 107, Criminal P. C., will require him not to break the peace, if he resists the other party or prevents him from enjoying his exclusive possession and a breach of the peace ensues in consequence, I do not see how the trespasser can escape a forfeiture of his bond. If this meaning of the word "dispute" he adopted, the initiation of the proceeding under Cl. (1), S. 145, being without jurisdiction it logically follows that no order can possibly be made under Cl. (6) of that section.

If, however, the aforesaid meaning be

not attributed to the word "dispute," necessity arises to consider the second question. In dealing with this question one has to look at it in its several aspects. Firstly, the object of the proceedings will have to be borne in mind, namely, to prevent a breach of the peace by making a temporary or tentative order which is to be in operation so long only as the rights of the parties are not decided by a competent Court and the right party is not put in possession by eviction, if necessary, of the wrongful one (S. 145) or a decision has been passed as to who is the person entitled to possession (S. 146.). The criminal Court thus exercises only a limited jurisdiction, the limits of which must be co-extensive with the exigencies of the object it seeks to attain. As Turner, C. J. put it in his decision in the Full Bench case of *Sundaram Chetti v The Queen* (55), which was a case under S. 518, Act 10, 1872 (=S. 144 of the present Code):

The Criminal Procedure Code declares the authority of the Magistrate to suspend the exercise of rights recognized by law when such exercise may conflict with other rights of the public or tend to endanger the public. But by numerous decisions it has been ruled that this authority is limited by the special ends it was designed to secure and is not destructive of the suspended rights . . . I must nevertheless observe that this power is extraordinary and that the Magistrate should resort to it when he is satisfied that the other powers with which he is entrusted are insufficient. Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of rights rather than in their suspension; in the repression of illegal rather than in interference with lawful rights.

These weighty observations were made in connexion with an order passed, no doubt, under a different section of the Code, but their effect cannot be belittled on that ground. If the Criminal Court finds before it a complete adjudication of the dispute as to actual possession by a competent Court, for it to think of making an order in favour of a party who has been defeated in that Court and to relegate the successful party to get a second adjudication is to ignore the very object which it should have in view and thus would amount to lending countenance to an abuse of the processes of the Court. Nextly, the Civil and the Criminal law are but productions of the

(51) [1911] 39 Cal. 150=14 C.L.J. 429=12 I.C. 838=16 C.W.N. 83 (F.B.).

(52) [1918] 3 Pat. L. J. 243=47 I.C. 65=4 Pat. L.W. 354.

(53) [1918] 3 Pat. L.J. 287=47 I. C. 76=4 Pat. L. W. 357.

(54) [1903] 25 All. 597=(1903) A.W.N. 102.

(55) [1882] 6 Mad. 208=2 Weir 77 (F.B.).

same legislature and to permit the criminal Court in the exercise of its limited jurisdiction to override or nullify the proceedings of civil Courts is to attribute an inconsistency to the legislature and to assume against it an intention to create a conflict where harmony is to be presumed. I cannot express my disapproval of such a course in better words than Heaton, J., used, though in a different connexion, in his judgment in the case of *In re Markur* (56). He said :

If we are to administer justice as a civilized country, if we are to avoid conflicts between civil and criminal Courts which ordinarily must be fraught with evil and can produce no good, if, in short, we are to make the actual administration of justice in this country bear a proper relation to that which we profess it to be, then we cannot have criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a civil Court of competent jurisdiction. It may be that to this principle there would be rare exceptions, founded on, possibly, the discovery of new, cogent and important evidence. But ordinarily that principle must prevail and if that principle must prevail, it is a matter of the first importance, of the very highest relevancy, to show to a criminal Court that that matter which the criminal Court is asked to adjudicate on has already been fully dealt with by a civil Court.

Thirdly, if the plea of the party who was defeated by the civil Court and ousted from position is nothing more than this that in spite of the delivery of possession by the civil Court he continued in possession, or, in other words, that he was in possession in defiance of that Court, no Court should listen to a plea of that character. In other words, in the eye of the law and for the purposes of S. 145, Criminal P. C., such possession cannot be regarded as possession at all. A negative answer, therefore, in my opinion, may be given to the second question also.

But the question of jurisdiction, in my opinion, is now a matter of academic interest only, because by the restoration of our ordinary powers of revision under the Code by the amendment introduced in 1923, it is enough to-day, from a practical point of view, to consider the question of propriety only, as the words used in S. 435, Criminal P. C., are "correctness, legality or propriety."

Looking at the matter from the point of view of propriety—and not as a matter of jurisdiction—I think I am on much firmer ground when I say that it is improper in the circumstances assumed in

the reference either to institute proceedings under S. 145, Criminal P. C., or to pass an order in favour of the unsuccessful party in the civil Court proceedings. In saying this I shall try to define the exact limits within which my answer should apply.

A decree of a civil Court, unless it negatives a right and dismisses a claim to possession, does not determine a dispute as to possession; other decrees, even decrees for possession, do not ordinarily determine such a dispute. This proposition was recognized long ago, and I am not aware that it has been dissented from at any time. In a case under S. 318 of the Act of 1861, it was held by Norman and E. Jackson, JJ., that a party out of possession cannot, even on getting a decree for possession from the civil Court, and without obtaining possession by executing the decree, be declared in possession merely by virtue of the decree itself: *Mahant Dhansaj Giri Goswami v. Sri-pati Giri Goswami* (57). Delivery of possession, to effectively determine the dispute, must be, in fact inter partes or between parties to the proceedings or at least one that may be treated as such. When possession is delivered against a judgment-debtor under O. 21, R. 35, Civil P. C., or to a purchaser under O. 21, R. 95, Civil P. C., that is the only procedure by which khas or actual possession may be delivered, and unless there is a refusal to vacate—a case which necessitates the taking of possession by the physical removal of the judgment-debtor—it is as good as any possession may conceivably be.

Judged by these tests, in the hypothetical case on which the order of reference proceeds the criminal Court, in my opinion, would have acted altogether improperly in initiating proceedings under S. 145, Criminal P. C., if it at all apprehended the true position at the outset. If it did so at any time during the progress of the proceedings its duty was to drop the proceedings under Cl. (5) of the section and to take other suitable measures for preventing a breach of the peace. If it was only at the conclusion of the case that the facts appeared in their true light, the order that the Court passed was, in my judgment, clearly wrong.

To turn now to the order of reference.

The questions referred are :

(56) [1914] 41 Bom. 1—33 L. C. 693=18 Bom. L. R. 185.

(57) [1869] 2 B. L. R. App. Cr. 27.

(1) Do the words "actual possession" in sub-S. (1) of S. 145, Criminal P. C., mean actual personal, physical possession even though wrongful, i. e., that of a recent trespasser in actual physical possession at the time of the proceedings under S. 145?

(2) Does the word "dispute" in the same subsection mean actual disagreement existing between the parties at the time of the proceedings under S. 145 even though the question as to right to possession has already been decided by a civil Court?

(3) Had the law been correctly laid down in the case of *Ambarali v. Poral Ali* (1) or in the case of *Atul Hazra v. Uma Charan* (2) and *Akhoy Mondal v. Basir* (3)?

My answers are as follows :

(1) If the word "personal" is omitted from the question, "Yes;" subject to this that the answer is to apply to cases in which the dispute as to possession has not been determined by a civil Court as explained in the next answer.

(2) "Yes"—if the decision of the civil Court amounts only to a determination of the right to possession, except in cases where such right and a consequent claim to possession have been negatived by a decree which is either inter partes or may be treated as such, in which excepted cases "No." In cases in which khas or actual possession has been delivered by the civil Court either inter partes or between parties who may, in effect, be regarded as parties to the proceedings, the answer is "No."

(3) The last two cases correctly laid down the law. As regards the first case I give no answer, because the facts found are not, in my opinion, sufficient to put the case to the tests I have indicated above.

Turning now to the case now before us it seems to me that the facts thereof are not exactly what have been stated in the order of reference. In the judgment of my Lord the Chief Justice will be found a careful and accurate summary of the true position. It is apparent that the civil Court has not yet fully and finally adjudicated upon the rights of Afazuddin. It is also clear that the delivery of possession in execution of the decree in favour of the petitioner is of no avail as against Afazuddin, and in the absence of any adjudication as regards Afazuddin's share it was of very little use as an effective decision of the dispute as regards actual possession. I agree therefore in discharging the rule.

Cammiade, J.—I agree with my Lord the Chief Justice. The section em-

powers Magistrates to take action in order to prevent breaches of the peace, and directs them to ascertain who is in actual possession at the date of the order in writing referred to in sub-S. (1). The Magistrate is prohibited from enquiring into the merits of the parties' claims to possess. The only exception to the rule laid down that actual possession at the date of the order under sub-S. (1) shall be maintained is that provided in the proviso to sub-S. (4) in cases of forcible dispossession within two months prior to the date of that order. In these circumstances, there can be no room for doubt as to the meaning of the section.

There can also be no doubt that the word "dispute" used in the section means actual dispute, irrespective of the merits of the parties' claims to possess the land. The object of the section is to prevent breaches of the peace; and it is the duty of the Magistrate to interfere, wherever such a contingency arises, regardless of the good or bad faith of either of the parties. Even if there were no decree establishing the title of one of the parties to the land, bad faith might be imputed and proved. For instance, there may have been an encroachment subsequent to a formal partition by the Collector under the Estates Partition Act or after partition by act of parties followed by execution of a deed. If on each occasion the Magistrate had to enquire into the good faith of the parties before taking action, many breaches of the peace would occur.

Disputes such as the one in the present case arise from the fact that decree-holders frequently do not take actual possession. This is especially the case where the lands are homestead lands in the occupation of the judgment-debtor. If the decree-holder fears violence on the part of the judgment-debtor, and does not cause him to be removed from the land, he must suffer. He must insist on taking actual possession; and he must protect his possession after he has taken it. When the lands are arable lands, the decree-holder, after taking possession, should try and maintain his possession. At the very first act of trespass on the part of the judgment-debtor, he should seek the Magistrate's protection. If he waits till the judgment-debtor has re-established his possession, the Magistrate will have no authority to restore him to

possession. Once the trespass of the judgment-debtor has ripened into possession recognized by law, it is the duty of the Magistrate to maintain that possession and protect it, leaving the other party to seek his remedy in the civil Court.

By the Court.—We are unanimous that the rule should be discharged. The order of the Court, therefore, is that the rule is discharged.

D.D.

Rule discharged.

** A. I. R. 1928 Calcutta 640

Full Bench

RANKIN, C. J., C. C. GHOSE, SUHRAWARDY, B. B. GHOSE AND PAGE, JJ.

Sadar Ali and others—Plaintiffs—Appellants—Petitioners.

v.

Doliluddin Ostagar—Defendant—Respondent—Opposite Party.

Civil Rule No. 545-S of 1928, Decided on 17th July 1928, issued by the Calcutta High Court, in Appeal No. 2222 of 1926.

** *Letters Patent (Calcutta), Cl. 15 (amended 1927)*—Amendment does not apply to suits instituted prior to its coming into force.

The date of presentation of the second appeal to the High Court is not the date which determines the applicability of the amended Cl. 15, requiring permission of the deciding Judge, for further appeal, but the date of institution of the suit is, in each case, the determining factor: *Colonial Sugar Refining Co. v. Irving*, (1905) A. C. 369, *Foll*; A. I. R. 1927 P. C. 242; 32 Bom. 337; 3 Bom. 214; 16 Cal. 267; 3 Cal. 662; and 3 B. H. C. R. 166; *Discussed*.

[P 640 C 1. 2]

Trailakhya Nath Ghose and Bipin Chandra Bose—for Petitioners.

Nasim Ali—for Opposite Party.

Rankin, C. J.—This is a rule calling upon the respondents to show cause why a certain memorandum of appeal presented to this Court on 30th April 1928 should not be accepted and registered. The question raised is whether or not the applicants have a right of appeal from the decision of a single Judge sitting in second appeal in the absence of a certificate from him that the case is a fit one for appeal. This question arises upon the new Letters Patent which came into effect on 14th January 1928.

The facts are that the suit was instituted on 7th October 1920 and that after an appeal to the District Court a

second appeal was filed in this High Court by the present applicants on 4th October 1926. Under certain rules of this Court it was laid before Mallik, J. for disposal on or about 4th April 1928, and on that date the appeal was dismissed the learned Judge refusing to declare that the case was a fit one for a further appeal.

In these circumstances it is plain enough that the applicants have no right of appeal if the present case is to be governed by the terms of the new clause which by the said Letters Patent has been substituted for the 15th clause of the Letters Patent of this High Court as they stood prior to 14th January 1928. The contention of the applicants is that the new clause cannot be applied to this case because to do so would be to apply it retrospectively, and so as to impair and indeed to defeat a substantive right which was in existence prior to 14th January 1928. For this proposition the judgment of the Judicial Committee in *Colonial Sugar Refining Co. v. Irving* (1) is cited and it is clear enough that the law as there laid down is applicable in India: *Delhi Cloth Co. v. Income-tax Commissioner* (2) and *Nana v. Sheku* (3).

The only Indian decision upon the effect of an amendment of the Letters Patent as regards rights of appeal would appear to be that of *Framje v. Hormasyi* (4). The case had been decided at first instance by two Judges and under the Letters Patent of 1862 an appeal lay within the High Court (in practice an appeal to three Judges). By the Letters Patent of 1865 no such appeal was provided and the appeal lay to the Privy Council. The decree not having been perfected before the coming into operation of the Letters Patent of 1865 it was held that there was no right to appeal to the High Court.

The judgment of Sir Richard Couch proceeded upon the footing that the question was one of procedure and of the same character as the question of costs in *Wright v. Hale* (5). A sugges-

(1) [1905] A. C. 369=74 L. J. P. C. 77=92 L. T. 738=21 T. L. R. 513.

(2) A. I. R. 1927 P. C. 242=9 Lah. 284=54 I. A. 421 (P. C.).

(3) [1908] 32 Bom. 337=10 Bom. L. R. 330

(4) [1866] 3 B. H. C. R. 49.

(5) [1861] 30 L. J. Ex. 40=6 H. & N. 227=3 L.T. 444=6 Jur. (N.S.) 1212=9 W.R. 157.

tion was added, however, that S. 2 of the new Letters Patent, though it might bear a more limited meaning, pointed to an intention that pending suits should be treated as if they had been brought under the new Letters Patent. This decision was noticed in *Runjit Singh v. Meherban* (6), a case really governed by S. 6, General Clauses Act (1 of 1868). There Garth, C. J., noticed that the word "procedure" had been used by Sir Richard Couch in an extended sense but approved of the Bombay decision for other reasons which he did not specify.

It is urged for the applicants that the main ground of the decision in *Framji v. Hormasji* (4) is untenable in view of what was said by Lord Macnaghten in *Colonial Sugar Refining Co. v. Irving* (1) and that any other grounds upon which the decision may be defended are inapplicable to the present case. The applicants crave in aid the observation of Sir Richard Couch that

in construing a charter of this kind the Court should, I think, be guided by the rules and principles upon which Acts of Parliament are construed : *Framji v. Hormasji* (4).

Sir Richard Garth was apparently of the same opinion.

It is not contended that S. 6, General Clauses Act (10 of 1897) or S. 38, Interpretation Act, 1889 (52 and 53 vic. Cap. 63) applies to Letters Patent, but it is contended that these are but expressions of a common law presumption. Reliance is placed on the judgment of Garth, C. J., in *Runjit Singh v. Meherban* (6) and on other Indian decisions to the effect that a suit and all appeals from the decree made therein are to be regarded as one "legal proceeding" [cf. *Ratanchand Srichand v. Hanmat Rav* (7); *Deb Narain v. Narendra* (8) per Sir Arthur Wilson at p. 278] on the principle stated by West, J. in *Chinto v. Krishnaji* (9) at 216 :

that the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings connected by an intrinsic unity.

On these grounds the applicants claim that on 7th October 1920 when the suit was instituted their right to a Letters Patent appeal from the decision of a single Judge was a substantive right

vested in them by the existing law and that an intention to interfere with it, to clog it with a new condition, or to impair or imperil it, cannot be presumed, and cannot be affirmed, unless it has been clearly manifested by express words or necessary intendment.

Now there is a certain paradox in regarding the right to appeal within the High Court from the decision of a single Judge as a right "vested" in the litigant at the date of the suit, since it is in no way certain that the case will ever be decided by a single Judge. Again as the right of second appeal is the right given by S. 100, Civil P. C., to appeal "to the High Court" it does not seem unreasonable that a litigant should take the internal arrangements of the High Court as he finds them when he gets there. If under the Letters Patent all second appeals had been required to come before two Judges and a new Letters Patent had provided that one Judge should be competent to exercise this jurisdiction, leaving the right of appeal to the High Court and from the High Court as before, it would have been difficult, in my opinion, to hold that any litigant had a right to a hearing before two Judges. Again it is difficult to suppose that the amendment made by the Letters Patent which came into force in January last was made with any other view than to obviate unreasonable, or unreasonably prolonged, litigation, or to suppose that the date of the suit has any rational bearing upon that object or as distinguishing one case from another for this purpose. It may also be thought difficult to arrive at any opinion that the reform introduced is reasonable and necessary, but that it should in effect be postponed for years. The whole weight of these considerations has to be borne by the applicant's argument that the Letters Patent as they stood on 7th October 1920 conferred upon him at that date an existing right.

Now the reasoning of the Judicial Committee in the *Colonial Sugar Refining Company v. Irving* (1) is a conclusive authority to show that rights of appeal are not matters of procedure and that the right to enter the superior Court is for the present purpose deemed to arise to a litigant before any decision has been given by the inferior Court. If the latter proposition be accepted I

(6) [1878] 3 Cal, 352=2 C. L. R. 391 (F. B.).

(7) 6 B. H. C. R. 166.

(8) [1889] 16 Cal 267 (F. B.).

(9) [1879] 3 Bom. 214.

can see no intermediate point at which to resist the conclusion that the right arises at the date of the suit. It does not arise as regards Court *B* alone, when the suit is instituted in Court *A* and as regards Court *C* when the first appeal is lodged before Court *B*. A "present right of appeal" (cf. S. 154, Civil P. C.) is a different matter. The principle must I think involve that an admixture of different systems is not to be applied to a single case. It is quite true that the suitor cannot enter Court *C* without going through Court *B*, but neither can he enter Court *B* till Court *A* has given its decision. The right must be a right to take the matter to Court *C* in due course of the existing law.

In the present case, however, there is a further element or contingency in that the case might never have been dealt with by a single Judge, and the right claimed under Cl. 15 of the unamended Letters Patent might never have arisen at all. Whether this element would make the reasoning of the Judicial Committee in the *Colonial Sugar Refining Co. v. Irving* (1) inapplicable to the present case is a question which must be answered in the negative, if, as I think, the applicant at the date of the suit had a right to the use of the then existing system of appeals. But this question is I think academic in view of the effect of S. 111 of the Code upon the change introduced by the new Letters Patent. The new clause treats all second appeals in the same way, though it is in the power of the Court by its rules, and of the Chief Justice by administrative action, to ensure that only those second appeals shall be laid before a single Judge in which the value of the subject-matter is below a given limit. Nothing can be founded therefore in the circumstance that by the rules of this Court Rs. 1,000 is imposed as a limit, that in practice Rs. 50 is the limit and that any single Judge can direct the case to be laid before a Bench. Theoretically cases are brought to this Court on second appeal only if they are valued at less than Rs. 5,000. This valuation, however may under the Suits Valuation Act be of an artificial character, and second appeals do from time to time go to the Privy Council either under S. 110 of the Code because the real value is over Rs. 10,000 or because the decree affects property of

that value or for special reasons under S. 109 (c).

Section 111 of the Code, however, definitely prohibits an appeal to the Privy Council from a single Judge and to this extent overrides Cl. 39 of the Letters Patent. The section is not a mere provision that nothing in the previous sections shall be deemed to give a right of appeal from the decision of a single Judge. The provisions of Cl. (a) of S. 111 may have been motivated originally by the existence of the right of Letters Patent appeal [cf. *Sabhapathi v. Narayanasami*, (10),] or by the opinion that it is not reasonable in Indian cases that the Privy Council should be called upon to decide cases until a Bench has dealt with them. But in any case the effect of S. 111, upon Cl. 39, Letters Patent, cannot now be controlled by such considerations: *Satya Narayana v. Venkata* (11). It appears to me, therefore, that the new clause in the Letters Patent takes away in all second appeals decided by a single Judge (without his giving a certificate that the case is a fit one for appeal) the right to go to the Privy Council under the ordinary law, though the right of the Judicial Committee to give special leave is not of course affected. That right was a limited and qualified right; but such as it was, it was open to the party prior to 14th January 1928. It depended upon no contingency but merely on his prosecuting his case up to that point. It is reasonably clear that to determine the effect of the new Letters Patent upon pending cases these cannot be distinguished according as they are or are not fit to be taken on appeal to the Privy Council.

Considering the several safeguards that are provided the joint effect of the new clause in the Letters Patent and of S. 111 of the Code is doubtless admirable, but it prevents me from holding that the new Letters Patent can be applied to pending cases without taking away existing rights of appeal. Nor can I doubt that when the legislature has authorized His Majesty to legislate by Letters Patent upon questions which include rights of appeal the same principles of construction must be applied as would at common law be applicable to a statute dealing with the like subject-matter.

(10) [1902] 25 Mad. 555=11 M. L. J. 346.

(11) A. I. R. 1924 Mad. 399=46 Mad. 958.

In this view the only question which remains is the question whether the new clause can be given retrospective effect. The provision that the new Letters Patent shall come into force on the date of publication in the Gazette does not operate to give it such effect. Nor does the fact that the jurisdiction and authority of the Court is the primary subject of the Letters Patent found a valid argument to the effect that after the date of commencement the Court can have no authority to entertain such an appeal as this. Unless the contrary can be shown the provision which takes away jurisdiction is itself subject to the implied saving of the litigants' rights. Indeed that there is an implied saving of such rights in some cases cannot well be denied. It will not be supposed, for example, that jurisdiction is taken away as regards cases heard by a single Judge on second appeal prior to the date of commencement, viz., 14th January 1928, on which date for the first time the Judge had any duty or right to determine whether the case was fit for further appeal.

The question before us is thus narrowed down to this: Whether it is any necessary part of the intendment of the Letters Patent that they should operate upon appeals arising out of suits instituted before 14th January 1928, when such appeals were heard after that date?

As there is nothing in the language of the Letters Patent to evidence this intention, we must enquire whether it is manifest from the subject-matter.

Baron Parke said Lord Hatherly in *Pardo v. Bingham* (12) at 740.

did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed and said that the question in each case was whether the legislature had sufficiently expressed that intention. In fact we must look to the general scope and purview of the Statute and at the remedy sought to be applied and consider what was the former state of the law and what it was that the legislature contemplated.

A strong instance of an inference of this character was the decision in *Quilter v. Mapleson* (13) where Jessel, M. R., held that the right given by the Conveyancing Act, 1881, to obtain relief against forfeiture could be claimed in a suit that

had been instituted and tried at first instance before the Act came into operation. There, however, a similar right under the Common Law Procedure Act had been abrogated by the Act of 1881 and was thus lost to the lessee.

Now in this case I cannot say that it appears to me that there is much material upon which to base a definite conclusion that the intention was to bring pending suits under the new system. The long postponement of a desirable reform may have been thought wise and it would hardly be correct for a Court of law to proceed merely upon its own opinion as to the degree of respect to which the right of a third appeal is entitled. In this aspect the present case may reasonably be thought less strong than the case of *Bourke v. Nutt* (14) where a similar argument was ultimately negatived. If bankrupts may continue to become members of School Boards I cannot say that litigants may not continue to have a third appeal unless it otherwise appears that this construction of the Letters Patent is not reasonably possible. Far be it from me to distinguish between such forms of excess or to divide such claims to toleration.

There is, however, another ground which should be mentioned. Cl. 15 of the Letters Patent is not read with what is now S. 108, Government of India Act, (formerly Ss. 13 and 14, High Courts Act of 1861). It puts a limit to the power that can be entrusted by the Court to the discretion of a single Judge, and both the rules of the Court and the administrative action of the Chief Justice have to be controlled by its provisions. It follows that when the amended clause begins to operate at all, it may well become necessary that second appeals should be differently dealt with according as they arise from suits filed before or after the 14th January 1928. This is likely to cause much inconvenience which would be avoided by treating the clause as applicable to all second appeals heard by a single Judge after the said date. Such an argument, however, falls obviously short of what is required to entitle the Court to draw the inference that retrospective effect must have been intended by the new clause.

(12) [1870] 4 Ch. App 735=20 L. T. 464=17 W. R. 419.

(13) [1882] 9 Q. B. D. 672=52 L. J. Q. B. 44 =47 L. T. 562=31 W. R. 75.

(14) [1894] 1 Q. B. 725=63 L. J. Q. B. 497=70 L. T. 639=58 J. P. 572=1 Manson 172=9 R. 395 =42 W. R. 388.

No clear inference can, in my opinion, be drawn from that part of the new Letters Patent which deals with difference of opinion between the Judges of a Division Bench and I do not think it necessary to discuss this subject.

I cannot see any logical reason which would on the authorities entitle us to hold that the date of presentation of the second appeal to this Court is the date which determines the applicability of the amended clause and I very regretfully assent to the argument of the applicants that as the matter now stands the date of institution of the suit is in each case the determining factor.

The rule should therefore be made absolute but without costs.

C. C. Ghose, J.—I agree.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree.

Page, J.—I agree.

D.D. *Rule made absolute.*

A. I. R. 1928 Calcutta 644

RANKIN, C. J. AND C. C. GHOSE, J.

Lachmi Chand Jhawar—Appellant.

v.

Bipin Behari Ghose—Respondent.

Appeal No. 81 of 1927, Decided on 3rd January 1928.

Presidency Towns Insolvency Act, S. 9, Cl. (e)—Cl. (e) does not apply to a person against whom an adjudication order is taking operation.

Section 9, Cl. (e) is intended to apply to a person who is responsible for the payment of his own debts. It has no application to a person who has been adjudicated and to the acts of the Official Assignee in the process of the insolvency administration.

On 13th July 1926 *A* made an application for the adjudication of *B*. The adjudication order was made on 23rd July 1926. But it was rescinded in March 1927 on the ground that no act of insolvency had been made. In the meantime on 20th January 1927 *A* got the property of *D* sold in execution of a decree for the payment of money. The Official Assignee had been added as a party to the proceedings. On 27th April 1927 *A* filed an application for the adjudication in insolvency of *D* alleging that *B* had committed an act of insolvency as he had allowed the property to be sold on 28th January 1927.

Held : that the sale was not an act of insolvency. [P 645 C 1]

J. N. Roy—for Appellant.

Arun Sen—for Respondent.

Rankin, C. J.—In this case a petition was filed on 27th April 1927 for the ad-

judication in insolvency of one Bipin Behari Ghose. The act of insolvency alleged was that the debtor had allowed certain premises to be sold on 28th January 1927 in execution of a decree for the payment of money. It appears that the facts are that on 13th July 1926 the present creditor made an application for adjudication of the present debtor. That adjudication order was made on 23rd July. But an application for review having been made and an appeal taken both from the adjudication order and from the order dismissing the application for review the whole matter was remanded in appeal. That ultimately came before Page, J. who in March 1927 held that no act of insolvency had been made out and rescinded the adjudication order. The act of insolvency now alleged is a sale on 28th January 1927. It was a sale in a proceeding in which the Official Assignee had been added as a party in view of the adjudication order that was then subsisting and the question, and the only question, is whether in a case like this with a subsisting adjudication order and the Official Assignee being added as a party the sale in a mortgage suit comes within Cl. (e), S. 9, Act 3, 1919. S. 9 deals with acts of insolvency and it will be observed that everything in that section with the exception, which I am about to mention, refers to the acts of the man or his agent.

Nobody is to be adjudicated as insolvent unless there is something in his conduct or in his agent's conduct imputed to him amounting to an act of insolvency so as to attract this form of jurisdiction. But there are in this S. 2, Cls. (e) and (h), which are intended to enable a creditor to procure an act of insolvency, in other words, to compel the debtor to commit an act of insolvency, in order that the creditor may get, if he wants them, the advantages of insolvency jurisdiction. One is Cl. (e), namely, to have a man's property attached for 21 days or sold in execution of a decree for the payment of a sum of money. Another way in which a man may be forced into an insolvency Court is under Cl. (h) if he is imprisoned in execution of the decree of any Court for the payment of money. A debtor who is not willing to commit any of the other acts of insolvency mentioned in S. 9

may in either of these two ways be compelled to commit an act of insolvency. But Cl. (e) does not in my opinion apply to a person against whom an adjudication order is taking operation. That is intended to apply to a person who is responsible for the payment of his own debts. It is he who may be compelled by the creditor to commit an act of insolvency. The clause has no application to a person who has been adjudicated and to the acts of the Official Assignee in the process of the insolvency administration. The argument on behalf of the appellant has dealt with a number of matters. It is pointed out that if one looks to the principle embodied in S. 23 of this Act of 1909 one finds that when an adjudication order is annulled it is as though it had never been made with certain exceptions. The act of the Official Assignee and of the Court if duly done are allowed to stand and subject to that the property vests in the bankrupt retrospectively that is to say, as it was at the time when the adjudication order was first made. That is perfectly true, but it is an entirely different thing to impute to a person an act of insolvency by means of this retrospective operation. It is quite right that a man should get his property back and get it as from the previous date. It is another thing to make him responsible for something that he could not possibly resist. In my opinion the learned Judge was perfectly right in refusing to hold that this was an act of insolvency.

In my opinion this appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

D.B./R.K

Appeal dismissed.

A. I. R. 1928 Calcutta 645

RANKIN, C. J., AND CHOTZNER, J.

Serajul Islam and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 164 of 1927, Decided on 8th November 1927, from order of Addl. Sess Judge, Comilla, D/- 24th January 1927.

Criminal P. C., Ss. 326 and 274—Trial by jury under S. 302, Penal Code—12 persons summoned as jurors—Eight appearing and

seven chosen—Tribunal is illegally constituted—Proceedings are illegal.

In a case of trial by jury for an offence under S. 302, Penal Code, only 12 persons were summoned to attend the Court as jurors. Of these eight appeared on the day of the trial and, from the eight who appeared, seven persons were chosen to act as the jury.

Held: that the tribunal was illegally constituted, as, contrary to the intention of the Code and to the standard set by the legislature, an unreasonably small number of jurors was summoned with the result that it was not possible to have a jury of 9 and the proceedings should be set aside. [P 645 C 2 ; P 646 C 1]

A. K. Fazlul Huq and Debendra Narain Bhattacharya—for Appellants.

Khundkar—for the Crown.

Rankin, C. J.—In this case it appears that the eight appellants and another person were put upon their trial before the Sessions Judge and a jury on charge under S. 302, I. P. C., and also upon charges under Ss. 147 and 148.

What was done with reference to the jury was this: that only 12 persons were summoned to attend the Court as jurors. Of these eight appeared on the day of the trial and, from the eight who appeared, seven persons were chosen to act as the jury. In these circumstances, Mr. Fazlul Huq, for the appellants, calls our attention to Ss. 274 and 326, Criminal P. C., and he contends that the tribunal was illegally constituted and that all the proceedings should be set aside.

Now, it is quite clear that under S. 274 where any accused person is charged with an offence punishable with death, the jury should consist of not less than seven persons and, if practicable, of nine persons. By S. 326 it is provided that the Sessions Judge, should send a letter to the District Magistrate requesting him to summon a number of persons, the number to be summoned not being less than double the number required for any such trial. The exact effect of that section I will not now attempt to define, but it, at least, sets a minimum standard for the number to be summoned and S. 327 also (where it is applied) can and should be applied so as to comply with this. In the present case only twelve jurors were summoned; and only eight persons appeared out of the 12. In these circumstances, the concluding words of S. 274 could take no operation whatsoever. Now, so far as can be seen, it was quite practicable to have this case tried by a jury of nine; but the manner in

which the jury was empanelled and the insufficiency of the number of jurors summoned defeated the intention of the section.

Mr. Fazlul Huq, in addition to this, has referred to the judgment of my learned brother, C. C. Ghose, J., in the case of *Roson Ali v. Emperor* (1). This judgment gives rise to several additional questions to which it is open to Mr. Huq to refer. With regard to these questions, I do not propose to say anything now, because, in my judgment, it is unnecessary to delay this case so as to deal with them. I am of opinion that, contrary to the intention of the Code and to the standard set by the legislature, an unreasonably small number of jurors was summoned with the result that it was not possible to have a jury of nine and that the proceedings ought not to be allowed to stand. The position is that the tribunal was illegally constituted and, in my judgment, in a case of this character it is necessary that the whole proceedings should be set aside and the case remitted for retrial.

As regards bail: we will put the appellants back to the position in which they were at the time when the original trial commenced so that they may give security to the satisfaction of the District Magistrate in the same amounts.

Chotzner, J.—I agree.

N.K.

Case remanded.

(1) A. I. R. 1927 Cal. 787.

**** A I. R. 1928 Calcutta 646**

Special Bench

RANKIN, C. J., C. C. GHOSE AND
BUCKLAND, JJ.

Hari Mohan Dalal and another—Opposite Parties—Appellants.

v.

Parameswar Shau and others—Applicants—Respondents.

Appeals Nos. 163 to 180 of 1925, Decided on 2nd May 1928, from the appellate orders of Dist. Judge, Midnapur, D/- 10th January 1925.

**** (a) Limitation Act, Art. 181—Decree of trial Court reversed in first appeal—Decree executed in the meantime—First appellate decree affirmed in second appeal—Limitation for application for restitution begins from date of first appellate decree—Civil P. C., S. 144.**

Where a trial Court's decree is reversed in

second appeal but the trial Court's decree is executed during pendency of first appeal, the limitation for an application for restitution begins from the date of the decree in first appeal and not that in second appeal : 7 B. L. R. 704 ; 27 C. L. J. 451 ; and A. I. R. 1926 Cal. 981, *Diss. from*. [P 651 C 1]

*** (b) Limitation Act—Construction—No exceptions should be made on the ground of hardship.**

In applying the Limitation Act to particular cases the Courts are not warranted in introducing savings or exceptions which are not found in the statute either because these may be within the reason of other exceptions which are to be found in the statute or because of considerations of mere hardship : 25 Cal. 113, *Ref.* [P 647 C 2]

*** (c) Limitation Act—Construction—Third column should be interpreted to date the cause of action from the date on which the remedy becomes available.**

The language of the third column of the schedule should in general, if not indeed always, be so interpreted as to carry out the true intention of the legislature, that is to say to date the cause of action from the date on which the remedy is available to the party : 26 Mad. 780 and 40 Mad. 1040, *Ref.* [P 648 C 2]

Basak and Satindara Nath Mukerjee—for Appellants.

Kshitish Chandra Chakravarti and Apurba Charan Mukerjee—for Respondents.

Biraj Mohan Majumdar—for Minor Respondents.

Rankin, C. J.—In these cases Mr. Suhrawardy and Graham, JJ. have differed on a question of law which has been referred to us under S. 98, Civil P. C., in the following terms :

Whether in the circumstances of the present cases, time to be reckoned under S. 181, Lim. Act, should be counted from the date of the decrees of the High Court dismissing the appeals from the decrees of the lower appellate Court, or from the dates of the pronouncement of the decrees of the lower appellate Court, or whether the respondents are entitled to get deduction of the period occupied by the appeals to this Court.

The facts which give meaning to this question of law are as follows :

The plaintiff brought a series of rent suits against tenants and on 31st July 1919 obtained decrees from the Court of first instance for the amount of his claim. During the pendency of appeals in the lower appellate Court, the plaintiff realized by execution the whole of his decretal amounts. Thereafter, on 14th August 1920, the lower appellate Court allowed the appeals in part and reduced the amounts for which the plaintiff could

plaintiff's appeal from this decision was dismissed by the High Court. In May and June 1924 the tenants made applications under S. 144, Civil P. C., for restitution of the amounts which in execution of the trial Court's decree had been paid by them in excess of the sums ultimately decreed to be due. These applications have been resisted by the plaintiff upon the ground of limitation, the contention being that Art. 181 of the Schedule of the Lim. Act of 1908 governs this matter and that the right of the tenants to apply for restitution under S. 144, Civil P. C., accrued to them more than three years before May 1924, namely, on 14th August 1920 when the lower appellate Court reduced the amounts of the plaintiff's decrees. The Munsif and the District Judge have both rejected the plaintiff's contention and Graham, J., in this Court has taken the same view. Suhrawardy, J., on the other hand has thought the plaintiff's contention to be correct.

Both the learned Judges in this Court are in agreement that the article applicable to the case is Art. 181 and not Art. 182. Thinking this question to be well settled so far as this High Court is concerned they have not thought fit to state the point of law, upon which they differed, as broadly as they might have done, e. g., by making a reference on the question whether the applications under S. 144, Civil P. C., are barred by limitation. The reference has been made in a limited form and upon the basis that the article applicable is Art. 181. This has been done deliberately by the learned Judges and I see no reason to quarrel with this exercise of discretion. This method of reference is now provided both by Cl. 37, Letters Patent, and by S. 98 of the Code and the method will be productive of much disorder and absurdity unless the terms of these enactments are strictly complied with. However tempting it may be to argue other points than the point or points referred, the temptation must be resisted. At the hearing we accordingly refused to discuss once more the question of the applicability of Art. 181 to applications under S. 144 of the Code. It is a matter upon which different High Courts have taken different views and are likely to go on taking different views for many years.

The view taken by Suhrawardy, J., was that unless it could be held that

by reason of the plaintiff's appeal from the decrees of the District Judge the tenants' right to claim restitution was suspended, it must be held that their right accrued on the date of his decrees. Following the decision in *Sarat Kamini Dasi v. Nagendra Nath Pal* (1), he held that no doctrine of suspension was applicable to these cases and that there was no other principle of law under which the time prescribed by Art. 181 could be extended. Graham, J., on the other hand held that time ran against the tenants only from the date when the final pronouncement was made in the proceedings instituted to test the propriety of the first Court's decrees. He thought it reasonable to hold that in such cases as the present limitation is saved on the ground that the relief granted by the decrees of the District Judge was imperilled by the appeals. He was accordingly prepared to follow the decision of a Division Bench in the case of *Atul Chandra v. Kunja Behary* (2), and to hold that the tenants' applications for restitution were in time.

It may be as well to deal first with the suggestion that the tenants' conduct in postponing their applications until the decision of the High Court had been given upon the matter, was reasonable and not negligent and that it would be a hardship in the circumstances of these cases to say that the law required them to make their applications within three years from the decision of the District Judge. If the case for the tenants has to be put upon such grounds it must, in my opinion be rejected for more than one reason. It appears to me that in applying the Indian Limitation Act to particular cases the Courts are not warranted in introducing savings or exceptions which are not found in the statute either because these may be within the reason of other exceptions which are to be found in the statute or because of considerations of mere hardship. In this respect I agree entirely with the judgment of Suhrawardy, J. I am of opinion further that in the present cases there is no hardship. In *Harish Chandra Saha v. Chandra Mohan Das* (3), an ex-parte decree had been obtained and satisfied in execution. It was subsequently set aside and upon a retrial the suit was dismissed

(1) A. I. R. 1926 Cal. 65.

(2) [1918] 27 C. L. J. 451=43 I. C. 775.

(3) [1901] 28 Cal. 113.

with costs. Upon an application for refund of the money paid in satisfaction of the ex-parte decree, it was contended that the right to apply did not accrue on the setting aside of the ex-parte decree but on the passing of the final decree dismissing the suit. It was said by Stevens, J. :

We think that there is nothing in this contention. The decree which had been satisfied was the ex-parte decree. Since that decree was set aside the appellants were entitled to a refund. They were in no way bound to allow the amount which they had already paid to remain in the decree-holder's hands in case the suit should eventually be decreed against them.

It is to be observed that S. 144 of our present Code makes it obligatory upon the Court of first instance to grant restitution :

Where and in so far as the decree is varied or reversed.

In the present case the decrees of the District Judge were dated 14th August 1920 and those of the High Court 8th August 1923. It seems unreasonable to say that for the tenants to leave the excess amounts in the pocket of their landlord for some three years without applying for a refund thereof was to take a course which practical good sense dictated, so as to prevent it being said with truth or justice that their conduct was dilatory. It appears to me therefore that the tenants' case must be rested upon other grounds.

The only other ground to which they can resort is the doctrine of which the best known and most frequently repeated exposition is to be found in the judgment of Mitter, J., in *Ram Charan Bysak v. Lakhi Kant Bannik* (4), a case decided under the Limitation Act, 1859 :

Whether the decree of the appellate Court is for reversing or for affirming the decree against which the appeal is preferred, it is, in either case, the final decree in the cause, and as such the only decree which is capable of being enforced by execution, after it is once pronounced. If the decree of the lower Court is reversed by the appellate Court it is absolutely dead and gone. If on the other hand it is affirmed by the appellate Court it is equally dead and gone, though in a different way, namely, by being merged in the decree of the superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously.

It does not appear to me that the decision in *Atul Chandra v. Kunja Behary* (2), proceeded upon this principle. Rather it would appear to have proceeded upon notions of due diligence or of hardship from which I have already expressed my

dissent. But in *Fazalar Rahaman v. Abdul Samad* (5), in appeal from an appellate order, where the facts were very similar to the facts of the present cases, it was held that the time for an application for restitution ran from the date when the decree of reversal was affirmed in second appeal and not from the date of the decree of reversal. That was a decision of Newbould and B. B. Ghosh, JJ., and it was based upon the observations of Mitter, J., in the case to which I have referred. Reliance was also placed on *Uma Charan v. Nibaran* (6), where, on a similar line of reasoning, it was held that when a preliminary decree in a mortgage suit has been affirmed on appeal, an application for a final decree is an application to make final the decree of the appellate Court and that under Art. 181, Lim. Act, time runs from the date of the appellate Court's decree. The decision of Newbould and B. B. Ghosh, JJ., does not appear to have been cited before the Division Bench which made this reference and the line of argument disclosed therein has not been discussed in either of the judgments. In my opinion, however, our answer to this reference must depend upon the view which we take of the applicability to the present question of the principle therein relied on.

Now, the article with which we are concerned, Art. 181, is in the full sense of the word a residuary article which is limited in its scope to applications. The broad scheme of the Limitation Act is that so far as possible the terminus a quo of the period of limitation shall be stated specifically with reference to each class of suit, appeal or application. The old English statutes of limitation had been content to prescribe the period by putting as the limit so many years after the cause of action. The Indian Legislature endeavours in detail by the Limitation Act to state in the third column of the schedule, the event which is to be taken as completing a cause of action, that is the date from which time begins to run. The language of the third column of the schedule should in general, if not indeed always, be so interpreted as to carry out the true intention of the legislature, that is to say to date the cause of action from the date on which the remedy is available to the

(5) A.I.R. 1926 Cal. 981.

(6) A.I.R. 1923 Cal. 389.

(4) [1871] 7 B. L. R. 704=16 W. R. 1 (F. B.).

party. This principle has been applied to the first clause in the third column of Art. 182, *Rungiah Goundan & Co. v. Nanjappa Row* (7); cf. *M. Vittil Seeti v. Kunhi Pathummal* (8).

In Art. 181 the legislature makes provision not for one definite type of cases but for an unknown number of cases of all kinds. The provision which it makes is specific as regards the period of limitation but as regards the terminus a quo it is content to state in general language and quite simply the fundamental principle that for the purposes of any particular application time is to run from the moment at which the applicant first had the right to make it.

When in a case such as the present we are asked to import language to the effect that decrees become dead when they are affirmed on appeal, it is necessary to be careful lest we be ridden by a metaphor. This becomes all the more necessary when it appears that the language employed was directed to the question of execution, a question which has since been dealt with by what is now Art. 182 of the Schedule to the Lim. Act, with which we are now concerned. Mitter, J. was applying his mind really to put the matter in terms of the Lim. Act of 1908, to the question whether Art. 182 or Art. 183 is applicable to the cases of execution of a decree of a provincial civil Court which has been affirmed on appeal by the High Court. Still greater caution is suggested by the fact that the language employed by the draftsman of the schedule to the Act of 1908 is in Art. 182 inconsistent with the rigour of the metaphor in question. Art. 182 speaks of the execution of a decree or order and dates the terminus a quo in a case where there has been an appeal from the order sought to be executed, from the date of the final decree or order of the appellate Court or the withdrawal of the appeal. I do not say this by way of casting doubt upon the view that where a decree has been affirmed by a High Court on appeal limitation for purposes of execution runs afresh from the appellate decree. Nor am I desirous of disputing that in such cases the appellate decree is the only decree which can be amended, *Muhammad*

Sulaiman v. Muhammad Yar Khan (9), or which can be reviewed, *Chandra Kant v. Lakshman* (10), or which can operate as res judicata, *Kailash Chandra v. Girija Sundari* (11), or which can be made final or absolute, *Gajadhar Singh v. Kishan Jivan Lal Khan* (12), *Uma Charan v. Nibaran* (6), or which puts an end to the period for which mesne profits can be ascertained, *Bhup Indar v. Bijai* (13). For each of these propositions there is specific practical reason. Indeed there are decisions of the Judicial Committee covering most of these points *Brij Narain v. Tejbal Bikram* (14), *Abdul Majid v. Jawahir Lal* (15), *Bhup Indar v. Bijai Bahadur* (13). If, however, the full vigour of Mitter, J.'s language is pressed in the present case, I cannot omit to point out that that language itself was considered by the Judicial Committee in the case of *Kristo Kinkar Roy v. Raja Burroda Caunt Roy* (16), at 488 to 492. In the view taken by the Board it became unnecessary to decide the question whether the decree of the High Court affirming a decree of a Zillah Court was to be taken to incorporate the latter in itself, so that for the purposes of execution, the decree to be executed was to be taken to be a decree of the High Court. To that question the words of Mitter, J. were understood to be limited but even so the opinion intimated was:

If the question were res integra, their Lordships would incline to the view taken by the Judges of the High Court in the present case, viz. that the execution ought to proceed on a decree, of which the mandatory part expressly declares the right sought to be enforced. Considering, however, that, for the reasons already given, the question is not of much practical importance, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying, that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from con-

(9) [1889] 11 All. 267 (F.B.).

(10) [1916] 24 C.L.J. 517=36 I.C. 460=21 C. W. N. 430.

(11) [1912] 39 Cal. 925=14 I.C. 299=16 C.W. N. 658.

(12) [1917] 39 All. 641=42 I.C. 93=15 A.L.J. 734 (F.B.).

(13) [1901] 28 All. 152=27 I.A. 209 (P.C.).

(14) [1910] 32 All. 295=6 I. C. 669=37 I. A. 70 (P.C.).

(15) A. I. R. 1914 P.C. 66=36 All. 350 (P.C.).

(16) [1870-72] 14 M. I. A. 465=17 W. R. 292=10 B. L. R. 101 (P.C.).

(7) [1903] 26 Mad. 780=13 M.L.J. 412.

(8) [1917] 40 Mad. 1040=6 M.L.W. 464=33 M.L.J. 320=43 I.C. 31=1917 M.W.N. 609 (F.B.).

firming a decree erroneous or questionable, yet not open to examination by reasons of the special and limited nature of the appeal.

The Privy Council appears to me to have had difficulty in appreciating that there is any necessity or reason that decrees become dead for all purposes when affirmed.

The decision of the Privy Council in *Juscurn v Prithichand* (17), was a direct refusal to apply the principle that a decree which has been affirmed in appeal is for all purposes dead. In that case the question of limitation arose on a claim by the purchaser of a patni taluq at a sale for arrears of rent under Bengal Regulation 8 of 1819 in suits by the darpatnidars to which the purchaser was a party. The sale had been set aside by the District Judge on 24th August 1905 and the High Court on appeal affirmed his decision on 3rd August 1906. The appellant sued for certain sums he had been required to pay to the zamindar and his suit was treated as a suit for money paid for an existing consideration which afterwards failed. The question was whether the three years prescribed by Art. 97, Lim. Act, 1877, should run from the date of the decision of the District Judge or the decision of the High Court, acting upon the footing that it was the reversal of the sale which constituted the plaintiff's cause of action, the decision of the Board, delivered by Sir Lowrence Jenkins, was in these terms:

Both the Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal.

Now Art. 97 is only a particular application of the general principle expressed in Art. 181 and, in my judgment, Art. 181 being a residuary article intended to meet all manner of cases it is necessary in applying it to see whether the nature of the case required that the decree which has been affirmed on appeal should be disregarded in arriving at the date at which the right in the applicant first accrued. That this may sometimes be necessary for the proper application of Art. 181 to applications in execution may well be thought to follow from the

(17) A. I. R. 1918 P. C. 151=46 Cal. 670=46 I. A. 52 (P.C.).

circumstance that it cannot be said that Art. 182 covers all possible cases of applications for execution. See *Rungiah Goundan & Co. v. Nanjappa Row* (7). The case of *Uma Charan v. Nibaran* (6), relied upon by Newbould and B. B. Ghosh JJ., in the unreported case already mentioned, is another instance of the same thing. The governing consideration in that case was that only one decree can be made final and that must be the preliminary decree of the appellate Court. It is true that the Bombay High Court in *Kurgodigauda v. Ningangauda* (18) applied Art. 6, Lim. Act, to an application under S. 144, Criminal P. C. on the footing that the words "an application for the execution of a decree" are not to be construed so narrowly as to exclude an application for restitution in consequence of the decree. It is further true that such an application may be said to be concerned with the working out of the decree which varies or reverses the decision of the lower Court. It is an application for relief which is consequential upon the appellate Court's decree of reversal. But the relief is not in all cases granted by the decree of the appellate Court taken by itself. If it is so granted, then a case arises of the character which was decided in this Court in Appeal from Appellate Order 301 of 1922, on 27th August 1923. In such a case the remedy provided by S. 144, Civil P. C. is not required.

All that it is necessary to do is to have execution of the appellate Court's decree as it stands. To such a case Art. 182 would apply as was held by Chatterjea and Panton, JJ. But the application to be made under S. 144 is an application which must be made to the Court of first instance whether the decree varied or reversed was passed by that Court or a higher Court. That Court has to determine whether the applicant is entitled to any and what benefits by way of restitution or otherwise by reason of the decree of the appellate Court varying or reversing a previous decree. We have to determine this case under Art. 181, Lim. Act, which directs us in general language to find out the date on which the applicants' right accrued. In the ordinary and natural meaning of the words their right accrued

(18) [1917] 41 Bom. 625=41 I.C. 233=19 Bom. L. R. 638.

immediately the District Judge reversed the decision of the trial Court and reduced the amount of the plaintiff's claim. Unless, therefore, we are required by reason of the nature of the matter to ignore the effect of that decision because it was confirmed on appeal it seems to me to be wrong to do so. To refuse so to do does not involve the proposition that two decrees for the same thing may be executed simultaneously. Nor does it involve, so far as I can see, the affirmation of any other proposition that can be regarded as inconvenient or absurd. I am of opinion therefore that we should answer the question put to us by saying that the time to be reckoned under Art. 181, Lim. Act, should be counted from the decrees of the lower appellate Court and that the tenants are not entitled to get deduction of the period occupied by the appeals to the Court.

As no further point remains to be determined the judgment of Suhrawardy, J. must take effect; the appeals of the plaintiff must be allowed and the tenants' application under S. 144, Civil P. C. must in each case be dismissed. There will be no order as to costs save that the plaintiff must have the costs of the hearing before us. Five gold mohurs for the whole case.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

D.D.

Appeals allowed.

A I. R. 1928 Calcutta 651

B. B. GHOSE AND BOSE, JJ.

Ajaz Hossain Jafri—Plaintiff—Appellant.

v.

Altaf Hossain and others—Defendants—Respondents.

Appeal No. 32 of 1927, Decided on 18th June 1928, from original order of Special Land Acquisition Judge, Zillah 24-Perganas, D/- 29th November 1926.

(a) *Mahomedan Law—Wakf—Appointment of a manager by committee under agreement—Power of dismissal reserved by the managing committee—Such a person is not really a mutwali and is liable to dismissal.*

Where the Managing Committee of a wakf appoints a person for the management of the property and reserves power of dismissal at its option, such a person is not really a mutwali under the provisions of Mahomedan law and he is liable to be dis-

missed at any time at the option of the Committee: 41 Cal. 19; Ref. [P 653 C 1]

(b) *Civil P. C., O. 22, R. 10—Removal of a manager by the managing committee of a trust—Appointment of another—The latter is entitled to be substituted in place of the former.*

Where a person is appointed as the manager of a trust and removed subsequently by the appointment of another person the latter is entitled to be substituted in pending legal proceedings prosecuted by the former in respect of the trust property, the interest of the former having ceased by his removal: 17 Mad. 143, Ref. [P 653 C 1]

Brojo Lal Chakraborty, Nasim Ali, Anil Chandra Ray Chaudhury and Hira Lal Chakraborty—for Appellants

Sarat Chandra Basak, Dwiptendra Mohan Ghose, Satindra Nath Ray Chaudhury, Panna Lal Chatterji and M. M. A. Quasim—for Respondents.

Surjya Kumar Aich—for Deputy Registrar.

B. B. Ghose, J.—This is an appeal against an order made under O. 22, R. 10, Civil P. C. by the District Judge of the 24-Perganas. It arises out of an application made by the appellant for continuing an appeal which has been preferred by the respondent pending in the Court of the District Judge on the allegation that the interest of the respondent in the appeal had devolved on the appellant. The District Judge rejected the application and hence this appeal.

The facts are very simple. There is a well-known foundation of Mohamed Mohsin of the Hooghly Imambara. There is a committee appointed under the Religious Endowment Act 20 of 1863 for the management of the endowment. The committee it appears from time to time appoints a manager or mutwali for the performance of the duties in connexion with the foundation. In this case the President of the managing committee advertised in the news papers, a copy of which has been exhibited in this case Ex. 7, inviting applicants for the post of Mutwali of the Hooghly Imambara. It appears that the respondent answered to the advertisement and an agreement was entered into between the members of the committee and the respondent Syed Altaf Hossain under which he was appointed Mutwali for a period of three years with option to the managing committee to continue the appointment if they so chose. There was a term in the agreement that the Mutwali was liable to dismissal by the

Committee without assigning any reason by simply giving him three months notice. What happened was that respondent Altaf Hossain was appointed mutwali or manager from the 1st March 1923. Towards the end of the term this gentleman expressed a desire that the period of his appointment should be extended, and after some correspondence as the Judge notes, the committee informed him on 21st January 1926 that he would be reappointed as mutwali for a further period of three years with effect from the 1st March 1926. Subsequently however on the 16th March the committee addressed a letter to this gentleman in the following terms :

We have the honour to inform you that in accordance with the terms of the agreement approved by you on 17th January 1926 on the basis of which you took charge of the office of mutwali (or manager) of the Hoogly Imambara on the morning of the 1st March 1926, we dispense with your services on and from 1st July 1926 under Cl. 5 of the aforesaid agreement and that you are requested to make over charge of the office of mutwali (or manager) to the new mutwali (or manager) to be appointed by the committee hereafter or in his absence to the Dewan and Seristadar of the Imambara or in his absence to the Peshkar.

It is said that the appellant before us Syed 'Ajaz Hossain Jafri was subsequently appointed mutwali, by the committee. On such appointment the appellant applied to the District Judge for an order under O. 22, R. 10, Civil P. C. The suit out of which the appeal is pending before the District Judge was one for setting aside a lease created in favour of the defendant in that suit by the previous mutwali. The succeeding mutwali named Riezuddin brought the suit originally. He was the mutwali then for a term of three years and after his term expired one Ali Kazmaini was appointed in his place and he was substituted as plaintiff in the suit, and after his term expired the present respondent before us Altaf Hossain was substituted in his place. Now after what has happened the present appellant applies to be substituted in the appeal pending before the District Judge in place of the respondent. The appeal it may be mentioned is Title Appeal No. 386 of 1925.

The reason assigned by the learned District Judge is that under the general provisions of the Mahomedan law the mutwali is a permanent official and, therefore, the position of the mutwali is

such that the committee is not in a position to dismiss him. With the general proposition of law as enunciated by the District Judge there is no reason to differ. But in the present case the difficulty seems to me to be this that the mutwali, or by whatever name this manager may be called, is not a mutwali appointed under Mahomedan law.

Under the Mahomedan law the appointment of a mutwali can be made by the donor and the succession to the appointment must be in accordance with the provisions of the deed of endowment if there is any. The succession to the office of mutwali may be in accordance with the desire of the donor if he is alive, or if the intention of the founder cannot be ascertained from any established usage, then the appointment may be made by the executor of the founder and failing all these the power of appointment is in the Court which represents the power of the Kazi. In no circumstances can the mutwali properly so called under the Mahomedan law be appointed in the manner in which the respondent Altaf Hossain was appointed mutwali. It can hardly be consistent with the Mahomedan law that the office of mutwali should be advertized and a gentleman who may be qualified in every respect should be appointed for a period of three years or for a further period at the option of the members of the committee. A person appointed in such a way cannot invoke under the provisions of the Mahomedan law the powers of a mutwali. The respondent Altaf Hossain entered into an agreement dated 1st March 1923 which embodied the terms by which he was to hold office. It is unnecessary to recite all the terms, but under these terms he was liable to be dismissed by the members of the committee. As the learned District Judge has himself said that ordinarily the authority which has the power to appoint an officer has also the power of dismissal, I do not see why the ordinary power should be held in this present case as not capable of being exercised. In support of the proposition of the learned Judge that the authority which appoints has the power to dismiss, the case of *Ram Charan Bajpai v. Rakhal Das Mukherji* (1), may be cited. That was a

(1) [1914] 41 Cal. 19 = 20 I. C. 157 = 17 C. W. N. 1045.

case of appointment in a Hindu Trust, but the principle is the same. I do not therefore, agree with the observation of the learned District Judge that the general principles of Mahomedan law applies to the office of the respondent Altaf Hossain and I am of opinion that he is liable to be dismissed under the terms of the agreement he entered into with the members of the committee.

The next point which was urged on behalf of the respondent seemed to me during the course of the argument to be of substance, and it was urged by the learned advocate for the respondent that if it be held that Altaf Hossain was a mere servant under the members of the committee then he had no interest in the property and there was no devolution of any interest on the appellant Ajaz Hossain and therefore, no order under O. 22, R 10 should be made. It appears, however, that it has been held in the case of *Sankra Murthi Mulaliar v. Chidambara Nadan* (2), that a manager appointed by the members of the committee has got the right to maintain a suit for recovery of property. And it appears in this case that successive mutwalis appointed in this manner for a term of three years have been substituted in the place of original plaintiff and the present respondent Altaf Hossain was also substituted in the place of his predecessor in office whose term of office expired after three years' service. This objection cannot therefore, be raised by the respondent.

The result therefore, is whether this gentleman is properly called by the name of mutwali or not he is not really a mutwali as understood by the Mahomedan law. That being so as I have already stated his term of office expired in accordance with the contract. Whether he was rightly dismissed or not is another matter. That is a question which I understand is the subject-matter of another litigation. But so far as the present application is concerned it must be held that as the present appellant has been appointed by the committee to act as manager he should be substituted in the place of the respondent in the appeal pending before the District Judge. I do not understand why the gentleman who obtained office according to his own agreement for a limited period in answer

(2) [1894] 17 Mad. 143.

to an advertisement in the newspapers should so desire to retain his office when his employers have discharged him in terms of his agreement.

The appeal is, therefore, allowed and it is directed that the appellant should be substituted in the place of the respondent in the appeal pending before the District Judge. The appellant is entitled to his costs in both Courts. We assess the hearing fee in this appeal at five gold mohurs. The costs will be recovered from the respondent Altaf Hossain personally.

Bose, J.—I agree.

A.L./R.K.

Appeal allowed.

A. I. R. 1928 Calcutta 653

C. C. GHOSE AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs—Petitioner.

v.

Srish Chandra Ray and others—Opposite Party.

Criminal Revns. Nos. 299 and 300 of 1928, Decided on 10th May 1928, from orders of Addl. Sub-Judge, Tippera, D/- 11th January 1928.

Criminal P. C., Ss. 471 and 475—"Detained in custody" does not mean detained in the custody of friends and relatives—It is the local Government and not Magistrate who can deliver the accused to his relations for safe custody.

"Detained in safe custody" in S. 471 does not mean having regard to the language used in S. 475, "detained in the custody of friends or relatives." [P 654 C 1]

What the magistrate or Court can do under S. 471, is to detain the accused in safe custody and report the matter to the Local Government. Under S. 475 it is the Local Government and not the Magistrate who can deliver the accused to any relative or friend of his for safe custody. [P 654 C 1]

Khundkar and Anil Chandra Roy Chowdhury—for Petitioner.

Debendra Narain Bhattacharjee—for Opposite Party.

Judgment.—No. 299. In this case what happened is this: The opposite party No 1 was tried before the Additional Sessions Judge of Tippera and a jury under S. 302, I. P. C. for having murdered his wife. The case for the defence was that the opposite party No. 1

at the time he committed the act in question was of unsound mind and therefore incapable of knowing what he was doing or that it was wrong or illegal. The jury returned a unanimous verdict of not guilty. In answer to a question put by the learned Sessions Judge to the jury, the foreman stated that the jury were of opinion that the opposite party No. 1 had killed his wife but that he was insane and incapable of knowing what he was doing. The learned Judge agreeing with the verdict of the jury acquitted the accused by his order dated 11th January 1928. He was of opinion that at the date of the aforesaid order, that is, 11th January 1928, the opposite party No. 1 was sane and he accordingly directed that he should be kept in the safe custody of his relatives, upon their furnishing two security bonds of Rs. 2,500, each to keep the opposite party No. 1 in safe custody and to prevent him from doing injury to himself or to others and to produce him if and when required by the Court. It appears that thereafter the opposite party No. 2 who is the father and the opposite party No. 3 who is the brother of opposite Party No. 1 stood surety for the opposite party No. 1 in terms of the order of the learned Judge. This order of the learned Judge was apparently made under the provisions of S. 471, Criminal P. C.

The Local Government has through the Legal Remembrancer now moved this Court and the contention on behalf of the Legal Remembrancer is that having regard to the language used in Ss. 466, 471 and 475, Criminal P. C., the order made by the learned Judge referred to above was clearly one which was without jurisdiction. It is contended that all that he could do under S. 471 was to detain the accused in safe custody and to report the matter to the Local Government and that under S. 475 it is the Local Government who can, if so satisfied, deliver the accused to any relative or friend of his for safe custody.

In our opinion, this contention is well founded, and must be given effect to. "Detained in safe custody" in S. 471 does not mean, having regard to the language used in S. 475, "detained in the custody of friends or relatives." That is quite clear. It would, therefore, follow that the learned Judge was in error in making the order in the form in which

he did. That order must, therefore, be set aside and it must be left to the Local Government under S. 475 to pass suitable orders for the delivery of the accused to such relatives or friends of the accused as may apply to the Local Government in that behalf. (A similar order was passed in case No. 300.)

N.K.

Orders set aside.

A I. R. 1928 Calcutta 654

GRAHAM, J.

Muktaram Rakshit and others—Petitioners.

v.

Gomasta Mahato and others—Opposite Parties.

Civil Rule No. 1536 (s) of 1927, Decided on 17th February 1928, from decree of Newbould and Graham, JJ., D/- 6th July 1925, in Appeal No. 481 of 1923.

Civil P. C., O. 22, R. 4—*One of the appellants dying during pendency of second appeal—Legal representatives of deceased not brought on record—Appeal heard and case remanded—Fresh second appeal against decision after remand—Application for vacating the previous order of remand—Proper procedure laid down—Civil P. C., O. 47, R. 5.*

While an appeal was pending in the High Court before the Division Bench, one of the appellants (defendants) died, whose legal representatives were not brought on record and the fact of his death was not intimated to the Court when the appeal was heard. Appeal was allowed and the case remanded for consideration. The lower appellate Court dismissed the suit of the plaintiff deciding the appeal in favour of the defendants. Plaintiff preferred a second appeal to the High Court and the heir of the deceased was added as a party respondent. An application was made by the plaintiff to the Division Bench whose members were different from the previous Bench of the High Court for vacating the previous order of remand.

Held: that the proper procedure was to place the matter before the members of the Division Bench, who had decided the previous appeal: *A. I. R. 1923 Cal. 676, Foll.* [P 655 C 2]

Held, further: that the proper remedy was to make an application for review under O. 47, R. 5, Civil P. C.

Held, further: that it was no doubt the duty of the defendants, then appellants, to make the substitution, but that could not absolve the plaintiff from the duty of bringing to the knowledge of the Court the fact which was known to them that one of the then appellants-defendants had died, so as to secure proper representation of the parties in appeal. [P 656 C 2]

Panchanan Ghose and Durgadas Roy—for Petitioner.

Dwarkanath Chakravarty and Fainindra Nath Das—for Opposite Party.

Cuming and Mukerji, JJ.—*Civil Rule No. 1345 (s) of 1927*: We have heard the parties. This rule is made absolute. Let Sreemati Bipin Mohatani the mother and sole heiress of the deceased respondent 17 be added as a party respondent in appeal from appellate decree No. 2232 of 1926.

The opposite party is entitled to the costs of this rule the hearing fee being assessed at two gold mohurs.

Civil Rule No. 1536 (s) of 1927: This rule was issued by my learned brother Mr. Justice Charu Chunder Ghose and Mr. Justice Buckland calling on the defendants-appellants and defendants-respondents to show cause why the decree of this Court dated 6th July 1925, as mentioned in the petition should not be vacated or why such other or further orders should not be passed as to this Court may seem fit and proper for the reasons stated in the application. The facts of the case are briefly as follows: The petitioners who have obtained this rule brought a suit for recovery of khas possession against a number of defendants one of whom was named Dolegobinda. This suit was dismissed. But the plaintiffs appealed to the District Court and on 31st October 1922 this appeal was decreed in favour of the plaintiffs.

On 20th December 1922 a second appeal was filed to this Court by all the defendants, among them was the aforementioned Dolegobinda. On 1st October 1923 Dolegobinda, who was one of the appellants, died. No attempt was made to bring his heirs on the record in his place. Neither does it appear that the Court knew of his death at the time of the hearing of this appeal. There were 28 Respondents to this appeal. This is perhaps the reason why the fact was lost sight of. This appeal was heard by Mr. Justice Newbould and Mr. Justice Graham on 6th July 1925 and it was ordered that the appeal should be remanded to the lower Court for a rehearing of the case. The appeal was heard and decided on 17th July 1926 by the District Court in favour of the defendants. The plaintiffs then filed a second appeal to this Court making Dolegobinda, the dead man, a party. Having now discovered that Dolegobinda died before the decision of the remand order the plaintiffs have now come to this Court and have obtained this rule to show cause why the order

of remand of this Court dated 6th July 1925 should not be vacated or why such other or further orders should not be made as to this Court may seem fit and proper. It seems to us that it is not open to us in this rule to vacate the order passed by Mr. Justice Newbould and Mr. Justice Graham. The proper procedure to follow is the one which was described by Mr. Justice Mookerjee in the case of *Abdul Aziz v. Lakhmi Chandra Majumdar* (1), namely, that the papers of this case should now be placed before Mr. Justice Graham for orders.

(In accordance with the above direction the rule was placed for hearing before Graham, J.)

Judgment.—This Rule was issued calling upon the opposite parties to show cause why the decree of this Court made by Mr. Justice Newbould and myself on 6th July 1925 should not be vacated or such other order made as might be deemed fit and proper. The rule came before my learned brothers Cuming and Mukerji, JJ., who in their order dated 17th February last expressed their opinion that it was not open to them to vacate the decree, and that the proper procedure to follow in the circumstances was the procedure described by Mr. Justice Asutosh Mookerjee in the case of *Abdul Aziz v. Lakhmi Chandra Mazumdar* (1), namely that the case should be placed before me for orders.

At the outset of the argument before me Mr. Chakravarti, on behalf of the opposite parties raised the question whether I had jurisdiction to hear the Rule without an order from the Chief Justice, and suggested that the formal orders of the Chief Justice should be obtained. The matter was accordingly referred to the learned Chief Justice who intimated that there is no need of any further order. It may be taken therefore that the order passed by Cuming and Mukerji, JJ., is correct and that there is no substance in the objection as to my jurisdiction.

The facts out of which this Rule has arisen are shortly these: The petitioners brought a suit for recovery of khas possession of certain plots of land against a number of defendants, one of whom was named Dolegobinda. That suit was dismissed by the Munsif on 13th May 1922. The plaintiffs appealed to the District

(1) A. I. R. 1923 Cal. 676.

Judge and on 31st October 1922 the appeal was decreed in favour of the plaintiffs. On 20th December 1922 a second appeal was filed in this Court by the defendants among whom was the aforementioned Dolegobinda. On 1st October 1923 Dolegobinda died. No steps were, however, taken to bring his heirs on the record in his place, and the fact of his death was not known to this Court at the time of the hearing of the appeal. The result of the appeal to this Court was that the case was remanded to the lower Court for re-hearing. Thereafter the appeal was reheard by the District Judge on 17th July 1926 and decided in favour of the defendants. The plaintiffs then filed a second appeal to this Court making Dolegobinda a party. Having now, however, as they allege, discovered that Dolegobinda died before the remand order by this Court, the plaintiffs applied for and obtained this Rule on the ground already stated.

It has been urged on behalf of the petitioners, that the decree being in favour of a dead person, to wit, the said deceased Dolegobinda, is a nullity, and that the appeal was improperly constituted.

On behalf of the opposite parties Mr. Chakravarti urged three points: firstly, that the application is misconceived, and that the decree passed by a Division Bench of this Court can only be set aside or altered on an application for review; secondly, that the petitioners were well aware of the fact of Dolegobinda's death on 12th January 1925, and that notwithstanding that knowledge when after the remand they were appellants in the Court of appeal below they took no steps for substitution, third and lastly, that the matter is now pending in second appeal No. 2232 of 1926 filed in this Court on 8th November 1926, in which the heirs of Dolegobinda have been added as respondents, and that that being so any question as to the effect of the remand by this Court can be decided in that appeal.

In my opinion these contentions on behalf of the opposite parties are well founded and must prevail. In the first place the matter is one which must be dealt with on the footing that it comes under O. 47, R. 5, Civil P. C. As an application for review it is hopelessly out of time, and inasmuch as the peti-

tioners were well aware even before the hearing of the second appeal in July 1925 that Dolegobinda was dead, and that knowledge has not, as they allege, only recently come to them, there can be no question of extension of the period of limitation. When the second appeal was before this Court it was no doubt the duty of the defendants-appellants to make the substitution, but that could not, as it seems to be, absolve the plaintiffs from the duty of bringing to the knowledge of the Court the fact, which was known to them, that one of the defendants had died, so as to secure proper representation of the parties in the appeal.

As to the second contention: it is conclusively established by the affidavit in reply that the petitioners were all along fully aware of the death of Dolegobinda. On 12th January 1925, after they had obtained their decree in the lower appellate Court and during the pendency of the second appeal (No. 481 of 1923) in this Court they instituted a suit for mesne profits in the Court of the Subordinate Judge, of Bankura making Bipin Mohatani defendant 17 in the said suit, on the death of Dolegobinda Mahto, as his sole heir and widow. It is idle for them, therefore, now to pretend they were not aware of this fact.

Finally as Dolegobinda's heirs have been added as respondents in the second appeal (No. 2232 of 1926) now pending in this Court any question as to the effect of the remand by this Court can be if necessary considered in that appeal. The learned vakil for the petitioners conceded that this is so.

For the reasons stated I am of opinion that this application is misconceived and wholly devoid of any merits. The Rule is accordingly discharged with costs which are assessed at three gold mohurs.

R K.

Rule discharged.

* A. I. R. 1928 Calcutta 657

COSTELLO, J.

M. Barnard—Petitioner.

v.

G. H. Barnard—Opposite Party.

Suit No. 32 of 1927, Decided on 31st January 1928.

* (a) *Divorce Act, S. 10—Joint presence of husband with another woman may prove adultery.*

Where it is found that the joint presence of the husband and another woman is not a mere farce staged for the purpose of allowing the wife to constitute divorce proceedings, but is an incident in the course of a liaison, adultery on the part of the husband may be held as proved. *Farnham v. Farnham*, 41 T. L. R. 543, *Rel. on.* [P 659 C 1]

(b) *Divorce Jurisdiction Act, (Ind. and Col. 1926), S. 3 — Parties resident in India but domiciled in England—Decree in Indian Court is valid.*

So far as decrees for the dissolution of marriage granted in India, the parties to which were domiciled in England or Scotland but resident in India, are concerned, they are for all purposes to be regarded as valid [P 661 C 2]

(c) *Divorce Act (1839), S. 7—S. 7 deals with procedure*

Section 7 cannot be read as interfering with or extending the grounds of dissolution of marriage, as set forth in S. 10, the section can only have reference to matters of machinery and questions of procedure and the amount of proof required in matters of this kind. [P 662 C 1, 2]

* (d) *Divorce Jurisdiction Act, (Indian and Colonial 1926, Geo. V 16 and 17 Ch. 40), S. 1 (1), proviso (a)—Wife domiciled in England but resident in India — Suit for dissolution tried in India — Mere adultery is sufficient ground for decree.*

The words of Prov. (a), S. 1 (1), are intended to mean that the grounds on which a decree for the dissolution of marriage of a British subject domiciled in England may be granted by a High Court in India shall be those on which such a decree might be granted by the Divorce Court in England according to the law for the time being in force in England, i. e., according to the law laid down in S. 176 of the Supreme Court of Judicature (Consolidation) Act of 1925, and therefore it is sufficient for a wife petitioner domiciled in England to establish to the satisfaction of the Court in India the adultery of a respondent husband: *A. I. R. 1925 Cal. 871, Held wrongly decided and A. I. R. 1925 Cal. 874, Doubtful*. [P 666 C 1]

Judgment.— This is a petition by Margaret Barnard 'praying for a dissolution of her marriage with the respondent George Henry Barnard on the ground of his adultery with a woman unknown on 17th November 1927. The petitioner was married to the respondent on 18th October 1917 according to the rights of the Christian Church at the Wesleyan

Church at Jhansi. At the time of the marriage the respondent was domiciled in England and before her marriage the petitioner was also domiciled in England and after the marriage they retained their English domicile. It was duly averred in the petition that the respondent at the time of the presentation of the petition was domiciled in England. It may therefore be taken that when this petition was filed both the parties to the marriage were domiciled in England. Both the parties to the marriage profess the Christian religion. It appears from the evidence of the petitioner that after her marriage she and the respondent lived and cohabited together first of all at Jhansi and afterwards at No. 5, Carnac Street, Calcutta and finally at No. 9 Rawdon Street in Calcutta, and therefore the place where the parties last resided together was within the jurisdiction of this Court.

The suit was brought under the Statute 16 and 17, Geo. V, Ch 40, which is the Indian and Colonial Divorce (Jurisdiction) Act, 1926, and accordingly the petition was in the form required by the rules made under that Act which form is similar to that of the petition for dissolution of marriage in use in England. The petitioner as required by Prov. (a), S. 1, sub-S. (1) of the Statute (16 and 17 Geo. V, Ch. 40) stated in para. 9 of her petition that in the interest of justice it is desirable that this suit should be determined in India inasmuch as the petitioner

for want of sufficient means was prevented from taking proceedings in the Courts in England and the witnesses to the charge of adultery are in Calcutta.

So far as the facts of the case are concerned the petitioner has established to my satisfaction all the necessary formal averments in her petition and she has proved before me that the respondent has been guilty of adultery as alleged in para. 8 of the petition.

At the end of the first day's hearing I was some what dubious as to whether or not adultery on the part of the respondent has been sufficiently established. At that stage of the case the evidence merely came to this: that the respondent on the evening of 17th November 1927 had come to the Continental Hotel in Calcutta and had there entered in the Registration Book the names "Mr. and Mrs. Barnard" and the evidence of a clerk from the hotel indicated that the respondent stayed

for the night at that hotel with a lady who was not the petitioner. The khansama from the hotel in question was called to say that on the next morning, somewhere about 9-30, he was summoned to room No. 77 (which was the number of the room set against the names of Mr and Mrs. Barnard) and that there he found the respondent and a lady seated in the bed-room; both of them were however fully dressed. The khansama further stated that in pursuance of an order given to him by the respondent he served breakfast to the respondent and the lady in the bed-room in question.

Counsel for the petitioner invited me to infer from those facts alone that the respondent had in fact committed adultery, but I was inclined to take the view that had the case stopped at that point the matter would have fallen within the decision of Lord Merivale in the case of *Farnham v. Farnham* (1). There the learned President said :

It was impossible to make a decree on the case as first presented to me. It came before the Court as if a married man who wished to be divorced had only to go to an hotel with a woman to achieve that end, and that, if he did so, the Court was of necessity obliged to grant a decree. If the Court were so to hold it would be the greatest possible encouragement to collusive proceedings. Divorce by consent is not part of the law in England.

In that case the learned President gave an opportunity to the petitioner in the case to call further evidence and following that precedent I allowed the petitioner in the present suit to be recalled on the second day's hearing in order to give additional evidence, and having heard that evidence of the petitioner I came to the same sort of conclusion as Lord Merivale finally arrived at in *Farnham v. Farnham* (1), and I was then fully satisfied that the joint presence of the respondent and the woman at the hotel was an incident in the course of a liaison and not a mere farce played for the purpose of obtaining the divorce.

I came to that conclusion because the petitioner produced and proved before me two letters written to her by the respondent whilst she was away in England from which it seemed quite clear that the respondent had committed adultery with a certain woman and that that woman had had a child by him. The further evidence of the petitioner

put an entirely different complexion upon the case from that which it bore after the first day's hearing and her evidence showed that the real facts were as follows: The petitioner had proceeded to England in the year 1923 expecting the respondent to follow her shortly afterwards which, however, he failed to do and thereafter owing apparently to financial stringency the petitioner was unable to return to India at the time she had intended but was obliged to remain on in England. It appears that letters from her husband as time went on became less and less frequent and he soon ceased to afford her any financial assistance whatever. Thereafter she received the first of the two letters to which I have already referred (dated 4th June 1925) in which her husband made definite confession of adultery and subsequently she received the second letter (which was dated 2nd September 1925) in which her husband informed her that the woman with whom he had been associating had given birth to a child. Apparently the petitioner made up her mind that it would be easier to prosecute divorce proceedings in India rather than in England, and accordingly she returned to this country in the latter part of the year 1926. For a time she stayed with her brother somewhere upcountry and then in the early part of 1927 she came down to Calcutta and instead of there and then commencing divorce proceedings against her husband she managed to effect a reconciliation with him and in fact not only forgave him for the misconduct which he had admitted but also in law condoned the adultery which had taken place by resuming cohabitation with her husband and living with him for some months at the address which I have already mentioned namely 9, Rawdon Street. Subsequently, however, she discovered that her husband was still associating and carrying on a correspondence with the woman with whom he had committed adultery and consequently the petitioner left the respondent and went to reside once more with her brother upcountry. Towards the latter part of 1927 the petitioner came down to Calcutta, apparently because another brother of hers was ill, and she thereupon or soon after discovered that the respondent had stayed at the Continental Hotel with a woman on the night of 17th No-

(1) [1925] 41 T. L. R. 543.

vember as I have already described. It was clear to me from the evidence of the Hotel clerk that the lady with whom the respondent stayed on the night of the 17th was the same person with whom he had previously confessed to having committed adultery. It was manifest, therefore, as I have already stated, that the joint presence of the respondent and the lady at the Continental Hotel was part of an association of long standing and not a mere sporadic incident merely staged for the purpose of allowing the petitioner to institute divorce proceedings. Accordingly, so far as the facts of this case are concerned, no difficulty arises. I find as a fact that the respondent did commit adultery as set forth in the petition. I am also satisfied from the evidence of the petitioner that in the words of proviso (d), sub-Cl. 1, S. 1 of the Act of 1926 there was sufficient cause which prevented the petitioner from taking proceedings in the Court of the country in which she is domiciled, i. e., England, and I am satisfied that in the interest of justice that it is desirable that this suit should be determined in India.

The real question, however, which I have to determine in this case is whether or not on the proper construction of the statute (16 and 17 Geo. V. C. 40) read in conjunction with the existing law with regard to dissolution of marriage in India the petitioner is entitled to a decree for the dissolution of her marriage upon the ground of the respondent's adultery alone. No other ground was alleged in the petition and as far as the evidence goes it appears that the petitioner is not in a position to make a charge of any matrimonial offence against the respondent other than that of adultery. The whole question, therefore, is whether or not under the existing law it is sufficient for a wife petitioner domiciled in England to establish to the satisfaction of the Court in India the adultery of a respondent husband.

This question which I have to decide is of some public importance because apparently this is the first suit arising under the provisions of the 'Indian and Colonial Divorce (Jurisdiction) Act of 1926. The point for decision is a matter which may affect the matrimonial rights of all British subjects resident in India but domiciled in England or in Scotland. It is, therefore, to be regretted that a

point of such far reaching effect should have arisen for decision in an undefended suit. Having regard to the importance of the matter I indicated that in my view the Advocate-General, as the authority appointed to give instructions to the Proctor under the provisions of the Act, ought to be represented at the hearing of this suit. Accordingly at the adjourned hearing Mr. R. C. Bannerjee appeared to represent the Advocate-General of Bengal in order that the other side of the case might be fully put before the Court. I have derived great assistance from Mr. Bannerjee as well as from Mr. Charles Bagram who appeared for the petitioner.

Now, in order to ascertain what the present legal position is, it is perhaps desirable to consider for a moment the matter in its historical aspect. By the Divorce Act of 1869 (which is Act 4 of 1869), passed by the Indian Legislature on 26th February 1869, for the purpose of conferring on certain Courts jurisdiction in matters matrimonial, it was enacted that that Act should extend to the whole of British India and also to British subjects in dominions mentioned in the Act, that is, certain Dominions of Princes and States in India in alliance with the British Crown, but nothing in that Act contained authorized any Court to grant any relief under the Act except in the cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decrees of dissolution of a marriage except in the following cases:

(a) Where the marriage shall have been solemnized in India; and

(b) where the adultery, rape or unnatural crime complained of shall have been committed in India; or

(c) where the husband has since the solemnization of the marriage exchanged his profession of Christianity for the profession of some other form of religion, or to make decrees of nullity of marriage except in cases where the marriage has been solemnized in India.

Accordingly under that Act the power to grant relief other than divorce was limited to cases where the petitioner professed the Christian religion and resided in India, and in cases of dissolution of marriage it was necessary that a marriage should have been solemnized in India or the matrimonial offence com-

mitted in India or that the husband should have exchanged Christianity for some other form of religion.

It is to be observed, therefore, that the basis of the jurisdiction conferred by the Act of 1869 was the residence of the petitioner at the time of presenting the petition, and upon that footing for a space of something like 50 or 60 years, apparently, decrees for dissolution of marriage were from time to time granted by the various High Courts in India. The validity of such decrees was, however, challenged in 1921 in the case of *Keyes v. Keyes and Gray* (2) and it was there decided by Sir Henry Duke, President of the Divorce Court in England, that the Courts in India had in fact no jurisdiction to make decrees for dissolution of marriage in the case of parties not domiciled in India, even though the marriage was celebrated in India and the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the Indian Courts. The learned President in the course of his judgment pointed out that Lord Westbury in the case of *Shand v. Gould* (3) stated it to be one of the rules generally observed by Christians and civilized states that questions of personal status depend on the law of the actual domicile of the party concerned, and the learned President came to the conclusion that the Indian Councils Act of 1861, which was then the statute empowering the Governor-General in Council in India to make laws and regulations, does not warrant the making of a law to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction. In other words, the effect of the decision in *Keyes v. Keyes and Gray* (2) is that the power to decree a dissolution of marriage even in India must be based upon the domicile of the parties and not upon the question of residence only. The effect of *Keyes v. Keyes and Gray* (2) was to invalidate a very large number of decrees for dissolution of marriage which had been made by the Indian Courts upon the footing of the residence of the parties. Accordingly it became necessary that an Act of Parliament should be passed in order to validate such decrees. Such an Act was

passed in the year 1921 under the title of the Indian Divorce Act whereby it was enacted that any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act of 1869 was confirmed and made absolute under the provisions of that Act for dissolution of marriage, the parties to which at the time of the commencement of the proceedings were domiciled in the United Kingdom, and any order made by the Court in relation to any such decree was to be valid and to be deemed always to have been valid in all respects as though the parties to the marriage had been domiciled in India.

The case of *Keyes v. Keyes and Gray* (2) also in effect decided that if and in so far as it purported to confer jurisdiction to grant decrees for dissolution of marriage based on residence only the Divorce Act of 1869 was ultra vires the Indian Legislature under the powers conferred upon it by the Indian Councils Act of 1861. The Indian Divorce Validating Act of 1921 remedied that defect so far as decrees already made were concerned. Dispite the decision of *Keyes v. Keyes and Gray* (2) various Courts in India continued to make decrees for dissolution of marriage in the case of persons who were resident in India, but not domiciled in India, and to my mind there is no doubt that such decrees had no legal effect on the status of the parties at any rate outside India. One of such cases was that of *Miller v. Miller* (4) which was decided by Mr. Justice Pearson in 1924. The head note of that case is as follows :

On a petition by the wife for dissolution of marriage it appearing that the husband was a subject of the United States of America and domiciled in that ; and that the marriage was celebrated and both parties resided in India up to January 1923, until which time the married life lasted (when the husband had left for America where he since remained) proof was given of adultery and cruelty committed within the jurisdiction of the Court sufficient to entitle the petitioner to a decree nisi :

Held : that the Court had jurisdiction to pass the decree. *Semle* : The result may be that the decree will hold good in India, but that everywhere else the parties will remain still legally married.

Mr. Justice Pearson in the course of his judgment said this :

Upon the question of jurisdiction, my attention has been drawn to the judgment of Sir Henry Duke in *Keyes v. Keyes* (2) which de-

(2) [1921] P. 204.

(3) [1868] 3 H. L. 55=37 L. J. Ch. 433=18 L. T. 833.

(4) A. I. R. 1925 Cal. 874=52 Cal. 566.

cided that the Courts administering the divorce law in India have no jurisdiction to decree dissolution of a marriage between parties not domiciled in India; it also decided that the East India Councils Act of 1861 does not warrant the making of a law to empower Courts in India to decree dissolution of the marriage of persons not domiciled within their jurisdiction.

That decision has since met with discussion in two reported cases in India, namely, *Wilkinson v. Wilkinson* (5) and *Lee v. Lee* (6). It has been pointed out that it would have been enough for the decision in *Keyes v. Keyes* (2) to say that since *LeMesurier's case* (7) or at any rate since *Bater v. Bater* (8) the jurisdiction to decree dissolution of marriage depended according to English law upon the domicile of the parties and that as the domicile in *Keyes v. Keyes* (2) was English, the English Courts would not recognise as valid in England a decree pronounced by a Court in India whose jurisdiction was based on a principle—that of the residence of the parties at the time—not accepted according to English Law as conferring jurisdiction. That this is so appears, I think, from the language used in an early part of the judgment, where the learned President says (at p. 211): “The petitioner has brought this suit to determine the validity, at any rate in England, of the decree made at his instance in India.” It was, therefore, as it appears to me, the extra-territorial invalidity of the Indian decree that was in question in the suit, and that question was sufficiently and completely answered by the decision above set out, so that it was not necessary to go further to the extent of enquiring whether the powers conferred by the East India Councils Act, 1861, had been exceeded in the enactment of the Indian Divorce Act, 1869.

Then Mr. Justice Pearson continues:

But if that enquiry is to be made, then I think it is of great importance to recognize that in the case of *Nboyet v. Nboyet* (9) in 1878 the Court of appeal did accept residence and not domicile to found the jurisdiction, and that that decision remained good at any rate until *LeMesurier's case*.

It may well be that the decision of Pearson, J. is right in so far as he says that

the result may be that the decree will hold good in India, but that everywhere else the parties will remain still legally married.

With all respect to my learned brother I think there may be some doubt as to whether *Miller v. Miller* (4) was rightly decided, but whether that was so or not is now quite immaterial, having regard to the provisions of S. 3 of the Statute 16 and 17 George V, Ch. 40, which provides that any decree granted under the

Act of the Indian Legislature known as the Indian Divorce Act of 1869 and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage, the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court under any such decree which, if the proceedings were commenced before the commencement of this Act, shall be valid and deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. It is, therefore, quite clear that so far as decrees for the dissolution of marriage, the parties to which were domiciled in England or Scotland are concerned they are for all purposes to be regarded as valid.

It is, however, to be observed that the validating clause in the Act of 1926, only applies to decrees for the dissolution of marriage between persons domiciled in England and Scotland and therefore even at the present time, assuming the decision in *Keyes v. Keyes* to have been correct (and apparently it was accepted as correct by the Imperial Legislature, seeing that it thought fit to pass the Validating Act of 1921) decrees for the dissolution of marriage pronounced by the Courts in India in regard to the marriage of persons who are not domiciled and resident in India or who are not domiciled in England or Scotland and resident in India as for example the parties in the case which has been referred to as the *Cooch Behar case*, would still not be valid. That case is reported in *Isharani Nirupoma v. Victor Niten-dra Narayan* (10) where Gregory, J., did not follow the decision in *Keyes v. Keyes* (2). In my view, and with all possible respect to the learned Judge who decided that case, the decision was not in accordance with the law as it then stood or now stands. The next stage was this: having regard to the decision of *Keyes v. Keyes* (2), the Indian Legislature in 1926 passed an Act (being Act 25 of 1926) bringing the law in India, so far as jurisdiction in matrimonial suits is concerned, into line with that decision and by that Act, which is called the Indian Divorce (Amendment) Act of 1926, it is provided in S. 2:

(10) A. I. R. 1926 Cal. 871=53 Cal. 282.

(5) A. I. R. 1923 Bom. 321=47 Bom. 843.

(6) A. I. R. 1924 Lah. 513=5 Lah. 147 (F.B.).

(7) [1895] A. C. 517=64 L. J. P. C. 97=72 L. T. 873=11 R. 527.

(8) [1906] P. 209=75 L. J. P. 60=94 L. T. 835=22 T. L. R. 408.

(9) [1878] 4 P. D. 1=48 L. J. P. 1=27 W. R. 203=39 L. T. 486.

For paras. 2, 3 and 4, S. 2, Divorce Act the following shall be substituted namely: 'Nothing hereinafter contained shall authorize any Court to grant any relief under this Act except where the petitioner or respondent professes the Christian religion or to make decrees of dissolution of marriage except where the parties to the marriage are domiciled in India at the time when the petition is presented, or to make decrees of nullity of marriage except where the marriage has been solemnized in India and the petitioner is resident in India and the petitioner is resident in India at the time of presenting the petition, or to grant any relief under this Act, other than a decree of dissolution of marriage or of nullity of marriage, except where the petitioner resides in India at the time of presenting the petition.'

It is, therefore, abundantly clear that under the Indian Divorce (Amendment) Act of 1926, in order to found jurisdiction to grant relief, the parties must be domiciled in India at the time when the petition is presented, and in order to determine in which Court the proceedings should be taken, they must also be resident in India by reason of the provisions of S. 3 of the Act of 1869.

The Act with which we are concerned in the present suit, however, extends the jurisdiction of the Courts in India in that it confers upon them by S. 1, sub-S. (1), jurisdiction to make a decree for dissolution of marriage (and as incident thereto make any order as to damages, alimony or maintenance, custody of children, and costs) in cases where the parties to the marriage are British subjects domiciled in England or in Scotland, in any case where a Court in India would have such jurisdiction if the parties to the marriage were domiciled in India. With regard to the latter part of that section the Courts in India, as I have already stated, will have such jurisdiction where the parties to the marriage are domiciled in India and resident within the jurisdiction of one or other of the Courts in India as set forth in S. 3 of the Act of 1869. Now it has from time to time been argued that S. 7 of the Act of 1869 is sufficiently wide in its scope to enable the Courts in India to grant relief and even to make decrees for the dissolution of marriage upon any ground which from time to time would be sufficient in England. The marginal note of that section is "the Court to act on principles of English Divorce Court." In my view, however, S. 7 has no real application in a matter of this kind in that it cannot be read as

interfering with or extending the grounds for dissolution of marriage as set forth in S. 10 of the Act of 1869 and I am of opinion that S. 7, which says that

subject to the provisions contained in this Act, the High Courts shall in all suits and proceedings hereunder act and give relief on principles and rules which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief

can only have reference to matters of machinery and questions of procedure and the amount of proof required in matters of this kind. That is apparently the view taken by Pearson, J., in the case to which I have already referred *Miller v. Miller* (4) where at p. 572, of 52 Cal. the learned Judge says;

it is unnecessary perhaps to discuss the question whether in any event the principles and rules referred to in S. 7 would include the question of residence as a basis of jurisdiction or whether that section is not designed rather as a residuary section to provide for matters that may not be otherwise specially mentioned in the Act.

A similar view was taken by Crump, J., in *Wilkinson v. Wilkinson* (5). There is moreover the opinion of Sir Lawrence Jenkins, *Bailey v. Bailey* (11), as an authority for saying that the language of S. 7 of the Act of 1869 points rather to the rules and principles on which the Court should deal with matrimonial causes in the way requiring a certain degree of evidence and other cognate matters. Pearson, J., referred also to *Ramsay v. Boyle* (12). My own view of the matter is that S. 7 has no sort of application to the present suit. In my opinion it cannot be said that there is anything like sufficient virtue in Cl. 7 of the Act of 1869 to import into Indian Divorce Jurisprudence any fresh ground for relief other than those set forth in S. 10. It is quite clear to my mind that under the Indian Act of 1869 (and the extending Act of 1872) the only grounds on which marriage may be dissolved are those set forth in S. 10 of the Act of 1869. If the petitioner therefore in the present suit is entitled to the relief which she seeks solely on the ground of her husband's adultery her right to such relief must in my opinion be derived entirely from the provisions of the Indian Colo-

(11) [1903] 30 Cal. 490 n.

(12) [1903] 30 Cal. 489.

nial and Divorce Jurisdiction Act of 1926 itself. That Act has to a large degree introduced a new principle into the administration of law in that it has conferred a jurisdiction on the Courts of one country that is to say, India, to grant a decree for dissolution of marriage in the case of persons who are domiciled in another country or rather in either one of two countries England or Scotland. I have no doubt that the word "jurisdiction" as used in the main part of sub-S.1, S.1 of the Act refers solely to the question of the High Courts in India having authority and the right to entertain and to try suits between British subjects in certain circumstances. The main part of the section does not in fact affect the question one way or the other as to what are the grounds upon which relief can be granted. If the first part of S. 1, sub-S. 1, stood alone and no proviso had been added the only grounds of relief would have been those set forth in S. 10 of the Act of 1869 unless it could be successfully argued that by virtue of S. 7 of the Act of 1869 other grounds might be added I have already dealt with that aspect of the matter and I am clearly and definitely of opinion that S. 7 does not affect this question one way or the other. That section, as I have already stated, is concerned in matters of procedure only and not substantive law at all

Mr. Bagram has invited me to say that the terms of the proviso to S. 1, sub-S. 1 of the Act of 1926 are sufficiently definite to enable the petitioner herein to obtain a decree for dissolution of her marriage. That proviso is as follows :

provided that (a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by High Court in England according to the law for the time being in force in England.

Now the law for the time being in force in England with regard to dissolution of marriage is contained in S. 176 of the Supreme Court of Judicature (Consolidation) Act of 1925. That section really re-enacts the material provisions of the Matrimonial Causes Act of 1857 and the Matrimonial Causes Act of 1923 which latter Act for the first time conferred upon a woman the right to obtain a dissolution of her marriage on the ground

of her husband's adultery alone. S. 176 of the Act of 1925 reads as follows :

A petition for divorce may be presented to the High Court (in this part of this Act referred to as the Court) by a husband on the ground that his wife has since the celebration of the marriage been guilty of adultery and (b) by a wife on the ground of her husband has since the celebration of the marriage been guilty of rape, or of sodomy or bestiality or that he has since the celebration of the marriage and since the seventh day of July nineteen hundred and twenty three been guilty of adultery ; provided that nothing in this Act shall affect the right of a wife to present a petition for divorce on any ground on which she might, if the Matrimonial Causes Act, 1923, had not passed, have presented such a petition.

If therefore there is no adultery available or provable as having been committed since 17th July 1923 a wife can still petition for divorce on the ground of adultery coupled with cruelty or desertion just as she could have done if the Act of 1923 had not been passed. That section (S. 176) as I have said sets out what the law is at the present time in force in England with regard to the grounds on which a decree for dissolution of marriage may be granted. It was argued and argued very cogently by Mr. Bagram that the whole scheme of the Act, the Indian and Colonial Jurisdiction Act of 1926, is to assimilate the law in India with that of England so far as regards British subjects resident in India but not domiciled there but domiciled in England or Scotland and therefore seeing that divorce jurisdiction has been conferred on the High Courts in India where the parties are domiciled in England or Scotland it is only reasonable to suppose that the Imperial Legislature intended that that jurisdiction should be exercised on exactly the same grounds as the jurisdiction of the High Court in England would be exercised in similar circumstances. In support of that view of the matter Mr. Bagram pointed out that by S. 1, sub-S. 4 of the Act of 1926 it is provided that

the proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State in Council of India with the concurrence of the Lord Chancellor

and those rules shall provide for certain matters as set forth in that subsection. The Indian and Colonial Divorce Jurisdiction Act, 1926 was passed on 15th December 1926, and rules under that Act (as provided for in S. 1, sub-

S. 4) were published in the Gazette of India on 20th August 1927. Amongst the matters provided for in the rules as required by sub-S. 4, S.1, are these: (a) for petitions being heard before a Judge or one of the two or more Judges of the Court nominated for the purpose by the Chief Justice of the Court with the approval of the Lord Chancellor of England : (b) for the decree or order made by such a Judge being subject to appeal to two Judges of the Court similarly nominated without prejudice, however, to any right or ultimate appeal to His Majesty in Council; (c) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland; and then (g) for conferring on such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor. Suits of this character, i. e., suits for dissolution of marriage brought by a British subject who is not domiciled in India are to be tried by a Judge nominated for that purpose by the Chief Justice and approved by the Lord-Chancellor in England.

The Lord Chancellor is to have some say with regard to the Judge who shall exercise jurisdiction under this Act personally by reason of the fact that it was intended that a portion of the jurisdiction of the High Court in England with regard to matrimonial causes should be transferred to or at any rate exercised in India. Further it is clearly an innovation that machinery should be instituted in this Court for setting up the office of a (King's) Proctor's department in order to ensure that some sort of scrutiny will take place after a decree has been obtained. I mention these matters solely by way of illustration as showing that no doubt the whole scheme of this Act is to assimilate the position of British subjects in India to that of British subjects in England or Scotland. I think Mr. Bagram rightly says that the Act was designed to place British subjects in India for all purposes in the same position as they would be as if they were bringing suits for divorce in England. That view is strengthened by Prov. (c), sub-S. 4, S. 1, which provides:

for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland.

Further there is this aspect of the matter. It would seem on the face of it somewhat unlikely that the Imperial Legislature intended one law to apply and, the wife petitioner to be clothed with one set of rights so long as she is in England and yet to lose a portion of those rights as soon as she came back to resume residence in India. Looking at the matter broadly therefore I think Mr Bagram is right in his contention that this Act was designed and intended to put British subjects on the same footing in India as they would be if they were actually resident as well as domiciled in England. The only doubt which is cast upon the matter arises from the fact that under the provisions of S. 1, sub-S 1, British subjects domiciled in Scotland and resident in India would or might be in a different position from British subjects resident in India and domiciled in England. I have not had before me any evidence as to what the law with regard to divorce in Scotland is or with regard to the grounds upon which dissolution of marriage can be obtained in that country. I do not feel that I am entitled to take any judicial notice of or to use my own knowledge as to the law of Scotland with regard to the dissolution of marriage. But I may put the matter in this way that upon the assumption that there are in Scotland grounds for divorce different from those obtaining in India it follows that under S. 1, sub-S. 1, a Scotch woman resident in India but domiciled in Scotland may have entirely different rights from an English woman resident in India but domiciled in England, because it is clear that British subjects proceeding under this statute and bringing suits under the terms of sub-S. 1 of S. 1 of the Act if they have any rights other than those conferred by S 10, Divorce Act 1869, can only have such rights as existing according to the law for the time being in force in England.

I have already stated by reference to S. 176, Judicature Act 1925, what the law is at the present time in England. What I have to decide is whether or not that law is imported into India and made available to the petitioner in the present suit by reason of the provisions of S. 1

(i) of the Act of 1926, and in particular by reason of the provisions, or rather the terms of the various provisos therein set forth. It is to be observed that by proviso (c) no such Court (that is, no High Court in India) shall grant any relief under this Act except in the cases where the petitioner resides in India at the time of presenting the petition and the place where the parties married, or resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or adultery or crime complained of was committed in India. The petitioner in the present suit fulfils all the requirements of that proviso because, as I have already stated, she was residing in India at the time of presenting the petition, the place where the parties (i.e., where the petitioner and her husband (the respondent) last resided together) was in Calcutta, the marriage was solemnized, as I have said, at Jhansi, and the adultery complained of was committed in Calcutta, so that the petitioner in this suit is within the terms of the provisos.

Mr. Bannerjee in a very able and full argument upon this matter pointed out to me that it is unlikely that the Imperial Legislature should have introduced what in effect is a new cause of suit—a new ground for obtaining a decree for dissolution of marriage—into the law in India without making a definite and perfectly clear and express provision to that effect. He argued, and in my view there is considerable degree of force in the argument, that it is improbable that the Imperial Legislature which apparently for the first time in history, confers a direct jurisdiction upon the Courts in India with regard to a particular matter, would have extended the grounds upon which decrees for dissolution can be obtained simply by means of a number of provisos to a sub-section, and Mr. Bannerjee put forward for the consideration of the Court the contention that the proviso contained in Cl. A was inserted merely for the purpose of excluding the petitioner who is a British subject not domiciled in India from obtaining a decree on a ground which would not be sufficient for obtaining a decree in England as for example, the ground set out in para. 2, S. 10 of the Act of 1869, which provides that any wife may present a petition to

the District Court or to the High Court praying that her marriage may be dissolved on the ground that since the solemnization thereof the husband has exchanged his profession of Christianity for the profession of some other religion and gone through a form of marriage with another woman.

It seems obvious that seeing that the provisions of the Act of 1869 were applicable only to British subjects professing the Christian religion, that provision was intended to safeguard a Christian wife from finding herself in the unfortunate and invidious position of having a husband who changed his religion merely for the purpose possibly of adopting some other religion which permits or countenances polygamy, which recognized polygamy so as to enable him to take to himself a second wife, and thereby act in derogation of the original wife's position. As I have already stated, Mr. Bannerjee argued that the proviso in (a) of S. 1 (i) of the Act of 1926 is solely designed to shut out that ground for a dissolution of marriage. I think that argument would have had more force had the word "only" appeared after the word "shall" in the third line of the proviso, which would have made the proviso read as follows:

The grounds on which a decree for dissolution of such a marriage may be granted by any such Court shall only be those on which such a decree might be granted by the High Court in India according to the law for the time being in force in England;

and even so, I am not at all sure that it would have seriously affected the contention put forward by Mr. Bagram on behalf of the petitioner.

Looking at the whole scheme of this Act having regard, as I have already said, to the fact that it provides that rules should be made thereunder containing the provisions to which I have already referred and having regard to the fact that such rules have already been made on the same lines as the English rules which are The Matrimonial Causes Rules, 1924, I think I ought to come to the conclusion that the contention of the petitioner is well founded, and that it was the intention of the Imperial Legislature to put as far as possible a British subject, domiciled in England or Scotland resident in India, upon the same footing for the purpose of obtaining a dissolution of marriage as he or she would be if they were bringing such suit not in

India, but in England or Scotland as the case might be. One is fortified in that view by the terms of Prov. (d) of (1) which seems to imply, or rather more than imply, that it is in no sense a question of the ground of relief which is to determine the form in which the suit is brought, but the question of whether or not the petitioner can reasonably bring the suit in England, and whether it is in the interests of justice that the matter should be determined in India. It seems to me it would work great hardship to a wife petitioner if the Court were bound to say:

It is true that there is a sufficient cause for preventing you from taking proceedings in the Courts of the country in which you are domiciled, and it is in the interests of justice, desirable, that the suit should be determined in India, but despite all that because the suit is to be determined in India, you have less rights in the way of obtaining dissolution of your marriage than if you had started instituting the suit in the country of your domicile.

Having heard the very full and able argument of both counsel in this matter, and having considered the question very carefully, I have come to the conclusion that the words in Prov (a) of S. 1 (1) are intended to mean that the grounds on which a decree for the dissolution of marriage of a British subject domiciled in England may be granted by a High Court in India shall be those on which such a decree might be granted by the Divorce Court in England, according to the law for the time being in force in England, i. e., at the present time, according to the law laid down in S. 176, Supreme Court of Judicature (Consolidation) Act of 1925. That being the case the petitioner in this suit having established to the satisfaction of the Court the adultery of the respondent, and the Court being satisfied as to the other matters referred to in Prov. C and D of S. 1 (1) the petitioner is entitled to the relief which she claims in this suit.

I accordingly pronounce a decree for dissolution of marriage of the petitioner and respondent. There will be the usual decree nisi with costs against the respondent and also an order that the respondent shall pay to the petitioner alimony at the rate of Rs. 250 per mensem pending further order.

D.D.

Dissolution ordered.

A. I. R. 1928 Calcutta 666

MITTER, J.

Sm. Afiran Bibi—Plaintiff — Appellant.

v.

Narimtulla Saha and others—Defendants—Respondents.

Appeal No. 2253 of 1926, Decided on 18th April 1928, from appellate decree of Sub-Judge, Dinajpur, D/- 29th July 1926.

Benami Transaction—Setting aside a benami transaction not contravening the provisions of the law—Courts are bound to give effect to it — A benamidar can maintain a suit for recovery of possession against a trespasser.

So long as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. The benamidar has no beneficial interest in the property or business that stands in his name; he represents the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. [P 667 C 2]

An action can be maintained by the benamidar in respect of the property although the beneficial owner is no party to it. He can maintain a suit for recovery of possession of the disputed property against a trespasser: *A.I.R.* 1918 P. C. 140, *Rel. on.* [P 667 C 2]

Panna Lal Chatterjee—for Appellant.
Radhika Ranjan Guha — for Respondents.

Judgment.—This is an appeal by the plaintiff from the decision of the Subordinate Judge of Dinajpur dated 29th July 1926 which affirmed a decision of the Munsif of the same district dated 28th November 1924. The plaintiff instituted the suit for a declaration of her title to and recovery of possession of the suit lands on the allegation that on 25th Baisakh 1319 B. S. the plaintiff purchased from her mother the suit lands for a sum of Rs. 299. Plaintiff further stated that her husband Amir and proforma defendant 2, Aswini, are step-brothers and that Aswini mortgaged the suit properties with defendant 1 who got a decree on the mortgage bond and took possession of the disputed lands through Court and afterwards reaped the paddy grown by the plaintiff on the disputed lands in the month of Agrahayan prior to the institution of the suit. Plaintiff stated that this gives rise to the cause of action for this suit.

The defence of the defendant 1 in substance was that the plaintiff's mother had sold the suit lands to one Esam Ali

and that later on Aswini, defendant 2, paid the consideration money to Esum Ali and took a reconveyance in the name of plaintiff's mother (the reconveyance was for himself and his brother Amir) and that in order to keep their title safe, Aswini had the deed of sale executed in the name of the plaintiff, and, although the plaintiff was the benamidar, the purchase was really for the benefit of himself and his step-brother Amir.

The Court of first instance held that the defence had established a case that the purchase in plaintiff's name was really for both Amir and Aswini and as in the mortgage suit which was instituted in 1916 there was decree against both Amir and Aswini and as defendant 1 purchased the disputed lands at a sale in execution of the mortgage decree, the plaintiff had no title to oust defendant 1 from the disputed lands. The Munsif accordingly dismissed the plaintiff's suit.

The lower appellate Court affirmed the judgment of the Munsif but came to somewhat different conclusions with regard to certain matters in controversy. The lower appellate Court found in disagreement with the Munsif that although the mortgage suit was filed against both Amir and Aswini, Amir contested the suit and the mortgage suit was dismissed as against him and what was sold in execution of the mortgage decree was the interest of Aswini alone. The lower appellate Court further found that the plaintiff was the benamidar of Amir and Aswini in the matter of her purchase from her mother in the year 1319 B. S. It also found that as the plaintiff was the benamidar of these two step-brothers, she had no title to the lands in suit and could not evict defendant 1 who had bought the interest of Aswini in execution of his mortgage decree.

Against the decision of the Subordinate Judge, a second appeal has been taken to this Court and the only point taken by the learned vakil for the appellant is that on the findings of the lower appellate Court, the plaintiff is entitled to a decree in respect of the half share of the lands in dispute and is entitled to recover joint possession in respect of the same with defendant 1. It is argued that on the findings of the lower appellate Court the plaintiff was not the beneficial owner in respect of the disputed lands but she was

the benamidar both for Amir and Aswini and as there is nothing to prevent a benamidar to successfully sue for recovery of possession from a trespasser although the beneficial owner is not a party to the suit, the lower appellate Court should have decreed the suit in respect of the share of Amir and in the absence of any evidence to the contrary it must be held that Amir and Aswini were interested in the property in equal shares and, therefore, there ought to have been a decree for joint possession in respect of Amir's half share. I think this contention of the learned vakil for the appellant is well founded and must prevail. It is now firmly established that so long as a benami transaction does not contravene the provisions of the law, the Courts are bound to give it effect. The benamidar has no beneficial interest in the property or business that stands in his name; he represents the real owner and so far as their relative legal position is concerned, he is a mere trustee for him. Their Lordships of the Judicial Committee say in the case of *Gur Narayan v. Sheo Lal Singh* (1), that they find it difficult to understand why an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. Their Lordships point out that the bulk of judicial opinion in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata* and with this view of the Indian Courts their Lordships of the Judicial Committee concurred.

I think, therefore, that it was competent to the benamidar who is the plaintiff in the present case to maintain a suit for recovery of possession of the disputed property against the trespasser. She was the benamidar for Amir and Aswini; Aswini's interest passed by the mortgage sale and defendant 1 is certainly entitled to retain possession of his interest but there is nothing to justify defendant 1 to retain possession of the other half share of Amir, although what passed by the mortgage sale appears from the decree in that suit was the interest of Aswini alone and that is also the finding of the lower appellate Court.

(1) A. I. R. 1918 P. C. 140=46 Cal. 566=46 I. A. 1 (P.C.).

It is argued by the learned vakil for the respondent that as this question was not specifically raised in the Court of first instance and as there is no evidence with regard to the extent of the shares of Amir and Aswini, the case ought to be sent back with an issue as to the extent of their shares. I asked Mr Guha if there was any suggestion on the record anywhere that the shares of these two brothers were unequal or that they did not possess it in equal shares. In the absence of any such evidence, the ordinary presumption is that these two brothers possessed the disputed land in equal shares.

The result is that the decrees of the Courts below dismissing the suit are set aside and the plaintiff's suit decreed to the extent of half share in the disputed lands, and it is ordered that she do recover joint possession of the same with defendant 1. There will be no order as to costs.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 668

B. B. GHOSE AND GARLICK, JJ.

Haripada Datta—Decree-holder—Appellant.

v.

Sashi Bhusan Basu—Respondent.

Appeal No. 36 of 1927, Decided on 16th March 1928, from original order of 3rd Sub-Judge, Hooghly, D/- 4th October 1926.

Civil P. C., S. 48 — Solenama instalment decree passed in a mortgage suit in 1909 authorizing decree-holder to realize whole amount in case of default—Final decree passed in 1911 —Personal decree passed under O. 34, R. 6 in 1920—Execution application in 1925 — Application was held to be time barred and personal decree not necessary.

The mortgaged property had been sold in the execution of a rent decree. A compromise decree was passed in the mortgage suit, whereby the decretal amount was payable in instalments and in default of two successive kists the whole could be realized at once and the properties under the solenama were to remain under mortgage. On default the final decree was passed in 1911 and the property under the solenama was sold. In 1920 a decree under O. 34, R. 6, was obtained against the person of the judgment-debtor. An application for execution was made in 1925.

Held: that the application was barred having been made more than 12 years after the date of the solenama decree of 1909. O. 34, R. 6 does not apply in the case of solenama decree.

Under the solenama decree the decree-holder was entitled to execute the decree on default and there was no necessity of obtaining the personal decree: *A. I. R. 1917 P. C. 85, Rel. on.* [P 669 C 1]

*Rishindra Nath Sarkar and Kali San-
kar Sarkar*—for Appellant.

*Harendra Kumar Sarbadhikari and
Nripendra Chandra Das* — for Respon-
dent.

B. B. Ghose, J.—This is an appeal by the decree-holder against an order dismissing his application for execution of a decree on the ground that it was barred by limitation under the provisions of S 48, Civil P. C. The decree-holder brought a suit on a mortgage. That suit was compromised between the parties. The mortgaged properties had actually been sold before the date of compromise in execution of a rent decree. By the compromise a certain sum was decreed in favour of the plaintiff-decree-holder which was payable in instalments, and it was provided that if two successive kists were not paid all the instalments would be considered as defaulted and the whole amount would at once be realized by means of execution of the decree with interest at 12 annas per cent per mensem. At the end of the decree it was stated that the mortgaged properties in suit being sold in auction for arrears of rent in rent execution case No. 46 of 1908 the properties mentioned in the solenama will remain under mortgage.

There was default and the decree-holder obtained what he called a final decree on that solenama on 23rd January 1911. The properties which were under mortgage on the terms of the solenama were then sold and on 11th February 1920 the decree-holder purported to obtain a decree under O. 34, R. 6, Civil P. C, against the person of the judgment-debtor. The present application was made on 23rd November 1925. The learned Subordinate Judge held that this application having been made more than 12 years after the date of the solenama decree dated 11th May 1909 the application is barred.

It is contended by the learned Advocate for the decree-holder that the Subordinate Judge is wrong because the personal decree was a fresh decree obtained in February 1920 and the 12 years prescribed under S. 48, Civil P. C., should be counted from that date. There seems to be an obvious fallacy in the contention; because under the solenama decree the

decree-holder was entitled to execute his decree if there was default in payment of two successive kists and there was no necessity for him to obtain a decree under O 34, R. 6; nor does O. 34, R. 6 apply to a case like this where a decree was passed upon the terms of a solenama. The real question is that the decree passed on the basis of the solenama should be construed in order to find what the rights of the parties were. The Subordinate Judge in my opinion rightly held that a compromise decree was passed according to the solenama in 1909 and therefore on the strength of the case, *Khulna Loan Co., Ltd. v. Jnanendra Nath Bose* (1), this application is barred by limitation.

The appeal is therefore dismissed with costs. The hearing-fee is assessed at five gold mohurs.

Garlick, J.—I agree.

A.L./R.K. *Appeal dismissed.*

(1) A. I. R. 1917 P. C. 85.

A. I R. 1928 Calcutta 669

MALLIK AND GARLICK, JJ.

Abdul Hakim — Defendant 1 — Appellant.

v.

Annada Prosad Sen and others — Plaintiffs—Respondents.

Appeal No 2117 of 1925, Decided on 18th June 1928, from appellate decree of Dist. Judge, Zillah Rangpur, D/- 22nd June 1925

Landlord and Tenant — Abandonment — Mortgage of an entire non-transferable occupancy holding — Mortgagee purchasing it in execution of his mortgage decree—The landlord is entitled to khas possession.

Where an entire non-transferable occupancy holding which is mortgaged is purchased by mortgagee in execution proceedings of his mortgage decree, the tenant retains no interest in the property. It is a case of abandonment and the landlord is entitled to khas possession: 22 C. W. N. 662 and A. I. R. 1922 Cal. 32, Dist. [P 670 C 1]

Atul Ch. Gupta and Ashutosh Das Gupta—for Appellant.

Sarat Ch. Bose and Narendra Krishna Bose—for Respondents.

Braj Mohan Majumdar—for Deputy Registrar.

Mallik, J.—This appeal arises out of a suit brought by the landlord to recover possession of a non-transferable occupancy holding on the allegation of an

abandonment thereof by the tenant. It appears that the tenant mortgaged the entire holding in favour of defendant 1, the appellant before us, in the year 1907. In 1911 the plaintiff landlord brought a suit for arrears of rent against the tenant and obtained a decree and in execution thereof he himself purchased the holding on 8th July 1913. After this purchase plaintiff settled the land with the pro forma defendant but the pro forma defendant, on failing to obtain possession of the land from defendant 1, surrendered the holding to the plaintiff. This was in 1918. Before 1918 defendant 1 had brought a suit on his mortgage in the year 1915 and obtained a decree in the same year and in execution of his mortgage decree put up the mortgaged property to sale and purchased it on 13th November 1916. Plaintiff's claim to recover possession of the raiyati holding was resisted by defendant 1 on the allegation that defendant 1 having purchased the raiyati holding in execution of his mortgage decree could not be ousted by the plaintiff. This defence found favour with the trial Judge and the trial Judge dismissed the plaintiff's suit. On appeal, the lower appellate Court reversed the decision of the trial Judge and gave a decree to the plaintiff for khas possession of the lands in suit. Defendant 1 has appealed to this Court.

As observed before, the plaintiff's claim for possession was based on an abandonment by the tenant. The question is whether the circumstances in the case were sufficient to make out a case of abandonment. We are of the opinion that they were. It is true that so long as the mortgage in favour of defendant 1 subsisted, there could not be an abandonment because even after the mortgage the tenant retained in himself some interest in the property, namely, the right of redemption. But when the defendant 1 obtained a mortgage-decree and in execution of that mortgage-decree purchased the holding, there, after his purchase, remained no interest left in the tenant. The learned advocate for the appellant drew our attention to the cases in *Pran Krishna Pal v. Atul Krishna* (1) and *Sital Chandra v. Parbati Charan* (2). But in both these cases the mort-

(1) [1918] 22 C. W. N. 662=46 I C. 176.

(2) A. I. R. 1922 Cal. 32.

gage was not in respect of the entire property but in respect of a portion only and so, even after the sale in execution of the mortgage decree on the basis of a mortgage of a portion of the property only, the tenant could not be said to have parted with the whole of his interest therein. We are, therefore, of opinion that the facts established in the case were sufficient to make out a case of abandonment, and if there was an abandonment the plaintiff landlord was entitled to a decree for khas possession.

We are, therefore, unable to interfere with the decree which the learned District Judge has made in the case. The appeal is, accordingly, dismissed with costs

Garlick, J.—I agree.

A L / R K.

Appeal dismissed.

**** A. I. R. 1928 Calcutta 670**

PAGE, J.

Aurabindo Nath Tagore and another—
Plaintiffs.

v.

Monorama Debi—**Defendant.**

Original Civil Jurisdiction Suit No. 80 of 1928, Decided on 16th May 1928.

*** * (a) *Hindu Law—Widow—Adverse possession against—Reversioners are bound.***

Where a Hindu widow has lost her title and interest in the husband's property by adverse possession, the adverse possession also bars the right of reversioners. There is no difference between the loss of the reversioners' rights by adverse possession against a widow, and the loss of such rights by an adverse decree against her : 9 W. L. 505, 9 M. I. A. 603; and *Goluk-mona v. Dagumber De*, 2 Boul. Rep. 193, Foll.: A. I. R. 1925 P. C. 249, *Expl.* [P 672 C 2]

*** (b) *Precedents—Binding effect.***

The interpretation which their Lordships of the Privy Council put upon a prior Privy Council case is binding upon all the Courts of India. [P 673 C 2]

(c) *Limitation Act, Art. 141—Applicability.*

Article 141 does not apply to moveable property. [P 674 C 2]

*** (d) *Limitation Act, S. 10—Plaintiff suing to enforce personal right of management of trust—Defendant not claiming right adverse to trust—S. 10 does not apply.***

Where the defendant does not purport to hold the property in a manner adverse to trust, and the plaintiffs do not purport to bring their suit either as beneficiaries under the trust, or on behalf of the trust, but for their own personal right to manage or in some way to control the management of the endowment, S. 10 does not apply : 6 All. 1 (P. C.), *Appl.* [P 674 C 2]

A. N. Chaudhuri and B. K. Ghosh—
for Plaintiffs

B. L. Mitter, N. Sarkar and S. M. Bose—
for Defendant

Judgment.—The controversy in this case relates to a dispute among certain members of the Tagore family over the right to administer the trusts of the will of one Kiranmali Mukerjee.

The suit arises in this way : Bonor-mali Mukerji founded and dedicated to two deities a temple in Monoharpukur Road, Ballygunge. He died in 1892, leaving him surviving Kiranmali Mukerjee and a daughter Mahaprova Debi. The daughter had two sons Aurabindo and Rabindra, and they are the plaintiffs. On 9th November 1903 Kiran died, having made a will of which he appointed one Pundarikakshya the executor and trustee. In his will, Kiran stated that he died possessed of no moveable or im-movable properties, and that he had made provision for his wife Mayabini Debi ; and he directed the executor and trustee to pay his debts, and to celebrate the pujah of the two deities at the temple in Ballygunge in the same manner that he had done in his lifetime. He further directed inter alia that a sum of Rs 10,000 the subject-matter of a life policy should be collected, and that out of the proceeds certain legacies should be paid, and the balance of Rs. 8,000 invested in 3½ per cent Government securities. Out of the income accruing from the Rs. 8,000 twelve Brahmins were to be fed on the occasion of the anniversary of the sradh of his father and mother and the expenses of the pujahs were to be defrayed, and he directed that the balance (if any) of the income should be spent on the construction and repairs of the temple.

Whether Pundari on Kiran's death became the sebaity of the deities, with such consequences as would follow therefrom, I do not propose to decide in this case, not because such matters are not relevant, but because in the plaint it is specifically requested that matters connected with the sebaity should be excluded from the scope of the suit, and, in my opinion, having regard to the nature of the claim, I am in a position otherwise to dispose of it.

Now Pundari was not a beneficiary under Kiran's will, but was a bare trustee of the funds which were charged

for debutter purposes. From the death of Kiran until the death of Pundari on 23rd October 1910 Pundari faithfully and duly carried out the trusts of Kiran's will. After Pundari's death, however, it was ascertained that under his will he had left all his property to his wife, who was the younger sister of the wife of Bonomali, and a daughter of the late Maharaja Tagore. He appointed his wife the executrix of the will, and further provided that

the aforesaid executrix of mine, her heirs or he whom she may appoint, shall continue to spend in connexion with the sheba of the God and Goddess at Ballygunge, in the same manner which I have been spending, the income derived from the Government promissory notes to the value of Rs. 8,000 which are with you, and which belonged to the estate of Kiran.

By his will, therefore, Pundari purported to appoint the defendant, his wife, the trustee of the property that had passed to him as trustee under the will of Kiran. That in my opinion, he was not entitled by law to do, and it is the common case of both parties that after the death of Pundari, the defendant did not become entitled to act as the trustee of the will of Kiran or to have the possession or management of the trust property. Who, then was entitled to act as the trustee? It is the common case of both parties, and for the purposes of this suit I will assume, without deciding, that the persons entitled to the possession and management of the trust property under Kiran's will were Kiran's heirs. Again, it is common ground that the heir of Kiran was his widow Mayabini, and that the reversionary heirs were the plaintiffs. Assuming, therefore, that Mayabini was entitled to possession of the trust property, and to carry out the trusts created under the will of Kiran, it is conceded that she never took possession of the trust property, or exercised her rights as trustee under Kiran's will. From the death of Pundari in 1910 until the present time I hold that the defendant has been in exclusive possession of the trust property, and that the trusts of Kiran's will throughout this period have been faithfully carried out by the defendant openly, and as of right, and without asking or obtaining Mayabini's permission in that behalf. The defendant was examined on commission. I refer to cer-

tain questions, and the answers that she made :

Q. 35. How did your husband entrust you with the charge of the idol? By his will, and I have carried on the sheba in the same manner in which my husband had been doing.

Q. 36. Did Mayabini know that your husband had entrusted you by his will with the sheba? Yes.

Q. 37. Generally were the facts that Kiran and your husband by their will made provision for the sheba well-known in the family, or were they kept secret? Nothing was kept secret. Everybody knew about it.

Q. Did Mayabini ever make any claim against either you or your husband in respect of the sheba? Never.

Q. Did your husband or you ever take Mayabini's permission or consent in the matter of the Thakur and the sheba? Never.

As thefts had occurred at the temple the defendant was asked:

Question 138.—Did you send information to Mayabini of these thefts? Where was she at the time?—Well, one thing I remember is that she was alive, but why should I inform her when the thakur was mine?

I hold upon the evidence that from the death of Pundari in 1910 until the present time the defendant openly, and as of right, to the knowledge and without obtaining the permission of Mayabini or the plaintiffs or anybody else, in fact, has been in possession of the trust property, and duly has carried out the trusts of Kiran's will in respect of this debutter estate. I hold further that in the circumstances her acts and possession were adverse to the rights of Mayabini, and if, and in so far as Mayabini as the heir of Kiran was entitled to the possession and management of the trust property, it is conceded by the plaintiffs and I hold that her rights and title were barred by limitation.

But that does not dispose of the plaintiffs' claim for learned counsel contended that the plaintiffs as reversioners could not be prejudiced by any act or omission on the part of Mayabini, and, although Mayabini through her negligence or otherwise had lost her rights as the heir of Kiran by adverse possession, the rights of the plaintiffs as Kiran's reversioners were thereby not affected, for they claimed through Kiran and not through Mayabini, his widow. In support of his contention M. A. N. Choudhury cited *Ranchordas Vandravandas v. Parbhatibhai* (1). I confess that if the matter were *res integra*, or if the meaning and effect

(1) [1899] 23 Bom. 725=26 I. A. 71=1 Bom. L. R. 607=7 Sar. 543 (P. C.).

of the decision in *Ranchordas'* case (1) had not been explained by the Judicial Committee in *Vaithalinga Mudaliar v. Srriranguth Anni* (2) I should have thought that the view which the plaintiffs urged upon the Court was correct, as being in consonance with the conception of the widow's estate in Hindu law. And the reason is this: that a Hindu reversioner has no right or interest in praesenti in the property which a female owner holds for her life, until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise, until then it is a mere spes successionis per Syed Ameer Ali in *Amrit Narayan v Gaya Singh* (3). No doubt, if by reason of the widow's acts or omissions there is danger that the corpus of the estate may be wasted appropriate steps may be taken by the reversioners to prevent the wastage taking place, but I doubt whether it is in accordance with the principles of the Hindu law of inheritance that the reversionary heirs, who during the subsistence of the widow's estate have no present right or interest in the property, and who do not in any sense trace their title through the widow, should lose their rights as reversioners merely because the widow has suffered her title and interest in the estate to be destroyed by adverse possession. I have ventured to indicate my opinion on this subject because in *Vaithalinga's* case (2) the Judicial Committee did not think it necessary for the purposes of that case to "make any formal pronouncement upon this point" (ibid p. 893), although in the present state of the authorities I am clearly of opinion that the contention of the plaintiff's cannot prevail, and that the plaintiff's claim as the reversioners of Kiran is barred by limitation.

The law stands in this way: In 1852, before the enactment of the Limitation Act (14 of 1859), Peel, C. J. observed that:

it has been invariably considered for many years that the widow fully represented the estate, and it is also settled law that adverse possession which bars her bars the heir after her which would not be the case if she were

a mere tenant for life as known to the English law: *Golackmann Debt v. Digumbar De* (4).

Again, in 1863, in *Katama Natchiar v. Raja of Shivagunga* (5) the Judicial Committee laid down that

the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts in this country as to tenants-in-tail representing the inheritance would seem to apply to the case of a Hindu widow and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

Now it is settled beyond doubt or controversy that a decree fairly obtained against a Hindu widow in respect of a transaction in which the 'represents the estate is binding upon the reversioners: *Shivagunga's* case (5) supra; *Jugal Kishore v Totendra Mohan* (6), *Harinath Chatterjee v. Mathur Mohan* (7), *Vaithalinga's* case (2) supra, and on principle I can find no ground upon which to differentiate between the loss of the reversioner's rights by adverse possession against a widow, and the loss of such rights by an adverse decree against her. In *Nobin Chandra Chakraborty v. Issur Chunder Chuckerbutty* (8) Peacock, C. J., observed that:

It is said that the reversionary heirs could not sue (for possession) during the lifetime of the widow, and that, therefore they ought not to be barred by any adverse holding against the widow at a time where they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she without fraud or collusion is barred.

I respectfully agree with the view expressed by Jackson, J., in the same case when his Lordship observed that

it has been distinctly held by the Privy Council in the *Shivagunga* case (5) that a decision fairly arrived at without fraud or collusion in the presence of a Hindu widow in possession of the estate will bind reversionary heirs, that being so decided it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs (ibid p. 510; see also per Macpherson, J.

(4) 2 Boul. Rep. 193.

(5) [1863] 9 M. I. A. 539 (P. C.).

(6) [1884] 10 Cal. 985=11 I. A. 66=4 Sar. 553 (P. C.).

(7) [1894] 21 Cal. 8=20 I. A. 183=6 Sar. 334 (P. C.).

(8) 9 W. R. 505=B. L. R. Sup. Vol. 1008 (F. B.).

(2) A. I. R. 1925 P. C. 249=18 Mad. 883=52 I. A. 322 (P. C.).

(3) A. I. R. 1917 P. C. 95=45 Cal. 590=45 I. A. 35 (P. C.).

in *Harinath Chakraborty v. Mathur Mohan* (7).

Now, it must be taken as settled that the law thus stated is the common law of the Hindu community, and when applied to the facts of the present case it is fatal to the plaintiffs' claim.

But has not the law been altered by legislation since these judgments were delivered? That is a question which has occasioned much discussion and given rise to a serious difference of opinion among the Courts in India.

Under the Limitation Act (14 of 1859, Ss. 12 and 16) the limitation for suits to recover immovable and moveable property was 12 and 6 years respectively "from the time the cause of action arose." But under the Limitation Act (9 of 1871, Sch. 2, Art. 142) a suit by a Hindu reversioner

entitled to the possession of immovable property on the death of a Hindu widow

must be brought within 12 years of the time "when the widow dies", and under the Limitation Act (15 of 1877, Sch. 2, Art. 141 a)

like suit by a Hindu or Mahomedan entitled to the possession of immovable property on the death of a Hindu or Mahomedan female

must be brought within 12 years of the time "when the female dies" Art. 141, Sch. 2, to the present Limitation Act (9 of 1908) is in the same terms. With respect to moveable property, however, there has been no change in substance, for in the later Acts the period of limitation is six years from the time "when the right to sue accrues" Art. 118 (1871), Art. 120 (1877 and 1908).

Now, in *Srinath Kur v. Prosonna Kumar Ghose* (9), a Full Bench of the Calcutta High Court held that the Limitation Acts of 1871 and 1877 had effected a change in the law, and

that the rule which was laid down under the Limitation Act of 1859 is no longer the law under the Acts of 1871 and 1877. A reversioner who succeeds to immovable property has now 12 years to bring the suit from the time when the estate falls into possession: per Garth, C. J., *ibid* at p. 937.

The same view was taken by the Allahabad High Court in *Ramkali v. Kedarnath* (10), and by the Bombay High Court in *Vundravandas v. Cursondas* (11), in which case Farran, C. J., observed that it (i. e., the legislature) has designedly

altered the law which formerly prevailed upon this subject as laid down in *Nobin Chandra v. Issur Chunder* (8), and approved by the Privy Council in *Amrito Lal v. Rajoni Kant* (12) is obvious, (*ibid* at p. 669).

In 1899 *Vundravandas'* case (11) was heard on appeal by the Privy Council under the name of *Runchordas v. Parbatibhai* (1), and the decision of Farran, C. J., and Tyabji, J., in substance, was affirmed, their Lordships, however, further holding that even in respect of moveables to which Art. 141 did not apply the reversioners' "right to this property, if any, accrued at the death of" the widow.

I shall not presume, indeed, it would be of no avail to express my own opinion as to what was decided in *Runchordas'* case (1), for in *Varthialinga v. Srinath* (2), the Judicial Committee explained what was the meaning and effect of that decision, and the interpretation which their Lordships put upon that case is binding upon all the Courts of India. The Judicial Committee, as I apprehend the judgment in *Varthialinga's* case (2), were of opinion that Sir Richard Couch, who had delivered the judgment of the Board both in *Runchordas's* case (1) and in *Harinath Chuckerbutty v. Mathur Mohan* (7) did not intend in *Runchordas's* case (1) in any way to discredit the rule laid down in *Shivagunga's* case (5) which had expressly been approved and applied in *Harinath Chatterjee v. Mathur Mohan* (7), and that in *Runchordas v. Parvatibhai* (1), in the circumstances obtaining in that case, there was no room for the application of the rule in *Shivagunga's* case (5). What, then, was decided in *Harinath Chatterjee v. Mathur Mohan* (7)? In that case the question that fell for determination was whether the rule in *Shivagunga's* case (5), namely, that an adverse decree against a Hindu widow bound the reversioner, was applicable to the case where a daughter (by name Sampurna) had succeeded to the widow's estate. Sir Richard Couch delivered the judgment of the Board, and in reference to a contention that the plaintiff as reversioner had by the terms of Art. 141 a period of 12 years from her (i. e., Sampurna's) death to bring his suit, observed that

their Lordships see no ground for this contention. The words "entitled to the possession of immovable property" refer to the existing law. Under that law the plaintiff, being

(12) [1874] 2 I. A. 113=15 B. L. R. 10=3 S. R. 430=23 W. R. 214 (P. C.).

(9) [1888] 9 Cal. 934=13 C. L. R. 372 (F. B.).
(10) [1892] 14 All. 156=(1892) A. W. N. 22 (F. B.).

(11) [1897] 21 Bom. 646.

bound by the decree against Sampurna, would not be entitled to bring a suit for possession. The intention of the law of limitation is not to give a right when there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The purpose of Sch. 2 in each of the Acts is only to prescribe the period of limitation for the suit. That appears from S. 4 of each Act. The prescribed periods are to be applied to suits founded on the existing law, and Art. 141 cannot be construed, as altering the law respecting the effect of a decree.

In *Sardar Sundari v. Dayamayi Dasya* (13), Jackson, and Tottenham, JJ., had taken the same view, holding that the person entitled to the possession of immovable property on the death of a Hindu widow means a person who succeeds to a certain right which is in being on the death of the Hindu widow, and that if the title which would have enabled that widow to hold the estate as a widow had become barred before her death the reversioner who would be the next taker is not to be entitled to possession of the property on the death of the widow.

Now, in *Vaithilinga's* case (2), although it became unnecessary for the Judicial Committee "to make any formal pronouncement upon" the question whether adverse possession obtained against a Hindu widow binds the reversioners, inasmuch as in that case it was held that the reversioner's claim was barred under Art. 129, Sch. 2, Act 9, 1871; nevertheless, as the issue had been raised and canvassed both in the Indian Courts and in the Privy Council their Lordships proceeded to examine the case-law as to the effect upon the rights of the reversioners of a title gained by adverse possession against a Hindu widow. It may be that the observations of the Board upon that matter were obiter, but merely upon that ground I should not be entitled to disregard them, and the less so as their Lordships indicated clearly how in their opinion the law upon the subject stands. After analyzing the material cases and expressing approval of the law as laid down in the earlier authorities, Sir John Edge observed that the result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivagunga's* case (5) as sound Hindu law where that rule was applicable.

In these circumstances, therefore, I hold that the common law of the Hindu community which is to be collected from *Goluckmani Dasi v. Digambar De* (4), *Shivagunga's* case (5), and *Nabin Chunder Chuckerbutty v. Issur Chunder*

Chuckerbutty (8), is still the law of the land and has been neither abrogated nor varied by any legislative enactment.

Now, the trust property in suit is moveable property to which Art. 141 is not applicable, but whether the appropriate article of the Limitation Act is Art. 49 or Art. 120 in either case, and notwithstanding *Runchordas v. Parvati-bhai* (1), I hold that the plaintiffs' claim to recover possession of such property from the defendant fails as it is barred by limitation.

That disposes of all the questions raised in this case with respect to the trust property, for it is to be observed that the plaintiffs have not brought this suit as the trustees, but as the heirs of Kiran. Mr. Chowdhuri in his reply expressly stated that the plaintiffs did not sue in a representative capacity as trustees, and it is obvious, having regard to the frame of the suit and the form of the pleadings, that S. 10, Lim. Act, does not apply. The defendant did not purport to hold the property in a manner adverse to the trust, and the plaintiffs did not purport to bring this suit either as beneficiaries under the trust, or on behalf of the trust, but

for their own personal right to manage or in some way to control the management of the endowment. The consequence is that the case does not fall within S. 10, Lim. Act: *Baluant Rao Bishwant Chandra Chor v. Puranmal Chobey* (14).

In substance and in fact the plaintiffs are suing in their personal capacity as the heirs of Kiran to recover possession of such part of the estate of Kiran as came into the defendant's possession as the executrix of Pundari. But I hold upon the facts that the plaintiffs have not proved that the defendant as the executrix of Pundari or otherwise obtained possession of any property that belonged to Kiran other than the trust property. The defendant has been examined and cross-examined, and her evidence supports the conclusion at which I have arrived. The statement in Kiran's will that he had no moveable or immovable property further strengthens that view, and, in my opinion, an examination of the affidavit of assets filed in connexion with Kiran's will places the matter beyond doubt or controversy. I find, therefore, upon the evidence that the plaintiffs have failed to prove that the

(14) [1884] 6 All. 1=10 I. A. 90=13 C. L. R. 39=4 Saf. 425 (P. C.).

defendant has been in possession, or is in possession of any part of Kiran's estate exclusive of the debutter property. The plaintiffs' claim contains other forms of relief, but these are ancillary to the main claim for possession.

For these reasons the suit must be dismissed with costs on scale No. 2 including the cost of the commission.

D.D.

Suit dismissed.

A I. R. 1923 Calcutta 675

RANKIN, C. J., AND CHOTZNER, J.

Satya Narain Mohata—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No 1 of 1927, Decided on 2nd December 1927, from order of Costello, J., D/- 21st June 1927.

(a) *Criminal trial—Facts material to constitute an offence must be stated in a charge—Allegations not essential though stated can be omitted without detriment to the accused as surplusage—Whether charge is good or bad is to be judged not after proof of facts but is to be seen at the beginning of the trial.*

In order to convict a man of an offence, all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward, must be stated upon the indictment, and all these requisite allegations must be satisfied in evidence, and proved as laid. But allegations not essential to such purpose which might be entirely omitted without affecting the charge against the person and without detriment to the indictment are considered as mere surplusage and may be disregarded in evidence. The indictment may be good or bad, but it cannot depend upon the facts which will ultimately be found by the jury and it must be good or bad at the beginning of the trial: *A. I. R. 1922 Cal. 107, Rel. on.* [P 676 C 2, P 677 C 1]

An accused was tried jointly with another on (1) a charge of conspiracy to cheat a certain company. He was also singly tried at the same time (2) for cheating the same company in respect of certain certified report of daily work, and (3) for dishonestly using as genuine the document stated above. The charges on (2) and (3) contained the following words: "in pursuance of the conspiracy in the first charge mentioned." The jury found the accused not guilty on the charge of conspiracy but found him guilty of the other two charges. It was contended that in view of the verdict of not guilty on the charge of conspiracy the conviction on the other charges would not stand.

Held: that the only function of the words "in pursuance of the conspiracy in the first charge mentioned" was to make it plain that counts (2) and (3) had no reference to inde-

pendent offences or to a different subject-matter than the first count and there was no objection to the jury convicting under counts (2) and (3) although they acquitted on the first.

[P 677 C 1, 2]

(b) *Criminal P. C., S. 342—Accused jointly tried—One giving one explanation—Judge can take another statement from the co-accused.*

Where two persons are jointly tried for an offence and one of them has given an explanation upon certain matter in the case, the Judge can take in his discretion another statement from his co-accused under S. 342. [P 677 C 2]

(c) *Calcutta High Court Original Side Rules, Ch. 2, Rr. 1 and 4—Criminal appeal from original side—Question whether a vakil can act is not concluded by Criminal Procedure Code but by the rules of the High Court—Criminal P. C., Ss. 340 and 449.*

The question whether a vakil can act for a party in a criminal appeal from the Original side of a High Court depends upon the rules of that Court and is not concluded by anything in the Criminal P. C. [P 678 C 1]

(d) *Calcutta High Court Original Side Rules, Ch. 2, R. 1 and 4—Criminal appeal from original side—A vakil cannot act unless a question of Hindu or Mahomedan law is involved.*

A vakil cannot act in an appeal from a trial held on the original side before a Judge and a jury at the High Court Sessions, unless in such appeal a question of Hindu or Mahomedan law or usage should arise. [P 681 C 1]

*N. Sircar and Satindra Nath Mukerji—*for Appellant

*A. K. Basu, Miss Sorabji and Sachindra Nath Banerjee—*for the Crown.

Rankin, C. J.—In this case the appellant Satya Narain Mohata was put upon his trial jointly with one Nandalal Banerjee at the High Court Sessions before Costello, J., and a jury. The facts out of which the case arose were alleged to be that Messrs. Bird and Company had a contract to supply labour to Messrs Kilburn and Company in connexion with the managing agency of the latter firm for the India General Steam Navigation Company Limited. It appears that there was an office at a certain ghat. It appears that Messrs. Bird and Company gave a sub-contract for the supply of this labour to the appellant. The appellant was to be paid at a flat rate based upon the number of maunds actually handled or transhipped by the coolies whom he supplied. The rate was not quite the same for all articles but it was a system of payment which depended upon the number of maunds that had been handled. The first accused, Nandalal Banerjee was a clerk or servant of Messrs. Bird and Company and the system as regards payment was alleged to have been

that certain vouchers were prepared by accused 1 and that accused 1 to a large extent looked after the business of the present appellant and assisted him in various matters connected with the supply of labour and obtained payment from Messrs Bird and Company. In these circumstances it was said that after certain records giving the weights of the different goods handled had been checked and passed on behalf of Messrs. Kilburn and Company these records were falsified and bills were presented on behalf of the present appellant to Messrs. Bird and Company for a larger sum than was justly due. To give a particular illustration which is referred to in one of the counts at the trial it is said that figure "36" maunds was changed into "4036".

In these circumstances the accused were put upon their trial jointly and the charges against them were as follows : The first charge alleged that between February and August 1926 they were parties to a criminal conspiracy to cheat Messrs. Bird and Company. The second count was against the present appellant alone and accused him of cheating Messrs. Bird and Company in respect of a certain certified report being the daily report of work done on the 7th July 1926. The third count was against Nandalal Banerjee alone and accused him of abetting the offence of cheating described in the second count. The fourth count was also against Nandalal Banerjee alone and accused him of committing forgery in respect of the same document as is mentioned in the second count, namely a certified daily report of work done on the 7th July 1926, and the fifth count was against the present appellant charging him with having dishonestly used as genuine the document referred to in the previous Court.

Now, the jury found the two accused not guilty on the first count of conspiracy but they found the present appellant guilty on the second count of the crime of cheating and they found Nandalal Banerjee guilty of abetting that. They also found Banerjee guilty of the charge of forgery and the present appellant guilty of dishonestly using as genuine the forged document.

In these circumstances Mr. Sircar on behalf of the present appellant calls attention to the fact that in the second

and the fifth counts on which this man has been convicted and sentenced the charge is that "he" in pursuance of the conspiracy in the first charge mentioned "cheated Messrs. Bird and Company and that "in pursuance of the conspiracy in the first charge mentioned" he dishonestly used a forged document as genuine and the first question which arises is this : If the jury have negatived the conspiracy can a conviction on these two counts stand ?

Now it appears to me, to deal with that question first, that the conviction on those two counts is quite in order, the reason being that the words "in pursuance of the conspiracy in the first charge mentioned" find their place in these charges not because they are any element of the offence alleged in the second or the fifth count but because they are proper words to show as the truth and substance of the matter was, that the accused were being (rightly or wrongly) charged with offences all having reference to the same subject-matter or series of transactions and properly brought together in one indictment.

In this connexion it may be desirable to point out that there has always been an important branch of the law as regards indictments which is referred to sometimes as the doctrine of surplusage. A very elaborate treatment of this may be found in Russel on Crimes, Book 6, Ch. 2, S. 3, and from this I will take the following statement of the law :

In order to convict a man of an offence all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves of the verdict and judgment, should the same charge be again brought forward must be stated upon the indictment, and all these requisite allegations must be satisfied in evidence and proved as laid. But allegations not essential to such purpose which might be entirely omitted without affecting the charge against the prisoner and without detriment to the indictment are considered as mere surplusage and may be disregarded in evidence.

In illustration and in support of that statement I will refer to two cases only. The first is the case of *Rex v. Hunt* (1), where Lord Ellenborough said :

If an indictment charges that the defendant did and caused to be done a particular act it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified.

(1) [1811] 2 Campbell 533.

The Court of King's Bench in the well-known case of *The King v. Hollingberry* (2), had before them a charge of conspiring falsely to indict one A B for keeping a gaming-house for the purpose of extorting money from the said A B. The jury found the defendants guilty of conspiring to indict A B for the purpose of extorting money but not to indict him falsely and upon that the conviction was upheld with these observations :

In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money and that is a misdemeanour whether the charge be or be not false.

It is said, however, that the words in the second and the fifth counts "in pursuance of the conspiracy in the first charge mentioned" cannot be omitted without detriment to this indictment because it is said that if they are omitted there will be nothing to show that the specific offences alleged in those counts arise out of the same subject-matter as the alleged offence under the first count. Upon that question it appears to me that the appellant's appeal cannot succeed. The indictment may be good or bad but it cannot depend upon the facts which will ultimately be found by the jury and it must be good or bad at the beginning of the trial. If the only function of those words is to make it plain that the second and the fifth counts have no reference to independent offences or to a different subject-matter than the first count then it seems to me that there is no objection at all to the jury convicting under the second and the fifth counts although they acquitted upon the first. This matter was considered by a Division Bench consisting of Newbould and Suhrawardy, JJ, in the case of *Abdul Salim v. Emperor* (3). The particular passage which deals with this matter is at p 596. In my judgment there is no validity in the objection that has been taken. It would have been quite possible to rearrange these counts differently, to have begun with what was in fact the second

count and to have added the charge of 'conspiracy last, provided only that suitable words were used in each count to show that they related to the same series of transactions. So far as the counts other than the first count are concerned they all have reference to cheating accomplished by means of forgery of the daily report of the 7th July 1926 and it is quite clear, therefore, that they merely specify the various sections of the Indian Penal Code which the course of conduct of the accused offends against.

It remains, therefore, only to consider the question whether the direction of the learned Judge was correct and sufficient. In our opinion, the learned Judge's summing up is unexceptionable. It is very elaborate upon each point that arose for decision. It was quite open to the jury to find Nandalal Banerjee guilty of abetment although they did not find a conspiracy, because conspiracy is only one of the possible ways of abetment by the definition given in the Indian Penal Code.

It was suggested by Mr. Sircar that the learned Judge in certain passages put too strongly to the jury the view that the appellant was the only person interested in getting over-payments; but if the charge be taken as a whole that matter was very fully dealt with. It would appear that as between these two accused their defences were at variance upon that very point.

Mr. Sircar complains that after the appellant had given an explanation upon this matter the Judge ought not to have taken another statement from his co-accused under S. 342, Criminal P. C. In my judgment that was entirely in the discretion of the learned Judge and he has not used his discretion unfairly.

The view taken by the jury as they were careful to explain was this : that the appellant was the principal and that Nandalal Banerjee who seems to have been a clerk on a small pay and an old man was a mere tool of the appellant. That may very well explain why the jury took a merciful view and acquitted both on the charge of conspiracy. We are not concerned with the question whether the jury's verdict was completely logical upon such a matter. It is sufficient that the jury have convicted this appellant upon the charge of cheating and the charge of using dishonestly

(2) [1825] 4 B. & C. 329=6, D. & R. 345=3 L. J. (O.S.) K. B. 226.

(3) A. I. R. 1922 Cal. 107=49 Cal. 573.

a forged document knowing it to be forged.

In my opinion this appeal must be dismissed. The appellant must surrender to his bail and serve out the remainder of his sentence.

I pass now to a question of practice which was argued in connexion with this case. This appeal is brought under a new provision—S. 449, Criminal P. C., as amended in 1923. It is an appeal from a trial held on the original side before a Judge and a jury at the High Court Sessions. It was represented to us that this appellant desired that a vakil of this Court should act for him in the matter of this appeal. In order that his case might not fail to be presented he also employed an attorney so as to put himself in order if the Court should think that the vakil was not entitled to act in a criminal appeal from the original side under the new section. I mention that because a point which is not raised in this case is the question whether it could possibly be right to appear by both a vakil and an attorney. I confine myself to the question whether in such a case as this it is open to a vakil to act for an appellant.

Now, we were referred to the rules of this Court and to certain sections of the Criminal Procedure Code by Mr. N. K. Basu who was good enough to argue this matter on behalf of the vakils and by the learned Advocate-General who argued it in the interest of the attorneys. In my judgment the question depends upon the rules of this Court and is not concluded by anything in the Criminal Procedure Code. Mr. Basu did not contend that it was outside the powers of the Court by rules to regulate this matter, but he drew our attention to the terms of S. 419 and to the definition of "pleader" in S. 4 of the Code. Now for the present purpose it matters nothing whether the true view be that the joint effect of these sections is to give the right to the vakils subject to any restrictions which the High Court by rules may have imposed or whether the true view be that the effect of these sections is to give the right in question to those practitioners who by the rules of the High Court are authorized to exercise it. It might be said that the definition of "pleader" in S. 4 of the Code means that unless there is a rule

to the contrary any advocate, any attorney or any vakil can file a memorandum of appeal under S. 419. If so, that might be inconvenient from the point of view of the vakils as much as of the attorneys, because it is quite clear that if that be the true view then a rule would have to be shown preventing an advocate from filing a memorandum of appeal in such a case as this or preventing an attorney from filing a memorandum of appeal in an ordinary criminal appeal from a mofussil Court. The point, however, when the actual rules of the High Court are considered does not fall to be decided by a mere choice between the two views I have mentioned.

I come now to set out the rules of this Court which bear upon the matter and their history in so far as this is necessary to explain them. The rules upon which the question depends are Rr. 1 and 4, Ch. 2 of the original side rules. Rule 1 is:

Advocate of this Court may appear and plead for parties on either side of the Court, but on the original side or in appeals from the original side, not unless instructed by an attorney.

Rule 4 as it stands now is as follows:

Vakils shall not appear, plead, or act for any suitor in this Court in any matter on the original side or in any matter of appeal from any case from the original side unless in such appeal a question of Hindu or Mahomedan law or usage shall arise, and the Court or a Judge thereof shall think fit to admit a vakil or vakils to plead for any suitor or suitors in that case. In such case the vakil or vakils so admitted may plead accordingly.

On that rule it is necessary to ascertain whether this reference to a "suitor" or "suitors" points to the provision being intended for civil appeals only so as to cut down the generality of the expression "in any matter of appeal from any case from the original side." If not, then there is an express prohibition because on that view by the term of the rule vakils shall not appear, plead or act in any matter of appeal from any case from the original side. It is for this reason that I thought it necessary to observe that it did not matter which interpretation was put upon the definition of "pleader" in S. 4, Criminal P. C.

I come now to see whether in the history of this rule there is any light to be obtained upon its real intention. The word "suitors" comes in this connexion from Cl. 11 of the original Charter of 1774. It is repeated in Cls. 7

8 and 9 of the Letters Patent, 1862 which deal with the same subject-matter, and it is repeated again in Cl. 9 of the Letters Patent 1865. In Cl. 11 from which subsequent clauses all derive their language we find this :

And we do hereby further authorize and empower the said Supreme Court of Judicature at Fort William in Bengal, to approve, admit, and enrol such and so many advocates and attorneys-at-law, as to the said Supreme Court of Judicature at Fort William in Bengal shall seem meet who shall be attorneys of record, and shall be and are hereby authorized to appear plead and act for the suitors of the said Supreme Court of Judicature at Fort William in Bengal.

Whether the idea underlying the word "suitor" is that of a person who owes suit and service or that of a person who is seeking or demanding something from a Court there can be no doubt that in Cl. 11 of 1774, the term is used in the very broadest sense for any client, i. e., for any person who may happen to require to employ a member of the legal profession to do his business for him.

In the Letters Patent of 1862 the clause reads as follows : Cl. 7 :

We do hereby authorize and empower the said High Court of Judicature at Fort William to approve, admit and enrol such and so many advocates as to the said High Court shall seem meet who shall be and are hereby authorized to appear and plead for the suitors of the said High Court subject to the rules and directions of such Court.

It seems to be quite clear that the ordinary case of an advocate defending a prisoner in a criminal trial is governed by that clause. The same phrase is used in Cl. 8 with reference to vakils :

We do hereby authorize and empower the said High Court of Judicature at Fort William to approve, admit and enrol such and so many vakils as to the said High Court shall seem meet who shall be and are hereby authorized to appear plead and act for the suitors of the said High Court subject to the rules and directions of such Court.

It seems quite clear that that language is intended to be read in the same wide general way as in Cl. 11 of 1774. When the Letters Patent of 1862 was amended in 1865, Cls 7, 8 and 9 were rolled into one and a certain change was made because no longer were the advocates or vakils or attorneys authorized to do something by the Letters Patent subject to a power in the High Court to restrict the authority, but the terms of the Letters Patent of 1865 gave to the High Court a power to give such authority to each branch of the profession as it would

think fit to do ; and Cl. 9, Letters Patent of 1865 went on to say not merely the High Court had power to approve, admit and enrol so many advocates, attorneys and vakils as to the High Court should seem meet, but that

such advocates, vakils and attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or act or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

The position, therefore, after 1865 was that the rights of each branch of the profession were to be the rights given to them by the rules.

I come now on this question to the rules that were made under the Letters Patent of 1862 and 1865. As it is not easy now owing to the lapse of time to obtain the exact words of those rules I propose to set them out in this judgment. The rules of the High Court under the first Letters Patent of 1862 were as follows : R 6 :

Advocates of this Court may appear and plead for suitors in any branch of the Court civil or criminal.

Rule 7 :

Vakils shall not appear, plead or act for any suitor in this Court in any matter of ordinary original jurisdiction civil or criminal or in any matter of appeal from any case of ordinary original civil jurisdiction unless upon appeal from judgment in a case of such civil jurisdiction a question of Hindu or Mahomedan law or a question of usage shall arise and the Court or Judge thereof shall think fit to admit a vakil or vakils to plead for any suitor or suitors in that case.

Now, so far as appeals are concerned it will be noticed that R 7 of 1862 confines the prohibition of vakils from appearing to cases of appeals from ordinary original civil jurisdiction. The reason for that is manifest because if one goes to the clause which corresponds to Cl 15 of the present Letters Patent one finds that that is Cl. 14 of 1862 and Cl. 14 of 1862 was in these terms :

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment in all cases of original civil jurisdiction of one or more Judges of the said High Court

and so on : so that there was no Letters Patent right of appeal in 1862 except in a civil case. That, however, was altered by the terms used Cl 15 of 1865 and the terms used by that clause were these that

an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the

judgment not being a sentence or order passed or made in any criminal trial, so that if it was possible to have an appeal in a criminal case which was an appeal from a judgment, but not from a judgment which was a sentence or order passed or made in a criminal trial, then for the first time it became theoretically possible to have an appeal in a criminal case from the original side. At first it does not appear that the consequences of that change were appreciated. When the High Court came in 1865 to revise its rules because of the new Letters Patent it left the rule about advocates (as I have set it out—Rule 6) without amendment. The only amendment it made in the rule about vakils was this: that instead of saying that

vakils shall not appear, plead or act for any suitor in this Court in any matter of ordinary original jurisdiction civil or criminal

and so forth it says that

vakils may appear, act or plead for suitors in this Court, provided that they shall not appear, plead or act for any suitor in any matter of ordinary original jurisdiction civil or criminal or in any matter of appeal from any case of ordinary original civil jurisdiction, so that in effect the rule which confined the execution in case of appeals to cases of civil jurisdiction was repeated after 1865.

It does not appear that the change effected by Cl. 15 of 1865 Letters Patent claimed the attention of this Court until the very well-known case of *Ameer Khan*, *In the matter of* (4) in 1870, where it will be remembered, Norman, J., refused an application for a writ of habeas corpus. That decision was taken on appeal and the question was debated whether or not you could have in a criminal matter an appeal from the original side under the Letters Patent of 1865. The point discussed chiefly was whether a refusal of a writ of habeas corpus was a "judgment" within the meaning of Cl. 15. The point, however, was not decided because both the learned Judges who heard the appeal were clearly of opinion that the writ had been rightly refused on the merits and that case, although it brought the question up for the first time, resulted in no decision. In 1889 a case arose in Bombay. *In the matter of Narrondas Dhanji* (5), where an order in the nature of habeas corpus applied for under S 491,

Criminal P. C., was refused by a Judge on the original side and the question was argued whether or not any appeal lay from that refusal. The point which was argued there again was whether a mere refusal to make such an order was a judgment—was really a determination of the rights of the parties—and it was held that an appeal did lie on the ground that the refusal of the order was a judgment and therefore the case came within Cl. 15, Letters Patent. But it was not until 1902, in the case of *In the matter of Horace Lyall* (6), that the question was authoritatively determined in this Court and there it was held that an appeal did lie from a refusal to grant an order under S. 491, Criminal P. C., on the ground that although it was a criminal matter, it was not a sentence or order passed or made in a criminal trial and from that date—and so far as I can judge, not before—it has been settled law in this Court that there can be an appeal from the original side in a criminal matter.

Now, the rules of this Court were subjected after 1910 to an extensive and general revision. The process of revision apparently took a long time, but ultimately the revised rules were passed by the full Court on 19th August 1913 to come into force on 15th April 1914 and in those revised rules we find that the old rules as to vakils and as to advocates and their authority have been altered. The alterations are very significant. At the same time we find incorporated in our rules a series of rules beginning with R. 14, Ch. 38, dealing with appeals under S. 491, Criminal P. C. We have therefore, to look back to Rr. 1 and 4, Ch. 2 to our present rules, with a view to see what is the alteration as compared with the rules of 1865 and what is the meaning of it.

Now, as the first rule stands, instead of the words :

Advocates of this Court may appear and plead for suitors in any branch of the Court civil or criminal.

we get the present R. 1.

Advocates of this Court may appear and plead for parties on either side of the Court, but on the original side or in appeals from the original side, not unless instructed by an attorney.

I cannot doubt that the intention of that rule was to cover criminal as well as civil appeals. Nobody supposes that an advocate of this Court is to be restricted

(4) [1870] 6 B. L. R. 459.

(5) [1890] 14 Bom. 555.

(6) [1902] 29 Cal. 286=6 C.W.N. 254 (F.B.).

to take his instructions from an attorney in civil cases only from the original side.

When we come to R. 4 we find there that, instead of the prohibition against vakils appearing in appeals from the original side being expressly confined to civil cases only as had been the practice ever since the Letters Patent of 1862, the following words are employed :

Vakils shall not appear, plead or act for any suitor in this Court in any matter on the original side or in any matter of appeal from any case from the original side unless in such appeal a question of Hindu or Mahomedan law or usage shall arise,

and so on. In my judgment it is reasonably clear that the revision of the rule which came into effect in 1914 took a broad line of division according as the case was on, or was an appeal from, the original side of this Court ; and whatever might have been the position had these rules not been revised the rules themselves are capable of but one interpretation.* In my judgment the proper and the only permissible course in cases under the new S. 449, where a new right of appeal is given by the Code to the subject is for this right to be exercised so long as the present rules remain unchanged in the way laid down by these rules, namely on the footing that it is part of the business of the Court from which, as the rules stand, vakils are excluded. This disposes of the question of practice and I have only to thank Mr. Advocate-General and Mr. Basu for their assistance in enabling the Court to come to a decision in this matter. It may be noticed that so far as appeals from applications under S. 491 of the Code are concerned the Letters Patent of 1865 was amended in 1919 so as to prohibit any Letters Patent appeal in a case of criminal jurisdiction, and since 1923 S. 491 itself has been elastically altered. It may well be that these legislative changes make it necessary for the Court to bring these rules up to date. I desire to make it quite clear that nothing that I have said touches in any way upon any question as to what rules should be made. I am concerned only with the correct interpretation of the rules as they are.

Chotzner, J.—I agree

R.K.

Order accordingly.

A. I. R. 1928 Calcutta 681

C. C. GHOSE AND BUCKLAND, JJ.

Bejoy Lal Seal and others—Plaintiffs—Appellants.

v.

Benarasidas Khandulal and others—Defendants—Respondents.

Appeal No. 63 of 1927, Decided on 25th November 1927, from original decree of Page, J., D/- 14th April 1927.

Lease—Assignment—The test to determine whether a certain transaction amounts to an assignment is whether the whole interest of the lessee has been granted.

As a general rule, an assurance for a period less than the whole term is an under-lease and not an assignment. While if a termor for years makes a lease for the residue of the term or for a time exceeding his interest, it operates as an absolute assignment. The test in such cases is whether the whole interest of the lessee has been granted. [P 683 C 1]

Plaintiff executed an indenture of lease in favour of a defendant for 61 years by which the lessee was allowed to sublet the leased property. Cl. 6 of the lease provided: "The said lessees shall have no power save amongst themselves to assign, transfer or in any way to alienate their right, title and interest upon the demised land." The defendant mortgaged the leasehold interest in the premises by way of sub-demise to a third person, whereupon the plaintiff determined the lease on the ground that a breach of covenant in the lease had occurred. The defendant contended that having regard to the act that under-letting even for the residue of the term was permitted, the circumstance that along with the under-letting there was a mortgage by way of sub-demise could not possibly amount to a breach of the covenant.

Held : that the transaction complained of did not amount to a mere under-letting or an under-lease but it amounted to an alienation and therefore, as such, was hit by Cl. 6 of the indenture of lease. [P 683 C 2]

N. Sarkar and A. K. Roy—for Appellants.

Binod Mitter, S. C. Bose and S. N. Banerjee—for Respondents.

C. C. Ghose, J.—This is an appeal against a decision of my learned brother Page, J., passed on 14th April 1927. The facts, shortly stated, are as follows : On 23rd August 1900, one Bolai Lal Seal who was the predecessor-in-interest of the present plaintiffs let out the premises in suit then known as No. 7/1, Halliday Street, to the predecessor of defendants 1 and 2 for a term of 61 years on certain terms and conditions specified in the indenture of lease. On 7th May 1923 defendants 1 and 2 mortgaged the leasehold interest in the said premises by way of sub-demise to the defendant 3.

On 20th August 1923 the plaintiffs gave notice to the defendants that they regarded the lease of 23rd August 1900 as having been determined by reason of the mortgage of 7th May 1923, which, according to them, operated as a breach by the lessees of a covenant in the lease.

The present suit was filed on 25th January 1924, in which the plaintiffs prayed for a declaration that the indenture of lease dated 23rd August 1900 stood determined and for possession of the premises in question, and also for mesne profits. On 30th June 1925, defendants 1 and 2 were adjudicated insolvents in Karachi and subsequently the Official Assignee of the Court of the Judicial Commissioner of Sind was added as a party defendant in their places. The principal defendant, namely, defendant 3, pleaded in his written statement that the mortgage in his favour was not an assignment of the lease in breach of any of the terms of the said document and denied that the plaintiffs were entitled to any relief whatsoever in the suit.

It is alleged that the plaintiffs came to know of the said mortgage in favour of defendant 3 shortly before 20th August 1923. The rents in respect of the premises had been paid to the plaintiffs up to the month of June 1923. In para. 9 of the written statement of defendants 1 and 2 it was stated that, although they had always been ready and willing to pay the rent reserved to the plaintiffs the plaintiffs, as a matter of fact, had not received any rent subsequent to the month of June 1923. When the suit came on for hearing before Page, J., in April 1927, it was suggested that the plaintiffs had accepted rent after they had become aware of the mortgage and that the forfeiture, if any, had been waived. It may be stated at once that, as far as one can make out from the pleadings, they do not raise any issue as to whether or not, after the forfeiture had occurred, the same was waived by the plaintiffs by acceptance of rent. Page, J., held that, on a true construction of the said indenture of lease and the mortgage, there had been no forfeiture of the lease and he accordingly dismissed the plaintiffs' suit.

For the purposes of the determination of this appeal, it is necessary to consider the effect of two clauses of the said indenture of lease, namely, Cls. 5 and 6

and of Cl. 3 of the mortgage. Cls. 5 and 6 of the said Indenture are as follows :

(5) That the said lessees shall be at liberty or shall have the full power and authority without having recourse to previously securing to that effect the consent of the said lessor written or verbal to under-let the said demised land and the buildings, structures, sheds, godowns, stables or any portion thereof to be so erected and built by them as aforesaid.

(6) The said lessees shall have no power save amongst themselves as hereinafter mentioned to assign, transfer or in any way to alienate their right, title and interest upon the demised land and the buildings so to be erected by them thereon as aforesaid created by virtue of these presents provided nevertheless that neither of the said lessees shall be entitled to exercise the right of transfer or assignment among themselves as is hereinafter reserved until a competent Engineer to be approved by the lessor, certifies that the construction of the buildings so to be erected on the demised lands as aforesaid is completed at a cost of not less than ten thousand rupees as is hereinafter provided.

Clause 3 of the mortgage is as follows :

In further pursuance of the said agreement and for the consideration aforesaid, the mortgagors do hereby demise and sub-let unto the mortgagee all the hereditaments and premises comprised in and demised by the said lease and more fully described in Sch. A hereunder written which is valued at Rs. 10,000 and covenant to hold the same unto the mortgagee for the unexpired residue of the term of 61 years granted by the said lease subject to the proviso that this sub-lease shall terminate forthwith as and when the amount of money advanced by the mortgagee shall be repaid with interest hereinbefore mentioned and all costs as between attorney and clients and all dues for the time being as hereinbefore and hereinafter mentioned either by the mortgagors personally or by realization of rents and profits by the mortgagee himself and from the tenants now occupying or those who will occupy in future less the expenses and costs of realization and all other payments to be incurred and paid in connexion therewith the said hereditaments and premises comprised in and demised by the said lease.

It is argued on behalf of the appellants that, having regard to the three clauses set out above, the mortgage of the leasehold in this case operated as an absolute assignment of the residue of the term of the lease and that it is hit by Cl. 6 of the said indenture of lease. On the other hand it is argued on behalf of defendant 3, first, that having regard to the fact that under-letting even for the residue of the term is permitted by Cl. 5 of the said Indenture of lease, the circumstance that along with the under-letting there is a mortgage by way of sub-demise cannot possibly amount to a breach of the sixth covenant of the said indenture and, secondly, that, having regard to the terms of the mortgage, there

is, as a matter of fact, no conveyance of the lessee's interest to the mortgagee but that there is merely a charge in favour of the mortgagee as is apparent from the terms employed in the mortgage itself in respect of the two classes of properties referred to in the mortgage, namely, the properties mentioned in Schs. B and A respectively. In other words, it is argued that, if the document amounts to a mortgage at all, it is a class of mortgages which is not hit by Cl. 5 of the said indenture and that an under-lease being permitted the fact of the creation of the mortgage by way of sub-demise, does not extend it into something which is precluded by the terms of the said clause.

I am of opinion that the contentions argued before us on behalf of defendant 3 must fail. As a general rule, an assurance for a period less than the whole term is an under-lease and not an assignment: per A. L. Smith L. J. in *Bryant v. Hancock* (1), while if a term for years makes a lease for the residue of the term or for a time exceeding his interest, it operates as an absolute assignment, *Parmenter v. Webber* (2), *Beardman v. Wilson* (3), *Hicks v. Downing* (4). The test in such cases is whether the whole interest of the lessee has been granted—it is immaterial whether it is called a lease or an under lease or a derivative lease—and if the whole interest has been granted it will operate as an assignment: see *Pluck v. Digges* (5).

This being the general rule it is necessary to find out whether in the present instance there has been such an absolute assignment of the lease as has been urged on behalf of the appellants. Under the Transfer of Property Act (See S 108, Cl. J.) in the absence of a contract to the contrary, the lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, however, by reason only of such transfer cease to be subject to any of the liabilities attaching

to the lease. In this case we have, however to determine for ourselves what the contract between the parties was. As pointed out in the case of *The Bengal National Bank Ltd. v. Janaki Nath Roy* (6), the reasoning of Dallas, C. J. in *Williams v. Bosanquet* (7), in such a case as this, is still valid in India. It is laid down there that

the assignment of a lease for the whole term whether absolute or subject to a proviso for re-assignment in a certain event is as far as concerns the interest to be transferred precisely the same. So completely does the interest pass from the one and vest in the other that there is a covenant to re-assign when the money shall be repaid. The whole interest is therefore assigned and the whole is to be re-assigned. It vests there absolutely till such re-assignment in the party who is to re-assign and is not less absolute because by agreement between the immediate parties to which the lessor is no party the assignor may in an event which may or may not happen entitle himself to a reconveyance by the money being repaid.

In my opinion having regard to these considerations there cannot be any doubt that the assignment in the present case by way of mortgage of the residue of the term is an absolute one and that there is no substance in the contention that there is a distinction discernible between the words employed when mortgaging the properties set out in Sch. B and when mortgaging the residue of the term referred to in Sch. A by way of sub-demise. The distinction, if any, is because of the nature of the properties set out in the two schedules; it may be noted further that the draftsman of the said mortgage has used sufficient and apt words to indicate that it was to be an assignment of all the remaining interest in the term. Mortgages of leaseholds by assignment before 1926 were made in England by assignment of the whole unexpired residue of the term and similarly in the case of mortgages of leaseholds by sub-demise they were made by demising the property to the mortgagee reserving the last day or the last few days of the original term. The mortgage in this case is, as indicated above, of the residue of the term. Further, the mortgage of the residue of the term in this case is really in the nature of a usufructuary mortgage and there would seem to be great force in the contention put forward on behalf of the appellants that it does amount to an alie-

(1) [1893] 1 Q. B. 716=67 L. J. Q. B. 507=78 L. T. 397=62 J. P. 324=40 W. R. 386 affd. (1899) A.C. 442.

(2) [1818] 8 Taunt 593=2 Moore 656=20 R. R. 55

(3) [1869] 4 C. P. 57=38 L. J. C. P. 91=19 L. T. 282=17 W. R. 54.

(4) [1698] 1 Raymond 99=91 E. R. 362.

(5) [1831] 5 Bingham N. S. 31=5 E. R. 219.

(6) A. I. R. 1927 Cal. 725=54 Cal. 813.

(7) [1819] 1 Br. and B. 238=3 Moore 500=21 R. R. 535.

nation within the meaning of Cl. 6 of the indenture of lease. I am unable to hold that there was anything reserved by the lessee when he executed the mortgage in the manner in which he did and I am of opinion that no comfort can be derived by defendant 3 from the words used in Cl. 3 of the mortgage. In my judgment the transaction complained of in this case does not amount to a mere under-letting or an under-lease but it amounts to an alienation and, therefore, as such, is hit by Cl. 6 of the Indenture of lease. In my opinion, it operates as a forfeiture.

For the reasons given, the appeal should be allowed with costs in both Courts. The plaintiffs will be entitled to a decree in terms of prayers (1), (2) and (3) in the plaint mesne profits being calculated at the rate of Rs 205 monthly from 1st July 1923 until possession is made over.

Buckland, J.—As we are differing from my learned brother Page, J, I feel I should say a few words though it is not possible to add to the judgment of my learned brother.

Since it has been conceded that an under-lease of the residue of a term amounts to an assignment the only question is whether by the mortgage of 7th May 1923 a breach of the covenant against assignment contained in the lease was committed. The answer to this question depends upon the construction to be placed upon the instrument of 7th May 1923.

It is not necessary that I should consider this point in detail for in my opinion it is covered by the decision in *Bengal National Bank, Ltd. v. Janaki Nath Roy* (6), to which I was a party and in which I fully stated my reasons for the view taken. Though, notwithstanding that case it has been argued that the mortgagor retained some interest in the leasehold premises the terms of the instrument in my opinion are inconsistent with such a view.

The only other question which arises and as to which it was submitted that there might have to be a remand is that of waiver. Apart from any question of fact such as when the last payment was made, there is no allegation in the written statement of a waiver on the part of the plaintiffs. That was the occasion when, if the defendants desired to allege waiver it should have been done by making the necessary allegations. It does at times

occur that waiver is allowed to be raised as an issue though not in the pleadings. That is where the defendant alleges that the plaintiff left undone certain things which he ought to have done and consequently he is not entitled to the relief claimed. In those cases, inasmuch as the practice Court does not admit of a reply, the plaintiff only has the opportunity when the case comes on for hearing of stating that there was a waiver by the defendant. But nothing of the sort could have happened in the present case as the plea is one which should have been raised by the defendants in the first instance. In my judgment, not only should this appeal be allowed on the grounds stated but I am also of opinion that it was not open to the defendants to raise an issue of waiver.

N K.

Appeal allowed.

A. I. R. 1928 Calcutta 684

CUMING AND MUKHERJI, JJ.

Deb Narayan Bhakat and others—Defendants—Appellants.

v.

Jagadish Chandra Deo Dhabal Deb—Plaintiff—Respondent.

Appeal No. 649 of 1925, Decided on 16th February 1928, from the appellate decree of Dist. Judge, Zillah Midnapur, D/- 10th December 1924.

Civil P. C., O. 2, R. 2 — Proceedings under S. 146, Ben. Ten. Act, for enhancement of rent pending—Decree obtained for rent at old rate—Subsequent suit, after decision of S. 105 proceedings allowing enhancement, for difference is not barred.

After the final publication of the Record of Rights, the plaintiff instituted proceedings under S. 105, Ben. Ten. Act, for assessment of fair rents. The Settlement Officer enhanced the rents to the amounts stated in the present suit, but on appeal by the defendants the Special Judge reversed that decision. The plaintiff preferred a second appeal and the case was as a result thereof remanded for a fresh decision. While this litigation was pending and after the decision of the Special Judge dismissing the plaintiff's claim for enhancement, the plaintiff instituted a suit for rent at the old rate and obtained a decree. The proceedings under S. 105, Ben. Ten. Act eventually ended in a decision in plaintiff's favour. The plaintiff thereafter instituted the present suit for the difference.

Held: that O. 2, R. 2, did not operate as a bar to the plaintiff's claim as it can hardly be said that the plaintiff was entitled to make the claim or that he had intentionally relinquished it within the meaning of O. 2, R. 2: 15 B. L. R. 125 (notes) and 15 Cal. 145 (F. B.), *Rel. on A. I. R. 1925 Cal. 463, Dist.* [P 685 C 2]

Santimoy Majumdar—for Appellants.
Sarat Chandra Bose, Suresh Chandra Dass and Durga Das Roy—for Respondent.

Mukherji, J.—This appeal arises out of a suit which was instituted by the plaintiff for recovery of rent from the defendants, representing the difference between the rents as they stood before enhancement and the amounts at which they stood after enhancement.

After the final publication of the Record-of-Rights the plaintiff instituted proceedings under S. 105, Ben. Ten. Act for assessment of fair rents. The Settlement Officer enhanced the rents to the amounts stated in the present suit, but on appeal by the defendants the Special Judge reversed that decision. The plaintiff preferred a second appeal and the case was as a result thereof remanded for a fresh decision. While this litigation was pending and after the decision of the Special Judge dismissing the plaintiff's claim for enhancement, the plaintiff instituted a suit for rent at the old rate, for the years 1326 to 1329 B. S. and obtained a decree. The proceedings under S. 105, Ben. Ten. Act eventually ended in a decision in plaintiff's favour, enhancement being allowed at the amounts stated in plaintiff and the said enhancement was to operate from 1923 B. S. The plaintiff thereafter instituted the present suit for the difference, for the said period, namely 1326 to 1329 B. S. The trial Court dismissed the suit, but the lower appellate Court on plaintiff's appeal has decreed the same. The defendants have then preferred the present appeal.

The contention that has been urged on behalf of the appellants is that O. 2, R. 2, Civil P. C., operates as a bar to the plaintiff's claim. In my opinion this contention cannot succeed and for two reasons :

The argument is that the claim for rent at the enhanced rate should have been included in the former suit in which only rent at the old rate was asked for. To include that claim in the former suit it would have been necessary for the plaintiff to ask in the first place for enhancement of rent and then for a decree for the amount to which it may be enhanced, and in the alternative for rent at the old rate. Where a plaintiff has not framed his suit as one for enhancement of rent, but merely as a suit claiming ar-

rears of rent at an enhanced rate, he is not entitled to a decree, as it is well settled that, though he can claim back rent for additional area, he cannot claim back rent at enhanced rate until the rent has been enhanced in a suit appropriately framed for the purpose: *Ejel Mullick v Felar Mullick* (1). In view of the facts as they stood at the date of the plaintiff's former suit, this claim would have involved a matter which was and had already been the subject of proceedings under S. 105, Ben. Ten. Act. Section 109 of that Act would have operated as a bar to the entertainment of a suit involving the said claim. In these circumstances it can hardly be said that the plaintiff was "entitled to make" the claim or that he had "intentionally relinquished" it within the meaning of O. 2, R. 2, Civil P. C.

Then again the relation of the two claims, namely, one for enhancement of rent and the other for recovery of arrears at the old rate, was considered by the Privy Council in the case of *Soora Sundary Devi v. Golam Ally* (2), and in the Full Bench decision of this Court in the case of *Sudduruddin Ahmed v. Beni Madhab Rai* (3) it was pointed out that the causes of action of the two claims are different. Those cases, no doubt, in one sense, may be regarded as converse to the present one, because in those cases the first suit was one for rent at an enhanced rate and the second one for rent at the old rate and the question arose under S. 43, Civil P. C. 1882. The principle enunciated in those cases, however, is quite clear and applies fully to the present case. The two causes of action may no doubt be joined in one suit, but still they are separate (*Gudar Tewari v. Brijanandan Pershad* (4)). O. 2, R. 2, Civil P. C., therefore, cannot be a bar.

The case of *Manmatha Nath Pal v. Surendra Nath* (5), upon which reliance has been placed on behalf of the appellant is wholly distinguishable, there having been in that case no proceedings under S. 105, Ben. Ten. Act, and the claim for enhancement incorporated in the first suit having already been decided

(1) [1915] 21 C. L. J. 309=28 I. C. 498.

(2) 15 B. L. R. 125 (note)=19 W. R. 141 (P. C.).

(3) [1888] 15 Cal. 145 (F. B.).

(4) [1901] 5 C. W. N. 880.

(5) A. I. R. 1925 Cal. 463.

686 Calcutta MUTHIAR CHETTIAR v. CHIDAMBARAN CHETTY (Rankin, C. J.) 1928

in the plaintiff's favour at the date of the second suit.

For the above reasons the appellants' contention must be overruled. The appeal accordingly should be dismissed with costs.

Cuming, J.—I agree.

A.L./R K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 686

RANKIN, C. J., AND MITTER, J.

A. T. K. P. L. M. Muthiar Chettiar—Appellant.

v.

Chidambaran Chetty and others—Respondents.

Appeal No. 54 of 1927, Decided on 18th July 1927, from original order, D/- 18th March 1912.

Limitation Act, Art. 183—To constitute "revivor" there must be a determination that decree-holder has a subsisting right to execute the decree.

To constitute a revivor of a decree there must be expressly or by implication a determination that a decree is still capable of execution and the decree-holder is entitled to enforce it.

An ex-parte decree was obtained on the original side on 18th March 1912 against a firm of which one S was a partner. An application for execution was made on 21st March 1924. S appeared through his solicitor and obtained an adjournment for moving to set aside the decree. No affidavit or any written objection as contemplated by O. 21, R. 16, was filed. On 13th June 1922, S obtained a rule on motion calling upon the decree-holder to show cause why the decree should not be set aside. It was ordered that an issue be tried as to whether S was partner in the defendant's firm and that all further proceedings in execution of the decree should be stayed until the trial of the issue. The issue was determined against S on 29th May 1924. An execution application was filed on 3rd September 1926. It was contended that the order of 29th May 1924 was by implication a determination that the decree was still capable of execution.

Held: that no question of right to execute the decree was before the Court. The order was confined to the simple question whether S was a partner. Such an order could not be regarded as an order determining the question whether decree-holder had a subsisting right to execute the decree and did not constitute a revivor. [P 687 C 2]

B. L. Mitter, S. C. Chaudhuri and R. N. Sarkar—for Appellant.

S. N. Banerjee, S. M. Bose and I. P. Mukerji—for Respondents.

Rankin, C. J.—The sole question upon this appeal is whether execution of an

ex-parte decree passed by this Court on the original side on 18th March 1912 is barred by Art. 183, Sch. 1, Lim. Act, 1908. The period of limitation is 12 years and when the decree has been "revived" the 12 years have to be computed from the date of revivor. The present application for execution was made on 3rd September 1926 and it was not contended by the learned Advocate-General before us, though it is suggested in the memorandum of appeal, that the application of that date can be regarded as a mere renewal of an earlier application. Taking this as the relevant date the appellant contends that the decree was revived by an order dated 29th May 1924 so far as the original judgment-debtor, Subramania Chetty, is concerned.

The relevant facts when disentangled are really there. On 21st March 1923 an application for execution was made by the present appellant as assignee of the decree. Whether this was validly or invalidly served upon Subramania does not matter for, on 21st May 1923, he appeared through his solicitor and obtained adjournments. It appears that he did not file any affidavit or give any written statement of any objections such as are contemplated by R. 16, O. 21, but that the solicitor obtained the adjournments on mentioning that he wanted to move to set aside the decree and have the execution stayed. On 13th June 1923 he obtained a rule on motion calling upon the appellant to show cause why the decree should not be set aside and execution stayed. On 17th August 1923 it was ordered that an issue be tried as to whether Subramania was a partner in the defendant firm and that

all further proceedings in execution of the decree should be stayed until the trial of the said issue.

Apparently the validity of the decree depended on this issue which was determined against him by an order of Thornhill, J., dated 29th May 1924. Twelve years had meanwhile expired, on 17th March 1924, since the date of the decree, and it is this order of 29th May 1924 that it is said to operate as a "revivor." The terms of the order merely declare that Subramania is a partner of the firm in question and that his application to set aside the decree is dismissed. As the interim stay granted on 17th August was expressed to be "until the trial of

the said issue" it came to an end of itself and without further order.

What followed has no bearing upon the present question, but to make the matter clear it may be mentioned that on 9th April 1925 the appellant applied for renewal of his application of 21st March 1923 and fresh notices were ordered. The judgment-debtors were not properly served and did not appear. In their absence the appellant on 18th May 1925 obtained an order giving him leave to execute the decree, which order was afterwards set aside.

It is contended for the appellant that the order of 29th May 1924 was by implication a determination that the decree was still capable of execution and that the decree-holder was entitled to enforce it. Reliance is placed on *Kamini Devi v. Aghore Nath Mukerjee* (1). That was a case of an application to execute a decree. The judgment-debtors before the Court were obliged to put forward all their objections. They put forward and pressed one only—a plea of limitation. This plea was overruled but no actual order, e. g., of attachment was made. It was held that the Court had impliedly decided that the decree-holder was entitled to have execution.

The facts of the present case are different in an essential point. There is no evidence that Subramania had ever stated his objections if any under R 16, O. 21. He took a prior point and obtained adjournments to litigate it—not under the summons or in chambers but by a rule and issue tried in Court. It is not shown that he at any time disclaimed all other defences to the summons or that he was required to state his defences before being given an adjournment. The learned Judge who tried the issue was in no way hearing the summons. He was under no obligation to know—and in all probability neither knew nor cared—what answer to the summons Subramania might have. He had to decide whether the decree had ever been a good decree. If it was then the Judge in chambers could proceed to decide the execution matter in the ordinary way. It is said that in the circumstances of this case it is clear that Subramania could have no defence of payment and no defence of limitation, and that the order of 29th May 1924 really concluded

the matter and was therefore a decision by implication that the appellant was entitled to enforce the decree. This was the main argument of the learned Advocate-General, but I think it is an illegitimate extension of the principle applied in *Kamini Devi's* case. The decision in that case proceeded on the objections which the judgment-debtor in fact took in the execution case, and on the fact that the question before the Court was whether the decree could be executed. The judgment-debtor took only one defence and that was overruled. The decision as to revivor did not proceed upon a consideration of the defences which the judgment-debtor had in the sense of good defences. The judgment-debtor had been called upon for his whole defence and he had failed to establish any. I see no proof that this was what happened in the present case. We are dealing with an order made by Thornhill, J., when the execution matter was not before him for decision. Its implication cannot for this purpose be carried beyond what was involved in the issue framed on 17th August 1923 and the rule of 13th June 1923. It seems clear enough that if the application of 21st March 1923 had been properly restored Subramania would have had the right to contest it by stating what defences, if any, he had. All that had been found against him was that the decree when passed was a good decree. One defence was gone—a defence that he could not take upon the summons. Any that he could take upon the summons were open to him.

Whether it be true or not that there can be no revivor without an order for execution, as the learned Judge has said, I think that no revivor has been shown in this case. I think the appeal should be dismissed with costs.

Mitter, J.—This is an appeal from a judgment of my learned brother C. C. Ghose, J., dated 14th April 1927, dismissing an application of the appellant for execution on the ground that the said application is barred by the statute of limitation.

The facts which are material for the purposes of the appeal may be briefly stated as follows :

On 18th March 1912 a decree was passed by the High Court in its original jurisdiction for a certain sum of money in favour of Sujan Chand Daga and

(1) [1910] 11 C. L. J. 91=4 I. C. 402=14 C. W. N. 357.

Champalal Binani (plaintiffs) and against a firm whose proprietors were Kanappa Chetty, Subramania Chetty and Ramanandan Chetty (defendants). The said three Chetties were members of a joint Mitakshara family and were carrying on business in co-partnership under the name and style of Shuna Vena Kannappa Chetty at No. 67, Canning Street, in the town of Calcutta. No appeal was preferred from the said decree nor was any adjustment of the matter in dispute made subsequent to the said decree nor was any writ issued before or after adjustment. Sujan Chand Daga died after decree and Kedar Nath Daga, the only son, heir and legal representative of the said Sujan Chand Daga and Champalal Binani assigned in favour of Muthiar Chettiar, the appellant before us, their right, title and interest under the decree by an indenture of assignment dated 9th November 1922. On 29th November 1922 the appellant as such assignee applied to the High Court for leave to execute the said decree and a notice under O. 21, R. 16, Civil P. C. was directed to the original decree-holders and the defendants. Before the said application was made Kanappa Chetty one of the judgment-debtors, had died leaving behind Chidambaran Chetty as his only son heir and legal representative. The notice which was issued on Kanappa Chetty in ignorance of his death consequently became infructuous.

On 21st March 1923 the appellant made another application for leave to execute the said decree against Subramania Chetty. Ramanandan Chetty and Chidambaran Chetty applied for an order that the certified copy of the decree be transmitted to the Court of the Sub-Judge of Shivaganga in Ramnad in the Madras Presidency for execution. Notice was issued upon the assignors of the decree and also upon the Chetties to show cause why the decree should not be executed by the said transferee against the three Chetties. On 21st May 1923 Subramania appeared through his solicitor and got the application of the appellant adjourned till 23rd May 1923 when again the said Subramania applied for a further adjournment on the ground that he wanted to have the decree set aside and the execution thereof stayed. On 13th June 1923 Subramania applied to the High Court to set aside the decree of

18th March 1912 and for the stay of the execution of the said decree on the ground that he was never a partner in the defendants' firm and that the writ of summons in the suit was not at all served on him. A rule was issued by the High Court upon the assignors of the said decree and on the present appellant to show cause why the said decree should not be set aside and the execution thereof stayed. The rule came on for hearing on 17th August 1923 and it was ordered that the suit be placed on the list of motions for the trial of the issue as to whether the defendant Subramania Chetty was a partner of the firm of Shuna Vena Kannappa Chetty at the time of the institution of the suit in which the ex-parte decree dated 18th March 1912 aforesaid was passed and it was further ordered that all further proceedings in execution of the said decree be stayed until the trial of the said issue.

On 29th May 1924 Thornhill, J., tried the issue and held that Subramania was a partner of the defendants' firm at the time of the institution of the suit viz., 9th January 1912 and that he was unable to show that his interest in that business subsequently ceased. Thornhill, J., observed:

The result is that the application by Subramania Chetty to set aside the decree is dismissed with costs including costs of commission and the costs of the trial of issue as of a hearing.

On 9th April 1925 a second application for execution was made and the notice under O. 21, R. 16, Civil P. C., was issued and the house of the defendant Subramania Chetty at Senalkudi (Madras) was attached. The attachment was raised by an order dated 13th January 1926. The appellant preferred an appeal against the said order which was dismissed on 20th August 1926. On 3rd September 1926 the present application for execution was made and the defendant Subramania put in an affidavit in opposition in which he stated amongst other things that the application for execution of the decree was barred by the law of limitation and that the application should be dismissed with costs. The application was heard by C. C. Ghose, J., with the result that the learned Judge gave effect to the plea of limitation raised by Subramania and dismissed the application with costs.

Against that decision the present appeal has been preferred by Muthiar Chettiar, the assignee of the original decree-holder and it is contended by the learned Advocate-General who appeared on his behalf that the decision of the learned Judge is wrong inasmuch as he should have held that the decision of Thornhill, J., dated 24th May 1924 operated as a revivor within the meaning of Art. 183, Sch. 1, Lim. Act. It is contended that the said order by implication decided that the decree of 18th March 1912 was still capable of execution and it is said that Thornhill, J., when he held in May 1924, that the application of Subramania Chetty to set aside the decree should be dismissed laid down in effect that the decree was still capable of execution. On the other hand it is contended by Mr. S. N. Banerjee for the respondent that in order to constitute a revivor there must be an adjudication on an application for execution by the decree-holder that the decree is capable of execution and reliance has been placed on several decisions of this Court. In particular reference has been made to *Ashotosh Dutt v. Doorga Churn Chatterjee* (2); *Kamini Devi v. Aghore Nath Mukherjee* (1); *Chutturpat Singh v. Sait Sumari* (3) and *Amulya Ratn Banerjee v. Banku Behari Chatterjee* (4).

It is not necessary to decide for the purposes of the present appeal whether in order to constitute a revivor an order must be made on an application for execution by the decree-holder. For I think in the present case the order of Thornhill, J., can in no sense be regarded as a determination by implication that the decree was capable of execution and that the decree-holder had a right to execute the decree. The question as to whether the decree-holder of the assignee had a right to execute the decree was not present to the mind of Thornhill, J., and it is conceded by the learned Advocate-General that no question of the right of the decree-holder to execute the decree by reason of lapse of time was raised before Thornhill, J., nor could it be so raised for having regard to the order staying execution of the decree the execution would not be barred on that date as

under S. 15, Lim. Act, the decree-holder would be entitled to get a deduction of the time between 17th August 1923 and 29th May 1924 in computing the period of limitation. The true rule in cases of this kind has been laid down in the case of *Kamini Devi v. Aghore Nath Mukherjee* (1), where it is observed that the essence of the matter is that to constitute a revivor of a decree, there must be expressly or by implication a determination that a decree is still capable of execution and the decree-holder is entitled to enforce it. An order for execution operates as a revivor because it necessarily implies such a determination. No question of execution was before Thornhill, J. He was only trying the issue as to whether Suoramania was partner in the firm of the defendants and as such liable under the decree against the firm. No question of right to execute the decree was before the learned Judge. One of the defendants applies to set aside the decree on the ground that he was not a partner of the firm against whom the decree has been made and the learned Judge's decision was confined to the single question as to whether he was a partner or not. Such an order cannot be regarded as an order determining the question whether the decree-holder has a subsisting right to execute the decree. Such an order does not fall within the definition of "revivor" which, as Woodroffe, J., pointed out in *Chutturpat v. Sait Sumari Muli* (3), means a decision holding that the decree was still capable of execution. The decree in the present case being dated 18th March 1912 and the application for execution having been made on 3rd September 1926 beyond twelve years of the decree the decree-holder has lost his right to have execution.

In this view I agree with my Lord the Chief Justice in dismissing the appeal.

The conclusion I have arrived at in this case is one that I somewhat regret, but I feel constrained to arrive at it. It is not a case in which there are on the part of the respondent Subramania any merits which could pre-dispose one to arrive at a conclusion in his favour.

A.L./R K

Appeal dismissed.

(2) [1831] 6 Cal. 501 = 8 C. L. R. 23.

(3) [1916] 43 Cal. 903 = 23 C. L. J. 645 = 36 I. C. 602 = 20 C. W. N. 889 (F.B.).

(4) A. I. R. 1925 Cal. 668.

A. I. R. 1928 Calcutta 690

CUMING AND LORT-WILLIAMS, JJ.

Mokbul Khan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 847 of 1927, Decided on 18th April 1928, from judgment of Sess Judge, Pabna.

(a) *Criminal P. C., S. 297—Trial by jury—The only witness relied on by prosecution turning hostile—No evidence remaining to go to jury—Failure of Judge to so direct is a misdirection.*

In a trial by jury under S. 325, Penal Code, prosecution relied upon the evidence of a certain witness who was the only witness in the case and who could testify as to what had occurred. His evidence was considered hostile in some respects and the prosecution sought to discredit him. Judge did not direct the jury that there was no evidence.

Held: that this was a serious misdirection as there remained no evidence to go to the jury, the witness having been discredited and the trial was vitiated. [P 691 C 1]

(b) *Evidence Act, S. 154—Witness cross-examined as hostile—He cannot be relied on as to part only.*

A party cannot be allowed to say that his witness is a truthful witness so far as part of his evidence is concerned but an untruthful witness so far as some other portion is concerned. Once a party cross-examines his own witness he must be held to no longer rely on him: *A. I. R. 1926 Cal. 139* and *A. I. R. 1923 Cal. 463, Rel. on.* [P 691 C 1]

K. N. Chowdhury, Mritunjoy Chattopadya, Manindra Nath Banerjee (II) and Gopal Ch. Mukherji—for Appellant.

B. M. Sen—for the Crown.

Judgment.—The appellant Mokbul Khan was found guilty under S. 325 by a unanimous verdict of the Jury and the learned Sessions Judge of Pabna agreeing with this verdict has sentenced the appellant to two years' rigorous imprisonment and a fine of Rs 200. The facts briefly are these: The appellant and his brother Mansur had an altercation with the complainant about an exchange of labour. One Prodhan Babu Khan came to arbitrate. Mokbul and Mansur began to beat complainant. Foiz Bepari protested. Mokbul struck him on the head with a lathi and Mansur on the side. He fell down and shortly expired. Defence was that the case was entirely false. In order to understand Mr. Chowdhury's point a few more facts are necessary. The occurrence took place at night. The

only witness as to what happened is the complainant Mahajan and the case of the prosecution depends on the belief or disbelief of his evidence and also of the witnesses to whom it is alleged he stated what had occurred immediately or shortly after the occurrence. After Mahajan had been examined the Public Prosecutor apparently considered his evidence in some respect hostile and with the leave of the Court proceeded under S. 154 to cross-examine him apparently with the view of getting rid of some part of his evidence which was unfavourable to the prosecution. That this was done has not been challenged by the Crown. Mr. Chowdhury argues that it is not open to the Crown to cross-examine its own witness merely for the purpose of discrediting him so far as a portion of his evidence is concerned. The effect of discrediting a witness as to a part of his evidence is to discredit him as regards the whole. Therefore the Crown had by seeking to discredit their own witness said that he was not a witness on whom they relied. As he was the only witness on whom the prosecution relied to ask the Court to convict the accused it was the duty of the Judge to have directed the jury that there was no evidence and that they should return a verdict of not guilty. As to the position of a witness who has been declared hostile and the party calling him allowed to cross-examine him we have been referred to two cases. The first case is the case of *Satyendra v. Emperor* (1). In that case it was held that where a party was allowed to cross-examine his own witness the effect of that cross-examination must be to discredit the witness altogether and not merely to get rid of part of his testimony and that hence the witness's evidence must be excluded altogether. I presume that this means so far as it supports the case for the prosecution for, obviously, the defence would I think be entitled to rely on so much of his evidence as supported their case. Otherwise a party who found that his witness had given evidence which supported his adversary's case could get rid of this evidence by declaring him hostile.

The other case to which we have been referred is *Khajiruddin Sonar v. Emperor* (2) a decision to which I was my-

(1) *A. I. R. 1923 Cal. 463.*

(2) *A. I. R. 1926 Cal. 139=53 Cal. 372.*

self a party. There it was also held following the dictum of Lord Campbell in *Faulkner v. Brine* (3) that the result of allowing a party to cross-examine his own witness was to discredit him altogether. In other words a party cannot be allowed to say that his witness is a truthful witness so far as part of his evidence is concerned but an untruthful witness so far as some other portion is concerned. Therefore it seems that once a party cross-examines his own witness he must be held to no longer rely on him.

Mr. Chowdhury argues therefore that the position is thus: the prosecution have discredited or sought to discredit their own witness. He is the sole witness to prove their case.

It is the duty of the Judge to determine whether any evidence has been given on which the jury could properly find the question for the party on whom the onus lay. *Emperor v. Upendra Nath Das* (4).

Mr. Chowdhury argues that the prosecution has cross-examined their own witness. In other words they seek to discredit him and do not rely on him. They cannot ask the jury to find for the prosecution on the testimony of a witness whom they have themselves discredited. Hence the Judge should have told the jury that there was no evidence on which they could find the accused guilty and directed them to find a verdict of not guilty. Not having done so the Judge has misdirected the jury.

This contention in the circumstances seems to me to be well founded.

In view of the prosecution treatment of their own witness there was no evidence on which the accused could have been found guilty and therefore no evidence to go to the jury and the Judge should have directed them accordingly. There has been a serious misdirection therefore and we are obliged to set aside the verdict of the jury and the sentence passed by the Judge agreeing with the jury's verdict. In the circumstances of the case it would obviously be useless to re-try the accused and we order he be acquitted.

Lort-Williams, J.—I agree.

N K.

Sentence set aside.

(3) [1858] 1 F. & F. 254.

(4) [1914] 19 C. W. N. 653=21 C. L. J. 377=30 I. C. 113=16 Cr. L. J. 561 (F. B.).

* A. I. R. 1928 Calcutta 691

SUHRAWARDY AND GARLICK, JJ.

Rabindra Nath Das—Appellant.

v.

Jogendra Chandra Deb—Respondent.

Appeal No. 722 of 1926, Decided on 10th July 1928, from appellate decree of 2nd Sub-Judge, Sylhet, D/- 16th December 1928.

*** (a) Malicious Prosecution**—"Prosecution" includes such civil actions as may be the subject of a suit for malicious prosecution—Application under S. 195, Criminal P. C., to grant sanction to prosecute rejected—Such application was held to be prosecution giving rise to a claim for damages for malicious prosecution.

The definition of 'prosecution' is not confined to prosecution before a Magistrate or a criminal Court. If a Judicial Tribunal is moved which has the power to take criminal action against the person charged the requirement of the law is satisfied and a claim for damages for malicious prosecution will arise. The word "prosecution" includes such civil actions as may be the subject of a suit for malicious prosecution: (*Case-law Discussed*) [P 693 C 2]

An application was made to a Munsif for sanction under S. 195. The application was rejected. Thereupon plaintiff sued defendant for malicious prosecution. The defendant contended that a mere application for sanction to prosecute was not a prosecution.

Held: that the defendant was liable, as proceedings for sanction to prosecute before a Munsif, even if regarded as civil proceedings, can sustain an action for malicious prosecution: *A. I. R. 1922 Cal. 145, Rel. on.* [P 694 C 1]

(b) Malicious Prosecution—Prosecution not mala fide in the beginning—Its continuance after knowledge that the facts upon which it was based were not true may give rise to a claim for damages.

A prosecution may not be mala fide in the beginning; but the continuance of such prosecution after it was discovered that the facts upon which it was based were not true may give rise to a claim for damages for malicious prosecution: *Fitzjohn v. Mashinder*, (1861) 30 L.J. C. P. 257; 30 Bom. 37; 30 All. 525 and 12 C. L. J. 410, Rel. on. [P 694 C 2]

Gopal Chandra Das, Jogneswar Majumdar and Upendra Chandra Roy—for Appellant.

Birendra Kumar De—for Respondent

Suhrawardy, J.—This appeal arises out of a suit for damages for malicious prosecution upon the following facts. In a previous suit in which one Bola Nath was defendant the plaintiff who is a pleader practising in Habiganj in the district of Sylhet filed a written statement accompanied by a vakalatnama on 16th February 1923 purported to have been

signed by Bhola Nath and some other defendants. The vakalatnama showed that it was accepted by the plaintiff on the 7th February 1923 which was the date of the vakalatnama. On 28th February 1923 the plaintiff reported to the Court that his client Bhola Nath had died. In May 1923 the defendant applied to the Munsif for sanction under S. 195, Criminal P. C., to prosecute the plaintiff, his clerk and defendants 30 and 33 on the allegation that the signatures of Bhola Nath on the written statement and the vakalatnama were forgeries since he had died on 3rd February 1923. The application was registered as a miscellaneous case and the plaintiff was directed to show cause. On 9th June 1923, the date of the hearing of the case, the plaintiff filed certain papers from the criminal Court to show that Bhola Nath was alive on 7th February 1923. On the next date of the hearing, that is, 30th June 1923, the defendant applied for time to summon his witnesses. On 21st July 1923 he again applied for time to file certified copy of the death register; and again on 4th August he applied for time for the same purpose, but his application was rejected and the case dismissed. Thereafter the plaintiff instituted the present suit for recovery of damages for malicious prosecution and defamation. One of the points of law raised by the defence was that the suit for damages for defamation was not maintainable. A preliminary issue was framed and the Munsif, who heard it decided that the plaintiff was not entitled to recover damages for defamation. The case was again finally heard by the same Munsif and the plaintiff's suit was decreed for Rs 250 with costs. On appeal by the defendant the learned Subordinate Judge confirmed the decree and hence this second appeal by the defendant.

The first point raised by the learned advocate on behalf of the appellant is that there was no prosecution within the meaning of the law such as to give rise to the plaintiff's claim for damages for malicious prosecution. It is argued that a mere application for sanction to prosecute is not a prosecution. No authority has been cited in support of this proposition. But several cases have been placed before us in which it has been held that a mere filing of a petition in a criminal Court for necessary action on

which no action was taken or which was dismissed is not prosecution giving rise to the plaintiff's claim for damages. The view expressed in the reported cases is not consistent on this point and so far as this Court is concerned it was authoritatively laid down by Jenkins, C. J. in *Golapjan v. Bhola Nath* (1) that dismissal of a complaint under S. 203, Criminal P. C. does not give rise to a right to claim compensation for malicious prosecution. This view is supported by the opinion expressed by Fletcher, J. in *De Rozario v. Gulab Chand Anandaji* (2) and by the English authorities and by most of the text writers on the law of Torts. In *Yates v. The Queen* (3) on which reliance has been placed by a decision of this Court upon this point, Brett, M. R. observed, apparently by way of an obiter, at p. 657 :

For my own part I consider that laying the information before a Magistrate would not be the commencement of the prosecution because the Magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced.

Cotton, L. J. in the same case expressed his opinion thus :

It cannot be said that prosecution commences before a person is summoned to answer a complaint.

The law has thus been laid down in Clerk and Lindsell on Tort, 7th Edn. at p. 637 where the dictum of Brett, M. R. in *Yates v. The Queen* (3) has been approved and quoted :

A Justice of the peace can only take action on an information laid before him. If he thinks that it discloses ground for believing that an offence has been committed, he either issues a warrant for the arrest of the incriminated party or a summons commanding his attendance. But until he issues such summons or warrant the prosecution cannot be said to begin. The gist of the action for malicious prosecution is that the defendant set the Magistrate in motion.

The same view has been taken in Madras in the case of *Nurse v. Kustamji Dorabji* (4). In *C. H. Crowdy v. O'Reilly* (5) and *Bishnu Pergash v. Phulman Singh* (6) it is expressly laid down

(1) [1911] 38 Cal. 880=11 I. C. 311=15 C. W. N. 917.

(2) [1910] 37 Cal. 358=6 I. C. 877.

(3) [1885] 14 Q. B. D. 648=54 L. J. Q. B. 258=49 J.P. 436=52 L. T. 305=33 W. R. 482.

(4) A. I. R. 1924 Mad. 565.

(5) [1913] 17 C. L. J. 105=18 I. C. 737=17 C. W. N. 554.

(6) [1914] 20 C. L. J. 518=27 I. C. 449=19 C. W. N. 985.

that a prosecution for the purpose of a suit for damages for malicious prosecution begins as soon as information is laid before the Magistrate. The same view has been expressed in *Ahmedibhai v. Framji Edulji* (7). It is not necessary to pursue this matter further as the question raised in those cases does not affect that which presents itself for determination in the present case. It is accordingly necessary to determine the meaning of "prosecution." In Halsbury's Laws of England Vol. 19, p. 670 "prosecution" is thus defined :

A prosecution exists where a criminal charge is made before a Judicial Officer or Tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge is deemed to prosecute it and is called the prosecutor.

The expression "criminal charge" has been used in view of the decision in *Rayson v. South London Tramways Co* (8). In that case the question was whether proceedings taken against any person for having travelled in a carriage or in tramways avoiding or attempting to avoid payment of fare thus rendering himself liable to a penalty not exceeding 40 shillings are proceedings in respect of a criminal offence so that a suit for damages for malicious prosecution could lie against the accuser. Lord Esher M. R. decided that the proceedings were in respect of a criminal offence so that an action for criminal prosecution would lie. The learned Master of the Rolls however, cautiously observed :

Now there can be no doubt that if what was done to her was to take criminal proceedings against her and if the criminal process was carried on without reasonable and probable cause and maliciously then her action would lie. I am not prepared to say that, if the proceedings taken against her in this case were not criminal proceedings, the action would not lie if those proceedings were taken without reasonable and probable cause and maliciously.

In *Quartz Hill Gold Mining Co. v. Eyre* (9) "criminal charge" has been defined as including all indictments involving reputation or possible loss of property to the person. In *Balbhadra*

Singh v. Budri Shah (10) Viscount Dunedin in pronouncing the judgment of the Judicial Committee observed:

In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused the action will lie.

The definition of prosecution is not confined to prosecution before a Magistrate or a criminal Court. If a judicial tribunal is moved which has the power to take criminal action against the person charged the requirement of law is satisfied and a claim for damages for malicious prosecution will arise. In *Clerk and Lindsell on Torts*, at p. 637, there will be found the following passage:

To prosecute is to set the law in motion and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question.

In the present case the application was made to the Munsif for sanction under S. 195, Criminal P. C. The Court was moved to grant sanction to prosecute the plaintiff in this case and if the application were granted the plaintiff would have been liable to prosecution. Some difficulty in applying the law as laid down arises in this case owing to the fact that after obtaining such sanction the defendant might or might not have gone to the criminal Court and prosecuted the plaintiff. But the proceedings relating to the granting of the sanction, though they may not lead to imposition of fine or imprisonment, render the person charged liable to fine or imprisonment and therefore come within the meaning of the term. It is with diffidence that I venture to take this view and if the matter were *res integra* I am not sure what opinion I might form upon this point; but the question was raised and decided in a very recent case of this Court in *Narendra Nath De v. Jyotis Chandra Pal* (11). In that case the defendant had impugned the genuineness of the copy of the will filed by the plaintiff and applied for sanction to prosecute. It was said, following the dictum of Mookerjee, J., in *Crowdy v. O'Reilly* (5) that the maintainability of a suit for

(7) [1904] 28 Bom. 226=5 Bom. L. R. 940.

(8) [1893] 2 Q. B. 204=42 W. R. 21=62 L. J. Q. B. 593=69 L. T. 491=4 R. 522=58 J. P. 20=17 Cox. C. C. 691.

(9) [1883] 11 Q. B. D. 674=52 L. J. Q. B. 488=49 L. T. 249=81 W. R. 668.

(10) A. I. R. 1926 P. C. 46=29 O. C. 168=1 Luck. 215 (P. C.).

(11) A. I. R. 1922 Cal. 145=49 Cal. 1085.

malicious prosecution does not depend on there having been a prosecution in the sense in which the term is used in the Code of Criminal Procedure. It was further observed:

We hold that in the present case the allegations in the plaint that the defendant maliciously and without just, reasonable and probable cause instituted proceedings for sanction and that the plaintiff was obliged to defend the case are sufficient to disclose a cause of action.

Even if the proceedings for sanction to prosecute before the Munsif are regarded as civil proceedings they may sustain an action for malicious prosecution as involving false imputations touching the plaintiff's business reputation as a professional man: *Quartz Hill Mining Co. v. Eyre* (9), per Bowen, L. J., at p. 691:

The word "prosecution" includes such civil actions as may be the subject of a suit for malicious prosecution: Bigelow on Torts, p. 204.

The first objection of the appellant must therefore be overruled.

The next ground on which the appeal is based is that it has been found in the first judgment by the Munsif that the defendant had no ground for believing to be false the information he had received that Bhola Nath died on 3rd February 1923. It is contended that there was on this assumption no ground for holding that the action taken by the defendant was without reasonable and probable cause. There is no doubt that that observation was made in the judgment of the Munsif when he was trying the issue relating to the plaintiff's claim for damages for defamation. But when the same officer came to try the suit for damages for malicious prosecution he came to the conclusion that the defendant was not actuated by honest belief in making the application for sanction and the reason given by him apparently supports his opinion. The learned Munsif, after discussing the evidence, enters another finding that the conduct of the defendant even if it was honest amounted to a continuance of the prosecution maliciously after he became aware of the real state of things. The learned Subordinate Judge on appeal had endorsed that finding in these words:

It appears to me to be clear in this case that the defendant rushed to Court with the false accusation, never believing that there was any truth in the same; and even when there was unimpeachable evidence on the record to show the nature of his indictment he persisted in pressing the charge.

These findings are on the face of them findings of fact and we cannot say in second appeal that they are not supported by the facts found by the Courts below. It is well established that a prosecution may not be entirely mala fide; but the continuance of such prosecution, after it was discovered that the facts upon which it was based are not true, may give rise to a claim for damages for malicious prosecution. This doctrine is based upon the dictum of Coburn, C. J., in *Fitzjohn v. Mackinder* (12), where he says:

A prosecution though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate or if spontaneous from having been commenced under a bonafide belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass if the prosecutor having acquired positive knowledge of the innocence of the accused perseveres *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused.

This view has been adopted in *the Town Municipality of Jambusar v. Gireja Sankar Nasiram* (13) and by the Judicial Committee in *Gayaprosad v. Bhakat Singh* (14) and also by this Court in *Shama Bibi v. Chairman of Baranagore Municipality* (15). It has been found by both the Courts below that the papers of the criminal Court were produced by the plaintiff in the sanction matter on 9th June 1923 which clearly showed that Bhola Nath, who was the defendant, was alive on 7th February 1923 on which date the written statement and the vakalatnama were purported to have been signed. In spite of those documents the defendant applied for time, on 30th June 1923, for summoning his witnesses thereby giving a clear indication that he meant to press his application for sanction. On two subsequent days he wanted time to file a certified copy of the death register presumably for the purpose of proving that Bhola Nath was not alive on the 7th February. In this case, however, the defendant has not attempted to prove that his case in the sanction matter was correct. In his deposition he says that he had no idea that the pleader and his clerk were in the conspiracy and also if Bhola Nath was not known to

(12) [1861] 30 L. J. C. P. 257=9 C. B. (N. S.), 505=7 Jur. (N. S.) 1283=9 W. R. 477=4 L. T. 149.

(13) [1906] 30 Bom. 37=7 Bom. L. R. 655.

(14) [1908] 30 All. 525=35 I. A. 189=5 A. L. J. 665=11 O. C. 371 (P. C.).

(15) [1910] 12 C. L. J. 410=6 I. C. 675.

them they might have been deceived by anyone falsely personating Bhola Nath before them. He admits that he came to know from the papers of the criminal case that the information that Bhola Nath was dead was not true. His subsequent conduct therefore amounted to continuing the prosecution maliciously though it might have been originally started under a bona fide mistake. With regard to the finding of malice and want of probable and reasonable cause, the findings of the Court below are clear and supported by the evidence in this case. Whatever ground of suspicion the defendant might have had against the other persons against whom he applied for sanction he could have no ground for asking for sanction to prosecute the plaintiff who is a respectable pleader as observed by the Munsif and who is not expected to have personal knowledge of matters relating to the identity of clients. The endorsement on the back of the vakalatnama showed that he had received it through another person. There cannot therefore be any reasonable or probable cause for asking permission to prosecute the pleader. As regards malice the finding of the Courts below is that at the time when he made the application, and after it, the defendant went about bragging that he had caught the pleader in a trap. One must not forget that in the original title suit the defendant was a plaintiff and for some purpose or other he thought it to be to his advantage to implicate the pleader.

Considering all the facts and circumstances of this case I think that the Courts below have taken a correct view of the matter and the appeal is therefore dismissed with costs.

Garlick, J.—I agree.

N.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 695

B. B. GHOSE AND CAMMIADÉ, JJ.

Sris Chandra Choudhury—Appellant.

v.

Bhaba Tarini Devi—Respondent.

Appeal No. 33 of 1926, Decided on 23rd November 1927, from the original decree of 2nd Addl. Dist. Judge, Zillah Faridpur, D/- 21st November 1925.

(a) *Succession Act*, (1925), S. 263 (d)—*Distribution of legacies only left to be done—Grant does not become "useless and inoperative."*

A grant of letters of administration does not become "useless and inoperative" if the administrator has nothing more to do than to distribute the legacies to the several legatees. S. 263, Cl. (d), contemplates that there is an administrator, who under certain circumstances is incapable of acting, so that the estate is practically without an administrator. [P 696 C 2]

(b) *Succession Act* (39 of 1925), S. 263 *Expl.*—*Wilful withholding of legacies is not a just cause—Remedy by legatee described.*

Wilful withholding by the administrator of the legacies payable under the will would be maladministration but mal administration is not a just cause for revocation of the grant. 24 Cal. 95, *Rel. on.* [P 696 C 2]

The remedy of a legatee to obtain the legacy from the hands of the administrator is either by a suit for obtaining the legacy or for administration of the estate. [P 696 C 2]

Nirmal Chandra Chakravarty and *Ajendra Nath Dutta*—for Appellant.

Brojo Lal Chakravarty, Radha Binode Pal and *Jitendra Mohan Bannerjee*—for Respondent.

Judgment.—This appeal arises out of an application for revocation of a grant of letters of administration which was made under S. 50 of the Probate and Administration Act now replaced by S. 263, Succession Act of 1925. The letters of administration were granted with the will annexed of the testator who died in the year 1883. By his will he gave his property to his two grandsons Satis and Sris and he made provisions for payment of annuities to his daughter Bama Sundari and his daughter-in-law Sakhi Sundari. Letters of administration were granted to Bama Sundari in 1901 and she was administering the estate till her death on 21st June 1923. After the death of Bama Sundari the present opposite party Sris applied for grant of Letters of Administration for the unadministered portion of the estate. The present petitioner for revocation objected to it, but letters were granted to the objector Sris on 19th June 1924. The other annuitant Sakhi Sundari died some time in October 1924. The present application was made by the widow of Satis for revocation of the letters of administration on 21st March 1925. The grounds stated for revocation were two :

(1) That the estate having been fully administered, the grant has become useless and inoperative through circumstances ; and

(2) the opposite party to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account as ordered by the Court granting administration.

It has been found by the learned Judge below that the second ground has not been substantiated. As a matter of fact the administrator has rendered accounts. He has, however, made the order for revocation of the grant on the ground that the estate has been fully administered. There is some confusion of ideas when it is stated that the estate has been fully administered. Because, if the estate has been fully administered, there is no occasion for an application for revocation of the grant of the letters of administration. What the applicant for revocation must have meant is—and that seems to be the idea of the learned Judge,—that nothing further has to be done by the administrator except to make over the legacies to the legatees. So long as the legacies are not paid, it cannot be said that the estate has been fully administered. The question, however, is whether the application comes within any of the provisions of S. 263 of the Act. It is now well settled that the Courts in India can revoke a grant of letters of administration only according to the provisions of the section which previously was S. 10, Probate and Administration Act: see the cases of *Annoda Prosad v. Kali Krishna* (1), *Official Trustee of Bengal v. Kumudini Das* (2). It is observed by the learned Judge that the present application comes within Cl. (d) of the explanation of "just cause" in S. 263 of the Act and upon that ground he has made an order for revocation of the grant. The administrator appeals against that order and it is contended on his behalf that the present question does not come within that clause while it is contended, on the other side, that it does. Under that clause it is provided that a "just cause" shall be deemed to exist where "the grant has become useless and inoperative through circumstances." It seems to me that it would be straining the meaning of the expression "useless and inoperative" if it is said that a grant becomes useless when the administrator has nothing more to do than to distribute the legacies to the several legatees. The

illustration as to how a grant becomes useless and inoperative is given in illustration (viii), S. 263. It seems to me that the clause contemplates that there is an administrator who, however, under certain circumstances, is incapable of acting so that the estate is practically without an administrator; and it does not mean that there is an administrator but he is wilfully withholding the legacies payable under the will. That would be maladministration by the administrator, but it has been held that maladministration by an administrator is not a just cause for revocation of the grant: see the case of *Annoda Prosad v. Kali Krishna* (1). The grant does not become useless or inoperative if an administrator is acting under the grant and is capable of doing so. Further, it would appear to be extremely inconvenient if the grant is revoked on the ground that the administrator has no further work to do and he ought to distribute the legacies at once. If that were done, difficulties and complications would arise, and notwithstanding the saving provisions of S. 297, as to what would happen when the grant of letters of administration is revoked, it would be difficult for the administrator who has acted under such revoked grant to reimburse himself in respect of any payments made by him under the grant. The remedy of a legatee to obtain the legacy from the hands of the administrator is either by a suit for obtaining the legacy or for administration of the estate: see the case of *Okhoy Coomar v. Koylash Chunder* (3). It seems that the order of revocation made by the learned Judge does not fall within the provisions of the law and is, therefore, wrongly made.

It may be added that the learned vakils on either side could not point out any authority with regard to the question before us. It is well known that in England the right to revoke a grant is not limited, as here, by statutory provisions. No authority has been pointed out to us that in England a grant of probate or letters of administration was ever revoked on the ground that the administrator has nothing further to do but simply to distribute the legacies and it seems to us that the power of the Courts in India should not be exercised

(1) [1897] 21 Cal. 95.

(2) [1910] 37 Cal. 387=6 I. C. 973.

(3) [1890] 17 Cal. 387.

with regard to the revocation of a grant deliberately and intentionally and not by accident or inadvertence, but so, that the mind of the person who does the act goes with it : *A. I. R. 1928 P. C. 24, Foll.* [P 699 C 2]

The appeal is, accordingly, decreed : the judgment and order of the Court below must be set aside and the application dismissed. Having regard to the fact that there is no reason why the administrator should not distribute the legacies and it seems to us that he is in possession of the properties without any just reason, we make no order as to costs either in this Court or in the Court below.

A.L/R.K.

Appeal decreed.

A. I. R. 1928 Calcutta 697

CUMING AND MUKHERJI, JJ.

Begraj Gadhuram—Plaintiff — Appellant.

v

E. I. Ry. Co. and another—Defendants — Respondents.

Appeal No 1382 of 1925, Decided on 24th February 1928, from appellate decree of Sub-Judge, Asansole, D/- 14th February 1925.

(a) *Railways Act, S. 72—Notice—Sufficiency of notice must be determined on facts of each case.*

It is always a question of fact to be determined in view of the circumstances of each particular case whether a notice is sufficient or not. [P 698 C 1]

(b) *Railways Act, S. 72—To hold railway liable, theft by the railway servants or their wilful neglect has to be proved—Theft by an outsider has no place.*

For the case to fall within the exception one of two things will have to be proved ; either that the loss was due to theft by servants of the Railway Administration or that the loss was due to wilful neglect on the part of the Railway Administration or its servants. Theft by an outsider has no place except as loss due to wilful neglect on the part of the Railway Administration or its servants. [P 699 C 1]

(c) *Railways Act, S. 76—Wilful neglect has to be proved by party alleging it*

The onus of bringing the case within the exception mentioned in Risk-note form B and of establishing wilful neglect is on the person claiming damages : 16 C. W. N. 766 ; 22 C. W. N. 622 ; *A. I. R. 1924 Cal. 725* ; 39 *All. 418* ; and *A. I. R. 1924 All. 177, Foll.* [P 699 C 1]

(d) *Railways Act, S. 72 — "wilful neglect" means act is done deliberately and intentionally.*

"Wilful neglect" means that the act is done

(e) *Railways Act, S. 72—Railway is not liable for damages if requirements S. 151, Contract Act, are fulfilled—Contract Act, S. 151.*

Whether the loss is due to theft by railway servants or by outsiders, the railway is not responsible if they have fulfilled the requirements of S. 151, Contract Act. [P 699 C 2]

(f) *Railways Act, S. 72—"Loss" explained.*

(Obiter) The term "loss" should be construed as including cases where the article consigned is loss to the consignor as such article. [P 698 C 2]

Bankim Chandra Mukherjee and Apurba Charan Mukherjee for Charu Chandra Ganguly—for Appellant.

Amarendra Nath Bose and Ambica Pada Chaudhury—for Respondents.

Mukherji, J. — The suit which has given rise to the appeal was for recovery of damages for non-delivery of a package of cotton piecegoods which, together with ten such packages, formed a consignment which was dispatched to the plaintiffs at Raniganj, a station on the E. I. Ry., from Aserva, a station on the G. I. P. Ry. The two railway administrations were made defendants in the suit. The Munsif decreed the suit against the E. I. Ry., only, but on appeal preferred by the said defendant the Subordinate Judge reversed that decision and dismissed the suit. The plaintiffs have preferred this second appeal.

The Subordinate Judge held that though the consignment was covered by a Risk-note in form B the railway was not absolved as the case came within the exception mentioned in the Risk-note, that the loss was due to theft by railway servants or by outsiders, and that if it was due to theft by outsiders there was wilful neglect of the Railway Administration or the railway servants. He held, however, that the notice of claim that was served under S. 77, Railways Act, was not valid and so he dismissed the suit.

The appellants' contention is that the learned Subordinate Judge has erred in law in holding against the validity of the notice, and that if this contention be accepted the appellants, on the other findings of the learned Subordinate Judge, would be entitled to a decree.

Now as regards the validity of the notice, what has been found is this : In the said notice every particular was correctly stated except the name of the station from which the consignment was dispatched, instead of Aserva which was the correct name, Ahmedabad was mentioned. The Subordinate Judge has expressed the view that S. 77 of the Act requires that the notice must be such as would enable the Administration to see at once the identity of the consignment without further enquiry at other station or stations.

The section, however, prescribes no such thing, and it is always a question of fact to be determined in view of the circumstances of each particular case whether the notice is sufficient or not. The defendants never raised this question in their pleadings and contented themselves with a denial of the service of the notice. In these circumstances it is not possible to say that the notice was not adequate and in view of the pleadings the question of its adequacy can hardly arise. The finding of the Subordinate Judge in respect of this matter must accordingly be reversed. As already stated the appellants' contention is that with the reversal of this finding he would be entitled to a decree. With this contention I do not agree, for several other questions will now arise which will have to be considered and discussed.

The respondents have argued that the case does not come within the exception mentioned in the Risk-note as there was no loss of a complete package, the gunny covering of the package not having been stolen. They rely upon several decisions most of which relate to cases of loss of ghee or oil contained in cans or tins, in which there was wholesale abstraction of the contents, but the receptacles were delivered. Of them may be mentioned the cases of *Moheswar Das v. Carter* (1), *E. I. Ry. Co. v. Shub Prosad Bhakat* (2), *E. I. Ry. Co. v. Nilkanta Roy* (3), *Toonya Ram v. E. I. Ry. Co.* (4), *Kali Das v. E. I. Ry. Co.* (5), *B. B. & C. I. Ry. v. Ambalal Sewaklal* (6), *Mulji v. S. M. Ry. Co.* (7). It is not profitable to discuss

these cases individually as the argument so far as this matter is concerned is based upon a misconception. What was found by the learned Subordinate Judge was that on one particular date the chaukidar who was in charge of the goods yard and who first noticed the loss saw that the contents of the package were gone and only the gunny covering was left, but there is nothing to show that even that gunny covering was delivered to the plaintiffs or tendered for delivery. There was therefore loss of one complete package so far as the plaintiffs are concerned. Perhaps, the true view to be taken of the matter is what Fletcher, J., said at the conclusion of his judgment in the case of *E. I. Ry. Co. v. Nilkant Roy* (3), namely that

it is impossible to say that there was loss of complete packages when such material portions of the packages as the tins were delivered to the consignee.

The view that there is no loss, whatever happens to the contents, if the character of the package as such is unaffected by damage sustained by its outward envelope alone, did not find favour with the learned Judges of the Madras High Court in the case of *M. & S. M. Ry. Co. v. Subba Row* (8). Referring to the Bombay and Calcutta decisions on which the respondents rely Seshagiri Ayyar, J., said in that case :

The Bombay and Calcutta cases do not discuss the matter and it seems to me that they have put too narrow a construction upon the expression "loss." I am inclined to the view that the term "loss" should be construed as including cases where the article consigned is lost to the consignor as such article.

As at present advised this view is one that commends itself to me. But as already stated the question does not arise and I shall not discuss it any further, nor express any definite opinion.

Then as regards the merits the finding of the learned Subordinate Judge is worded thus :

The circumstantial evidence proves that the loss was due to theft of railway servants or in case of theft by outsiders such theft was the effect of wilful neglect of the Railway Administration or railway servants.

This finding is defective as well as bad and for the reasons to be presently mentioned. All that need be said of the facts is that the consignment came to

(1) [1884] 10 Cal. 210=12 C. L. R. 122.

(2) [1913] 17 C. W. N. 529=18 I. C. 216.

(3) [1914] 41 Cal. 576=19 C. L. J. 142=22 I. C. 679=19 C. W. N. 95.

(4) [1903] 30 Cal. 257=7 C. W. N. 370.

(5) [1917] 21 C. W. N. 815=40 I. C. 626.

(6) High Court decisions of Ry. Cases 48. *

(7) [1914] 14 M. L. J. 33.

(8) [1920] 43 Mad. 617=38 M. L. J. 360=11 M. L. W. 357=55 I. C. 751=(1920) M. W. N. 198.

Jhajha station on the E. I. Ry. on the morning of 18th December 1921 from which date to 2nd January 1922 there was a general strike of the menials on the railway and the bale in question was stolen by somebody during this period. For the case to fall within the exception one of two things will have to be proved; either that the loss was due to theft by servants of the Railway Administration or that the loss was due to wilful neglect on the part of the Railway Administration or its servants. The words in the risk-note are:

Except for the loss, etc. . . . due either to wilful neglect of the Railway Administration or to theft by or to the wilful neglect of its servants etc.

In the risk-note, properly read, theft by outsiders has no place except as loss due to wilful neglect on the part of the Railway Administration or of its servants. The onus of bringing the case within the exception, and of establishing wilful neglect is on the plaintiffs [*H. C. Smith v. G. W. Ry.* (9), *Sheohar Ram v. B. N. W. Ry. Co.* (10), *E. I. Ry. v. Kanak Behari* (11), *E. I. Ry. v. Jagpat Singh* (12), *E. I. Ry. v. Nathunall Behari Lal* (13) *E. I. Ry. Co. v. Sriram Mahadeo* (14)] On the materials that are on the record the Subordinate Judge has not been able to find affirmatively that the loss was due to theft by railway servants. He has only found that the theft was either by railway servants or by outsiders. This finding will help the plaintiff in bringing the case within the exception if only he can show that the theft was due to wilful neglect on the part of the Railway Administration or of its servants. Dealing with the question of wilful neglect the Subordinate Judge has said a good deal to which it will be necessary to refer presently but there is one clear finding of fact which he has recorded in his connexion and which in my opinion is sufficient to establish neglect. That finding is to the effect that the wagon was not padlocked. Whether padlocking would have been a sufficient preventive for theft in view of the circum-

stances of the case is a somewhat difficult question, but that this omission facilitated the theft is scarcely to be doubted and it is therefore clear that there was neglect and the loss is, partly at any rate, due to such neglect. The question, however, is whether this neglect was "wilful." The Judicial Committee has in a very recent case explained the expression "wilful neglect" in accordance with the meaning given to it by Lord Russell, in *R. v. Senior* (15) as meaning

that the act is done deliberately and intentionally and not by accident or inadvertence, but so that the mind of the person who does the act goes with it: *Ardeshir Bhicaji v. Agent G. I. P. Ry. Co.* (16).

The question then is whether this neglect or any neglect that may have been proved was "wilful" within the aforesaid meaning. The other findings of fact from which the Subordinate Judge has concluded that there was "wilful neglect" and to which reference will presently be made in another connexion do not help us in answering this question.

If on a consideration of the materials on the record and the circumstance of the case it is possible to arrive at the conclusion that there was "wilful neglect" on the part of the Railway Administration or of its servants the case will come within the exception. But a further question will then arise, namely, as regards the measure of responsibility of the Railway Company for the loss that has taken place. That measure is laid down in S. 72, Railways Act. Whether the loss was due to theft by railway servants or by outsiders, the Administration is not responsible if they have fulfilled the requirements of S. 151, Contract Act. The finding of the Subordinate Judge, however, suggests that in the case of theft by railway servants the Administration is ipso facto liable. This view is not tenable. To establish the position that the standard of care required by S. 151, Contract Act, was not adhered to reliance has been placed on certain findings of the Judge on the question of "wilful" neglect." The learned Subordinate Judge has said in his judgment:

(15) [1899] 1 Q. B. 293=68 L. J. Q. B. 175=79 L. T. 562=15 T. L. R. 102=19 Cox. C. C. 219=33 J. P. 8=17 W. R. 367.

(16) *A. I. R.* 1928 P. C. 24=52 Bom. 169=55 I. A. 67 (P. C.).

(9) [1922] 1 A. C. 178.

(10) [1912] 16 C. W. N. 766=15 I. C. 56.

(11) [1918] 22 C. W. N. 622=44 I. C. 691.

(12) *A. I. R.* 1924 Cal. 725=51 Cal. 615.

(13) [1917] 39 All. 418=39 I. C. 130=15 A. L. J. 321.

(14) *A. I. R.* 1924 All. 177=46 All. 125.

There is no evidence to show that the strike was an unexpected one. The defence does not mention the strike in its written statement. A strike was refusal of the servants of the Railway Administration to work when they were still servants of the Administration and legally bound to be taken to task for such conduct without notice and without terminating service lawfully those menials were liable for damages. Any refusal of such menials to guard the wagon amounted to wilful neglect of the servants of the East Indian Railway Company. There is nothing to show that the strike was not the result of unfair or tactless attitude of the Railway Administration. Mostly injustice or want of tact drives poor menials to strike in India.

If this finding of "wilful neglect" is to have any bearing on the question whether the requirements of S. 151, Contract Act, have been complied with or not, it is clear to my mind that it is vitiated as it has proceeded upon a confusion of ideas which is the result of mixing up how the Administration should have behaved towards its servants with how the Administration should have dealt with the goods. As far as I can make out these findings were not meant to refer to S. 151, Contract Act, at all. A proper finding as regards that section will, therefore, have to be arrived at.

The result is that the appeal will succeed and the decree of the Subordinate Judge being set aside, the case will be sent down to his Court so that he will in the first place come to a finding on the question whether the loss was due to wilful neglect on the part of the Railway Administration or its servants.

If he answers this question in the affirmative the defendants will not be protected by the risk-note and it will be necessary for him to decide a further question that will arise and which in the words of S 151, Contract Act, may be formulated thus :

Whether the Railway Administration took as much care of the lost package as a person of ordinary prudence would under similar circumstances take of similar goods of his own.

In determining this question he will not take it that we are in any way approving of the suggestion to be found in the judgment under appeal and which is to the effect that the strike was not an unexpected one, but should hold that the strike was an unforeseen event unless he finds evidence on the record for committing to a contrary conclusion.

Costs will abide the result.

As regards the Bombay Baroda and Central India Railway Company the appeal is dismissed ; and the said respondents will be entitled to their costs in the appeal.

Cuming, J.—I agree

A.L./R.K.

Case remanded.

A I. R 1928 Calcutta 700

CUMING AND LORT-WILLIAMS, JJ.

Ajgar Shaik and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 779 of 1927, Decided on 28th March 1928, from judgment of Sess. Judge, Khulna.

(a) *Penal Code, S. 100—Detailed circumstances must be set out—No case for private defence is possible when the accused denies the striking of the blow.*

In order to establish the exercise of the right of private defence, it is absolutely necessary to detail the exact circumstances which led the accused to strike the blow in question. Obviously such a defence can seldom, if ever, successfully be made out when the accused's case is that he did not strike the blow at all. [P 701 C 2]

(b) *Criminal P. C., S. 233—Joinder of several offences in a single charge is only an irregularity—Criminal P. C., S. 537.*

The joinder of two offences in a single charge is only an irregularity cured by S. 537, Criminal P. C., and not an illegality: 40 Cal. 846 Diss. from ; A. I. R. 1922 Cal. 573; A. I. R. 1925 Cal. 341; and A. I. R. 1927 Cal. 17; Dist.; 19 C. W. N 972, Foll. [P 701 C 2]

(c) *Criminal P. C., S. 238 (2)—Scope.*

It is not the duty of the Judge to put to the jury hypothetical cases unsupported by any evidence. [P 702 C 2]

Harendra Nath Mukherjee—for Appellants

Santosh Kumar Pal—for the Crown.

Cuming, J.—This is an appeal by three persons Ajgar Shaikh, Soleman Shaikh and Ekabbar Shaikh. They were tried by the learned Sessions Judge of Khulna with the aid of a jury. The jury found Ajgar and Soleman guilty under S. 326 and also under S. 447, I. P. C. The learned Judge sentenced Ajgar to one year's rigorous imprisonment under S. 326 and Soleman to six months' rigorous imprisonment under S. 326. The jury also found Ekabbar guilty under Ss 323 and 447, I. P. C. The learned Judge sentenced him to six weeks rigorous imprisonment under S. 323. The learned Judge sentenced all the three

appellants to one month's rigorous imprisonment under S. 447, I. P. C. The sentences under S 447 in the case of all the accused persons were to run concurrently with the sentence under Ss. 326 and 323, I. P. C.

The facts very briefly are these: There are three brothers Bahadur, Sadeq and Kabiladdi, who live in the same or adjacent homestead. Bahadur is the father of the three appellants now before the Court. In the yard of Kabiladdi there is a certain plum tree which is apparently the cause of the present trouble. On the day of occurrence Maminaddi, the son-in-law of Kabiladdi, cut a branch of the plum tree. Bahadur objected to the tree being cut. Maminaddi apparently then went away. When Kabiladdi returned from a market to which he had gone he was told what had happened. On this a quarrel arose between Kabiladdi on one side and Bahadur on the other. Apparently the quarrel took place from their respective houses. Then Bahadur and the three present appellants rushed up to the plum tree, Ekabbar and Bahadur carrying lathis and Soleman and Ajgar carrying axes. Apparently they had an idea of cutting down the plum tree by force. Ajgar hit the tree several times with his axe. Kabiladdi then came up to the tree when Ekabbar hit him on the head with a lathi. Kiamuddi, the son of Kabiladdi, then ran to the help of his father Kabiladdi. He was also beaten on the head with a lathi by Ekabbar. Soleman hit him on the elbow with an axe and Ajgar hit him on the back and the waist with an axe. Hearing the row Sadeq came to the scene. He was also beaten on the head with a lathi by Ekabbar. Soleman then hit him on the back with an axe. Ajgar also hit him on the back with an axe. Bahadur and Ekabbar beat Sadeq with lathis. This is shortly the case for the prosecution.

The defence admits to some extent the incident of the afternoon. With regard to the fight in the evening Ajgar says he was not at home at the time, Bahadur says he was lying ill at home. Soleman admits some sort of occurrence but his version being that the plum tree belongs to Bahadur, that there was an altercation over it between their mother on one side and Kabiladdi on the other, that their mother protested when Kabiladdi proceeded to cut the tree, that Kabiladdi

thereupon was about to assault their mother who fell down on the ground, that they ran to her assistance on which Maminaddi hit Ekabbar with a spear and that Soleman also received some injuries from the axe in the hand of Kabiladdi, whether intentionally inflicted or not he could not say.

The pleader who appears for them as is usual in such cases raises a question of right of private defence. I may at once point out that it was not the case of the accused that they inflicted these injuries on the other party in the exercise of the right of private defence. On the contrary their case was that they did not inflict them at all. Merely to state that the other party wounded them is not the same as to say that they struck the opposite party in the exercise of the right of private defence. In order to establish the exercise of right of private defence it is absolutely necessary to detail the exact circumstances which led them to strike the blow in question. Obviously such a defence can seldom if ever successfully be made out when the accused's case is that they did not strike the blow at all.

The first point raised by the learned vakil for the appellant is that the learned Judge has tried the accused for two distinct offences which have been included in one single charge. He contends that it is illegal to do so. He contends that under S. 233, Criminal P. C., for every distinct offence a separate charge is necessary and that the omission to draw up a separate charge for each distinct offence is an illegality which vitiates the whole trial. On this point the learned vakil has referred us to a large number of cases in which apparently different views have been taken as to whether inclusion of two distinct offences in one charge is or is not illegal. In the case of *Aqar Ali Biswas v. Emperor* (1) it was no doubt held that a single charge relating to several distinct offences is illegal. Since that decision, however, we have the case of *Ram Suba Singh v. Emperor* (2) where it has been distinctly held that joinder of two distinct offences in a single charge amounts to an irregularity only cured by S 537.

(1) [1913] 40 Cal. 846=17 C. W. N. 827=20 I. C. 609=14 Cr. L. J. 449.

(2) •[1915] 19 C. W. N. 972=30 I. C. 465=16 Cr. L. J. 641.

Criminal P. C., and not an illegality. As far as I can see this decision has never been dissented from. We are referred to the case of *Radha Nath Karmakar v. Emperor* (3) for an authority that joinder of several distinct offences in a single charge is an illegality and is not curable by S. 537, Criminal P. C. I have read the judgment with considerable care and I admit I cannot find this principle propounded in that case. As far as I can see the learned Judges there seem to have been of opinion that a charge which relates to more than one distinct offence is a bad charge. But the learned Chief Justice in disposing of that case went on to say:

But when he (the learned vakil) went further and argued that because that particular charge was in contravention of S. 233 the whole trial was vitiated I... am unable to agree with him.

As far as I can see the learned Judges in that case never really decided whether such a joinder of offences in one charge, was or was not an irregularity or illegality. The learned Chief Justice remarks at p. 99 that

strictly speaking there should have been separate charges in respect of these distinct offences. Consequently, in my judgment, we shall be on the safe side in setting aside the convictions under S. 149 read with Ss. 325 and 328.

That will be a very long way from saying that inclusion of distinct offences in a single charge is an illegality. As far as I can see the learned Judges avoided deciding that point.

The next case to which we have been referred is the case of *Alimuddin Naskar v. Emperor* (4). This case, far from supporting the view which the learned vakil has asked us to take on this point is distinctly against him. Walmsley, J., in dealing with the case remarks that it is merely a technical defect that the seven inmates of Momraj's hut are all named in one charge of murder instead of a separate charge of murder being drawn up in regard to each. To that I attach no importance.

The next decision to which we have been referred is the case of *Azimddy v. Emperor* (5). I have read this decision also very carefully; and as far as I can see the learned Judges did not decide the particular point with which we are now concerned. In this particular decision we have been referred to that por-

tion of the decision which appears at p. 248 of the report. A perusal of this judgment clearly shows that the learned Judges did not decide whether such joinder of offences in a single charge was or was not an illegality. They no doubt remark:

It is clear that the proper way would be to have had three separate heads of charges.

I am quite clear in my mind that joinder of two offences in a single charge is an irregularity and not an illegality and the only question is whether the appellants have been prejudiced by this. It has not been suggested to us that they have.

The next point, if I understand the learned vakil for the appellants correctly, is that the learned Judge has not put to the jury the case of the accused as to the right of private defence. The simple answer to this contention is that it was never the case of the accused that they acted in the exercise of the right of private defence. Their case was that they never struck the opposite party at all. Obviously if they do not admit striking the opposite party they can hardly be heard to urge that they struck the opposite party in the exercise of the right of private defence; for, as I have already remarked, unless you make out the exact circumstances in which you struck the blow it is not quite possible to say whether such a blow was struck in the exercise of the right of private defence. The accused possibly may plead that they were not there and at the same time plead that they acted in the right of private defence. If there is evidence either from the evidence of the prosecution witnesses or defence witnesses that they did so then of course the Judge must put the case of private defence to the jury. But I cannot discover in the present case that there is any evidence to show that they did so and therefore there is no case of the right of private defence to be put to the jury. It is not the duty of the Judge to put to the jury hypothetical cases unsupported by any evidence.

The learned vakil has next argued that the learned Judge has misdirected the jury about the boundaries. In view of the fact that the accused did not set up the right of private defence nor is there any evidence that they were acting in the exercise of the right of private de-

(3) A. I. R. 1922 Cal. 573=50 Cal. 94.

(4) A. I. R. 1925 Cal. 341=52 Cal. 253.

(5) A. I. R. 1927 Cal. 17=54 Cal. 237.

fence the question of boundaries has nothing to do with the case and is entirely irrelevant.

This disposes of all the objections raised by the learned vakil for the appellants.

The appeal therefore stands dismissed. The accused if on bail must surrender to serve out their sentences.

Lort-Williams, J—I agree.

A L./R.K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 703 (1)

CHOTZNER AND LORT-WILLIAMS, JJ.

Daulat Ali Molla—Petitioner.

v.

Hedarl Molla and others—Opposite Parties.

Criminal Revn. No. 1334 of 1927, Decided on 2nd March 1928.

Criminal P. C., S. 146—No evidence on record—Order attaching property under S. 146 cannot be made.

Section 146 presupposes an enquiry by the Magistrate on the evidence recorded and the object of S. 146 is to give the Magistrate jurisdiction to attach property if, upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under S. 145 was drawn up, and where there is no evidence of any kind on record order attaching property under S. 146 is without jurisdiction. [P 703 C 1, 2]

Suresh Chandra Taluqdar—for Petitioner.

Judgment.—This rule was granted to show cause why the order of the Magistrate attaching certain property under S. 146, Criminal P. C., should not be vacated on the ground that the case was called on for hearing before 11 a. m. which was the time fixed by the Court for its sitting and, therefore, the parties were unable to attend the Court. The learned Additional District Magistrate in his explanation says :

There is nothing on the record to show that the case was called on for hearing before 11 a. m. The Court generally sits at 11 a. m. or after but not before 11 a. m. It was also not stated before me that the case was taken up by the trying Magistrate before 11 a. m.

Prima facie, therefore, this ground has little weight. But it appears to us, on a perusal of the record, that the order complained of cannot be maintained on another ground. S. 146, Criminal P. C., presupposes an enquiry by the Magistrate on the evidence recorded and the object of S. 146 is to give the Magistrate jurisdiction to attach pro-

perty if, upon the evidence so recorded, he is unable to come to a finding as to who was in possession on the date on which the order under S. 145 of the Code was drawn up. In this case apparently there was no evidence of any kind. Therefore we cannot but hold that the order attaching the property under S. 146, Criminal P. C. was without jurisdiction. The order has the effect of debarring the lawful owner from enjoying the property until such time as he recovers a decree in the civil Court and of putting him in the embarrassing position of being the plaintiff in the civil Court. We think, therefore, that on this ground the rule must be made absolute and the order set aside. It is always open to the Magistrate in the case of a further apprehension of a breach of the peace arising to take such steps as he may think necessary to prevent it.

N.K.

Rule made absolute.

A. I. R. 1928 Calcutta 703 (2)

MITTER, J.

Abdul Munser Munshi and others — Plaintiffs—Appellants.

v.

Yakub Talukdar—Defendant—Respondent.

Appeal No. 2710 of 1926, Decided on 30th April 1928, from appellate decree of Second Sub-Judge, Pabna. D/- 10th July 1926.

Evidence Act, S. 13—Mortgage deed stating rent payable to superior landlord—Mortgage debt paid off—Superior interest purchased by mortgagee—Suit for recovery of rent at an enhanced rate—No proof of enhanced rent—Mortgage bond is admissible to prove the rent.

Defendant mortgaged the rent land to the plaintiff in 1899. The mortgage deed stated the rent in respect of that holding payable to the superior landlord as Rs. 18. In 1904 the mortgage debt was paid off, the plaintiff purchased the superior interest and claimed rent at the rate of Rs. 24, although there was no proof of such enhancement.

Held : that the question as to what the amount of rental was, was one of the essential terms of the mortgage bond. That the document was admissible in evidence as it was a transaction by which the right of the defendant to the land was asserted and for the definition of that right, the amount of rent had to be stated : A. I. R. 1927 Cal. 1, Dist. [P 404 C 2]

Jatish Chandra Guha—for Appellants.

Krishna Kamal Moitra — for Respondent.

Judgment. — This is plaintiffs landlords' appeal and arises out of a suit for rent. Plaintiffs claimed rent at the rate

of Rs. 24-20. The defence of the defendant was that the rent was payable at the rate of Rs. 18 per annum. Plaintiffs purchased the superior interest in the year 1914. In the year 1899 the defendant mortgaged the rent-land to the plaintiff and borrowed a certain sum of money. In that mortgage-deed it was stated by the defendant that the rent in respect of this holding payable to the superior landlord was Rs. 18. In 1904 the mortgage debt was paid off and as I have already stated ten years after, in 1914, plaintiff purchased the superior interest. The Court of first instance held that the collection papers on which the plaintiffs relied were not genuine and should not be relied on, and that the plaintiffs had failed to establish that Rs. 24-20 was the rental payable in respect of the holding. The Court of first instance further relied on the mortgage bond and held that the defendant's case that the rent was Rs. 18 and odd and not Rs. 24-20 was established by the statement in the mortgage bond. An appeal was taken to the Subordinate Judge of Pabna and the learned Subordinate Judge affirmed the decision of the Munsif.

A second appeal has been taken to this Court and the main point taken here is that the Courts below should not have relied on the statement in the mortgage bond having regard to the provisions of S. 21, Evidence Act. It is said that at the time when the mortgage bond was executed plaintiffs did not acquire the superior interest in respect of holding in suit and that any statement made in the mortgage-deed was the statement of the defendant and could not be used in his favour. It is to be noticed, however, that both the mortgagor and the mortgagee are now dead. It is conceded that the mortgage bond could be admissible in evidence, if the matter fell within S. 32, Cl. 7, Evidence Act. The question, therefore, turns on this, as to whether this mortgage bond could be regarded as a transaction within the meaning of S. 13, Evidence Act. By the mortgage bond it was asserted by the defendant that he had a right in the leasehold interest which carried a rental of Rs. 18 which was payable to the superior landlord whose interest has now devolved on the present plaintiffs. There was a further assertion in that deed that that interest was being mortgaged in favour of the plaintiffs' pre-

decessor-in-title. In these circumstances it is difficult to say that by the deed in question the right to the leasehold interest which carried a rental of Rs. 18 and odd payable to the superior landlord was not asserted. The question as to what the amount of rental was, was one of the essential terms of the mortgage bond. It was one of the essential elements which was necessary to be stated in order to determine the rights of the defendant-mortgagor in the holding which he was mortgaging in favour of the plaintiff's predecessor or ancestor. The present case is, therefore, distinguishable from the case cited at the Bar by the learned vakil for the appellant. Reference has been made to the case of *Brojendra Kishore Roy v. Mohini Chandra Bhattacharya* (1). It will appear, however, that the facts of the case are distinguishable and the learned Judges in that case did not express any opinion on the question now in controversy. For the reason which I have stated I think this document is admissible in evidence it is a transaction by which the right of the defendant to the land was asserted, and for the definition of that right, the amount of rent had to be stated. I think the mortgage bond was admissible in evidence. Apart from the question as to whether the mortgage bond was rightly admitted in evidence, it appears that other findings are conclusive in second appeal. The lower appellate Court states that a closer examination of the papers goes to show that these papers were rather clever fabrications. The effect of the judgment of the lower appellate Court is that it was established satisfactorily that the original rent was Rs. 18. Whether the document is admissible or not, the judgment was based on an independent conclusion with regard to the nature of the plaintiffs' papers. It is conceded that the burden was on the plaintiffs and that the papers were disbelieved by both the Courts below. In this view the Courts below were right in coming to the conclusion that the rate of rental was Rs. 18 and odd payable by the defendant and not Rs. 24-20 as claimed by the plaintiffs.

The appeal, therefore, fails and must be dismissed with costs.

A.L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 705

MUKHERJI AND BASU, JJ.

Bhudeb Chatterjee and others—Defendants—Appellants.

v.

Asutosh Gangopadhyaya and others—Plaintiffs and Defendant—Respondents.

Appeal No. 383 of 1926, Decided on 22nd June 1928, from appellate decree of Sub-Judge, Asansole, D/- 5th September 1925.

Registration Act, S. 17 — Hissanama, not amounting a partition deed or a deed of gift but merely a memorandum purporting to acknowledge certain shares need neither be stamped nor registered—Stamp Act, Art. 45.

When a document was neither a deed of partition nor a deed of gift, but was merely a memorandum in which one of the sharers purported to acknowledge the fact that he was taking away his share of the property while the remaining shares belonged to others and the arrangement recorded therein was also given effect to for a period over 60 years, each party enjoying the usufruct of the land getting a share of paddy and possession of the homestead,

Held : that the document was only a record of the family arrangement and did not require to be either stamped or registered. [P 705 C 2]

B. Surendra Nath Ghosal and Jyotish Chandra Sarkar—for Appellants

Urukramdas Chakravarti—for Respondents.

Judgment.—The suit which has given rise to this appeal was for partition. The Courts below have concurrently decreed the suit. Some of the defendants have then preferred this appeal. Shortly put, the plaintiffs are the descendants of one Mathura who happened to be one of the sons of Mangala Devi, daughter of one Lakhi Kanta Tapadar, the original owner. The defendants are the descendants of Ram Bishnu, another son of Mangala. The plaintiffs claimed an 8-annas share of the properties which had originally belonged to Lakhi Kanta and had descended to them through Mathura from Mangala. The Courts below held that Mathura predeceased Mangala and that therefore the plaintiffs failed to prove the title which they had set up in the plaint. The said Courts, however, proceeded on the basis of a hissanama which was a document dated 1269 B S and which purported to record the fact that the predecessors of the plaintiffs, namely the three sons of Mathura, had

an 8-annas share in the property. Two arguments have been advanced before us on behalf of the appellants. It has been argued in the first place that the document was inadmissible in evidence inasmuch as it was not stamped and registered as it should have been. This argument in our opinion is not sound, because the document is neither a deed of partition nor a deed of gift, being merely a memorandum in which Ram Bishnu purported to acknowledge the fact that he was taking away an 8 annas share, of the property, the remaining share belonging to Umesh and others. It was, therefore, a document which did not require to be stamped, nor need it have been registered. It was merely a record of the family arrangement, which, as has been found by the Courts below, was also given effect to subsequently on the death of Mangala. Then it is said that the document was executed at a time when Mangala was alive; and for that reason it has been urged that Ram Bishnu could not have entered into any arrangement with regard to the property as he had merely a chance of succession at that point of time. As regards that matter it may be said that there was no difficulty on the part of Ram Bishnu in acknowledging the fact that he himself had so much share in the property. Regarded as a document reciting the facts as they stood at the time, the document is entirely unobjectionable. The findings of the Subordinate Judge are that after the death of Mangala the arrangement recorded in this hissanama was also given effect to and that since then for a period of 60 years or more the plaintiffs had been enjoying the usufruct of the land getting a share of the paddy and being in possession of the homestead.

The next contention that has been urged is that in as much as the plaintiffs had failed to prove their case because it was found that Mathura had predeceased Mangala, the Courts below were in error in giving to them a decree on the footing of a new and inconsistent case. It is true that the specific case of title as to the property having descended to them from Mangala through Mathura failed. But still what was relied upon by the Courts below was that inasmuch as the plaintiffs and their predecessors had been in possession for a very long period, at least since 1269 B. S., the hissanama

having spoken of the half-share belonging to them, that possession was referable to a legal origin; and the learned Munsif distinctly held:

On the basis of the hissanama which speaks of half-share, I find that Dinesh and Kirti have 8-annas title to the disputed property.

Whatever may be the origin of the title, on the face of the hissanama that title had a legal origin, and that in our opinion was sufficient to entitle the plaintiffs to an allotment in respect of an 8-annas share in the properties.

For these reasons we are opinion that the appeal should fail. We accordingly dismiss it with costs.

A L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 706

CUMING AND PAGE, JJ.

Rai Mani Dasi and others—Appellants.

v.

Upendra Nandan Das Mahapatra and others—Respondents.

Appeals Nos. 1881 to 1906 of 1925 Decided on 27th April 1928, from appellate decrees of District Judge, Zillah Midnapur, D/- 30th April 1925.

Bengal Tenancy Act, Ss. 109-A, 105-A—(Per Page, J.)—Application under S. 105-A—Custom of suspension of rent held not to exist—Decision not having been appealed against by tenant operates as res judicata in subsequent rent suit between the parties (Cuming, J., contra.).

Per Page, J.—When the incidents of a tenancy to which the Bengal Tenancy Act applies had been canvassed and determined in a proceeding under Ss. 105 and 105-A, the decision of the revenue officer should be final, and should not be challenged except in an appeal as provided in the Act. Notwithstanding the dismissal of the landlord's application for enhancement of rent under S. 105-A it is open to tenants to appeal to the Special Judge under S. 109-A against the decision of the revenue officer that a custom giving them a right of suspension of rent did not exist in the locality, and if they do not elect to take that course, the issue relating to that custom becomes res judicata in a subsequent rent suit between the parties: (*Cuming, J., dissenting.*) 11 Cal. 301, (P.C.); A. I. R. 1924 Cal. 907; and A. I. R. 1928 Cal. 479; Ref. [P 708 C 1, 2]

Dwarka Nath Chakravarti and Bhupendra Kumar Ghose—for Appellants.

Gunada Charan Sen and Gopendra Nath Dass—for Respondents.

Cuming, J.—These are a number of appeals which arise out of a number of rent suits which were tried together.

The main contention of the defendants with which we are now concerned is that there is a custom of suspension of rent when the crops have been destroyed by flood or drought. The trial Court gave effect to the contention and dealt with the cases on this footing dismissing the claim for rents for the year 1329 Amli. The landlord appealed. The lower appellate Court found with regard to the holdings within the touji No. 274 that the defendants had failed to prove the existence of any such custom. This disposed of appeals Nos. 173, 174, 178, 182, 187, 188, 190, 191, 194, 195 and 197 of the lower appellate Court. With regard to the appeals with regard to tenancies within touji No. 275 he held that the question was res judicata because in certain proceedings under S. 105, Ben. Ten. Act, it had been held that no such custom existed. He therefore decided these appeals in favour of the zamindar.

With regard to appeal No. 186, which he dealt with separately, he found no evidence of any such custom. He was clearly influenced in coming to this finding by the fact that it had been found in the S. 105 proceedings that no such custom existed in the neighbouring estate. With regard to the appeals relating to the holdings falling within touji No. 274 the lower appellate Court has come to a finding of fact on the evidence which we cannot interfere within second appeal. With regard to the holdings falling within touji No. 274 all these holdings except appeal No. 186 (of the lower Court) formed the subject-matter of a proceedings under S. 105, Ben. Ten. Act. In these proceedings the zamindar prayed for an assessment of fair and equitable rent. The tenants in those proceedings raised the same question of the existence of the custom. The Assistant Settlement Officer decided the question against the tenants. But the proceedings under S. 105 were for some reason or other dismissed.

In such circumstances can the decision of the revenue officer make the matter res judicata between these parties? No doubt the revenue officer had the power to decide the question and he decided it against the tenants. But against this decision the tenant could not appeal, for the case was decided in the tenant's favour and he could not appeal against the decision of an issue which had been decided against him when the final order

on the whole proceedings was in his favour.

It is the decision of the revenue officer in the proceedings which has the effect of a civil Court decree and his decision in these proceedings was that the application be dismissed. Neither so far as the decision of the proceedings was concerned was it necessary to decide the question regarding the custom. Obviously not; for although the decision of the issue was against the tenants the final decision was in his favour.

I do not think that S. 109-A contemplates that where the final decision is in a party's favour he may appeal against the decision of an issue which has been decided against him, which decision was not necessary for the purposes of finally determining the matter. The learned Judge was therefore wrong in holding that the question whether there existed any such custom as alleged by the tenant was *res judicata* between the parties. It is quite clear that he decided these appeals on this point only and did not consider any other evidence there might or might not be. The decree of the learned Judge should therefore in my opinion be set aside and the case remanded to him to rehear and determine these appeals bearing in mind the above observation.

I have lien to consider appeal No. 186. The Judge then seems to consider that the fact that no custom has been established with regard to other land of the estate is itself strong proof of the absence of the custom. This holding lies within touji No. 275 and so apparently the Judge in coming to his finding was largely influenced by the fact that such a custom had not been proved for the other holding in touji No. 275. But that finding depended on an erroneous decision on the question of *res judicata*. It may be found, after considering the evidence, that such a custom does exist. The right course would seem to me to be to set aside the decree in this appeal also and let the Judge deal with it after he has decided the connected appeals in touji No. 275.

My learned brother, however, is of opinion that the appeal should also be dismissed. The result is under S. 98 that the appeal also stood dismissed with costs.

Page, J.—In my opinion these appeals should be dismissed. The issue that falls to be determined is whether a custom of

haja exists in the locality in which the two touzis Nos 274 and 275 are situate. That is an issue of fact, and the onus of proving the existence of the custom lay upon the tenant-appellants.

With respect to the appeals by the tenants of lands within touzi No. 274 I agree that the tenants have failed to prove that any such custom exists, and those appeals fail.

All the lands in respect of which the remaining appeals are preferred were held by the lower appellate Court to fall within touzi No. 275.

Now, before the present suits to recover arrear of rent were brought the jamas within touzi No. 275 (except the jama in appeal 186) were the subject-matter of applications for enhancement of rent under S. 105, Ben Ten Act, by the respondent landlords against the appellant-tenants or their predecessors-in-title. In those proceedings under S. 105-A an issue was raised, contested, and decided at the instance of the tenants with respect to the existence of the alleged custom of haja in the locality. The revenue officer found that inundations were prevalent in the district, but expressly held that no custom of haja was proved. Taking that circumstance into consideration the revenue officer came to the conclusion that it would be

a hardship on the tenants to allow any enhancement,

and that the existing rents were fair and equitable. The applications for enhancement, therefore, were dismissed.

In my opinion the fact that in the proceedings under Ss. 105 and 105-A, the revenue officer found that the alleged custom did not exist was admissible and cogent evidence in the present suits to disprove the existence of the custom as against all the tenants of lands within touzi No. 275. The learned District Judge, however, went further, and (except in appeal 186) treated the question whether the alleged custom of haja existed in the locality as *res judicata* against the tenants in touzi No. 275.

In my opinion the decision of the learned District Judge was correct, and that it was not open to the tenants of lands within touzi No. 275 (except in appeal 186) to re-assert the existence of the alleged custom in the present suits. The finding that the custom of haja did not exist was the basis of the decision of the revenue

officer that an enhancement of rent ought not to be allowed, and that the prevailing rate of rent was fair and equitable. To hold now that the custom existed would involve a fundamental alteration of the decision that the prevailing rent was fair and equitable. No appeal was preferred against that decision, and so long as the decision that the prevailing rent was fair and equitable remains in force and is to be treated as having the effect of a decree under S. 107, in my opinion, the finding that the custom did not exist in the locality is conclusive against the tenants who are bound by the proceedings under S. 105. *Rajah Run Bahadur v. Mt. Lachoo Koer* (1); *Dharani Mohan Roy v. Asutosh Mookerjee* (2); *Sajjal Ahmad v. Trailakhya Nath* (3).

The appellants, however, contended that inasmuch as the landlord's application in the proceedings under S. 105 was dismissed the tenants could not appeal and, therefore, the findings and decisions of the revenue officer in those proceedings could not be res judicata against them.

Now, the provisions of the Bengal Tenancy Act are beset with difficulties and pitfalls, but it appears to me that S. 105-A, which was inserted in the Act by S. 26, Act 1, 1907, was enacted to meet circumstances such as those which obtain in the present case. By S. 105-A it is provided that :

Where in any proceedings for the settlement of rents under this part any of the following issues arise . . . (f) Whether the special condition and incidents of the tenancy or any right of way or other easement attaching to the land have not, or has not, been recorded, or have, or has been wrongly recorded, the revenue officer shall try and decide such issue, and settle the rent under S. 105 accordingly. By S. 107 it is provided that the decision of the revenue officer in every proceeding under S. 105, S. 105-A and S. 106, shall have the force and effect of a decree of a civil Court in a suit between the parties and subject to the provisions of S. 108 and 109A shall be final and under S. 109 A

an appeal shall lie to the Special Judge from the decisions of a revenue officer under Ss. 105 to 108A (both inclusive).

As I apprehend the matter the legislature intended and provided that when the incidents of a tenancy to which the Bengal Tenancy Act applied had been canvassed and determined in a proceed-

ing under Ss 105 and 105-A, the decision of the revenue officer should be final, and should not be challenged except in an appeal as provided in the Act. In my opinion, notwithstanding the dismissal of the landlords' application for enhancement of rent it was open to the tenants to appeal to the Special Judge under S. 109-A against the decision of the revenue officer that the custom of haja did not exist in the locality, and, as they did not elect to take that course for this reason also the issue relating to the custom of haja is now res judicata.

There is a further ground upon which I think that the appeals should be dismissed. The decision of the Revenue Officer on the issue of custom, even assuming that it did not amount to res judicata, was cogent evidence against all the tenants of land within touzi No. 275 (including the tenant in appeal 186) that the custom did not exist :

and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform : per Lord Dunedin in *Midnapur Zemindary Co. v. Naresh Narayan Rai* (4).

As I understand the judgment of the learned District Judge the issue of fact whether the alleged custom of haja existed was raised and contested, not only by the tenant in appeal 186, but by all the tenants who held lands within touzis No. 274 and 275, and although the learned District Judge decided that the issue of custom was res judicata in respect of the tenants who were bound by the proceedings under Ss. 105 and 105-A, in considering appeal 186, the learned District Judge also decided and intended to decide that no such custom was proved to exist in the locality in which all the lands within touzi No. 275 were situate. Indeed it was inevitable that he should do so, for there could be no custom confined to the tenancy in appeal 186. It is clear, I think, that the learned District Judge disposed of the appeals in this manner because in considering whether the onus of proving the custom had been discharged he refers to the evidence that had been adduced on behalf of all the tenants in support of the alleged custom. He states that "there are close on 700 tenancies within the estate," that is, touzi No. 275, and then discusses the evidence relating to the cus-

(1) [1885] 11 Cal. 301=12 I. A. 28=4 Sar. 602 (P. C.).

(2) A. I. R. 1924 Cal. 907.

(3) A. I. R. 1928 Cal. 479

(4) A. I. R. 1922 P. C. 241=18 Cal. 460=48 I. A. 49 (P. C.).

tom of haja that had been adduced to prove its existence in the locality generally. Indeed, the hisab of 1251 upon which the tenants relied did not relate in any way to the jama in appeal 186, but was tendered to prove that the custom had prevailed in the locality for many years. In these circumstances I think that there is no reasonable ground for granting a remand in this case, or for disturbing the decree of the lower appellate Court and, in my opinion, all the appeals should be dismissed with costs.

N.K.

*Appeals dismissed.***A. I. R. 1928 Calcutta 709**

CUMING AND MUKHERJI, JJ.

Upendra Nandan Das Mahapatra and others—Defendants—Appellants.

v.

Banamali Charan Pati and others—Plaintiffs—Respondents.

Appeal No. 560 of 1925, Decided on 30th January 1928, from appellate decree of Dist Judge, Zillah Midnapur, D/- 2nd December 1924.

(a) *Provincial Small Cause Courts Act, Art. 13*—The words "by reason of interest in immovable property" contemplate payments to which a person is entitled as representing his interest in immovable property and not because he possesses some interest in such property.

The words "by reason of his interest in immovable property" in Art. 13, contemplate payments which a person is entitled to, as representing his interest in immovable property and not because he possesses some interest in such property: 36 *Mad.* 18 and 11 *N. L. R.* 100, *Rel. on.* [P 712 C 1]

Certain dues and cesses were being claimed in a suit only by reason of the interest in immovable property which plaintiffs, notwithstanding the sale, claimed to have retained in a mauza and which in their view was still continuing in their favour:

Held: (per Mukherji, J.) notwithstanding the legal or juridical relation subsisting between the parties such a suit was covered by Art. 13 (*Cuming, J. dissenting*). [P 712 C 1]

(b) *Jurisdiction—Estoppel—Conduct of parties cannot give Court jurisdiction which it does not possess.*

The Court cannot entertain an appeal which is barred by an express provision of the law. The parties cannot by their conduct give the Court a jurisdiction which it does not possess. [P 703 C 2, P 710 C 1]

Gunada Charan Sen and Gopendra Nath Das—for Appellants.

Santosh Kumar Pal—for Respondents.

Cuming, J.—The facts of the suit out of which this appeal has arisen are these:

The plaintiff sued the defendant for what he described as dasturat. He stated that the defendant's predecessors were in possession of mouza Maisagote with Mehal Padima, by right of purchase from the plaintiff's predecessor. That he and his predecessor had been realizing amicably and by suit in an annual sum of Rs. 28-12-6 as dasturat and cesses from the predecessors of the defendants and the defendants in respect of the said mauza. The defendants had not paid the amount and hence the suit.

The defendants admitted that they were in possession by purchase and that they never agreed to pay for ever any dasturat to the plaintiff. This dasturat forming a separate amount was realized from the tenants in addition to the rent they had to pay. That amount was paid to Sashimukhi during her lifetime and her successors had no right to get the same, nothing now being realized from these tenants and that as the defendants cannot realize the amount from the tenants, the plaintiffs are not entitled to get it. The first Court decreed the plaintiffs' suit on 18th August 1921.

The defendants appealed. This appeal was heard *ex parte* and was decreed. There was then an application under O. 41, R. 19, for re-admission of the appeal. This was rejected. Under O 43, R 1 (t), the plaintiffs appealed to this Court and the appeal was allowed and the appeal ordered to be reheard. It was heard by the District Judge of Midnapur and decided on 2nd December 1924, when that learned Judge allowed the appeal in part and modified the decree. Against the decree the defendants have appealed. A preliminary objection has been raised that no appeal lies, an appeal being barred by the provision of S. 102, Civil P. C.

Against this the following arguments have been adduced: (1) that the plaintiffs-respondents described the suit as a suit for rent and hence they are now estopped from arguing that it is a suit for money and so no appeal lies. The simple answer to the contention is that it is quite immaterial whether the plaintiffs are or are not estopped. The Court cannot entertain an appeal which is barred by an express provision of the law. The

parties cannot by their conduct give the Court a jurisdiction which it does not possess.

(2) The next contention is that the appeal against the District Judge's order was once entertained by a Bench of the Court (Greaves and Graham, JJ.) and so the question whether an appeal does or does not lie has already been determined. This contention is based on an obvious misunderstanding of the facts. The first appeal to this Court which was determined by Greaves and Graham, JJ., was not an appeal against the decree in the suit, but against the order of the District Judge refusing to re-admit the appeal under O. 41, R. 19, an order against which an appeal lies in every case under O. 43, R. 1 (t).

It has been argued that if there was no appeal against the decree there could be no appeal against an order refusing to rehear the appeal. That the appeal against the order is quite independent of whether there is or is not an appeal against the decree is clear from a comparison of O. 43, R. 1 (c), (d), (u). I now pass on to a consideration of the question whether S. 102 is a bar. The appellant contends it is a suit for rent or in all events that Art. 13, Sch. 2, is a bar.

To deal with the first contention that it is a suit for rent and hence Art 13, Sch 2, is a bar. A definition of rent will be found in S. 105, T. P. Act, and S. 3 (5), Bengal Tenancy Act. Both definitions presuppose the relationships of lessor and lessee or landlord and tenants between the parties. In the present case no doubt the plaint is headed: Plaint under S. 148, Ben. Ten. Act. But a consideration of the statement of facts both in the plaint and in the written statement makes it quite clear that the relationship of landlord and tenant does not exist between the parties. The plaintiff's own case is that the property was sold to the defendants. A sale implies a complete transfer of ownership.

Neither is there in the plaint any suggestion that the relationship of landlord and tenant exists. The amount is, therefore, not rent. It is then contended that the suit falls within Art. 13 of the Schedule. Art. 13 deals with a suit to enforce the payment of the allowance or fees respectively called malikhana, or haqq or cesses or other dues when the

cesses or dues are payable to a person by reason of the interest in immovable property or in a hereditary office or in a shrine or other religious endowment.

It does not seem on the facts that the dasturat and cesses are paid by reason of the plaintiff's interest in any immovable property. The plaintiff, on his own statement, has no interest in the defendant's property. The property has been sold to the defendant and by the sale all the interest that the plaintiff had in the property passed to defendant. For whatever reason the money might be due to the plaintiff, if due, it is not on account of any interest in immovable property. The suit does not fall within Art. 13. It is not contended that it falls under any other article of the schedule. It follows, therefore, that it is a suit of the nature cognizable by a Small Cause Court and being under the value of Rs 500 no second appeal lies. That being so, in my opinion, the appeal should stand dismissed with costs. The result is that the appeal stands dismissed with costs.

Mukherji, J.—I am sorry I do not agree.

The appeal arises out of a suit which was instituted by the plaintiffs for recovery of dasturat, cesses and damages. The trial Court decreed the suit. The defendant appealed and the appeal was allowed *ex parte* the plaintiffs' suit being dismissed. The plaintiffs then applied for having the *ex parte* decree set aside and for the re-hearing of the appeal, but this application was rejected. They then appealed to this Court which set aside the said *ex parte* decree and ordered the appeal to be reheard. That was done by the lower appellate Court. That Court modified the decree of the trial Court by awarding the plaintiffs a decree for dasturat for three years only. The defendants have now preferred this second appeal.

The plaintiffs-respondents have taken a preliminary objection that the appeal is not maintainable, being barred by S. 102, Civil P. C. They have clutched at a passage in the judgment under appeal which says dasturat is not rent. This was said for restricting the decree to a period of three years from four, which was the period for which the plaintiffs laid their claim and obtained a decree from the trial Court. From this

the respondents argue that the suit was suit for money—a suit of a nature cognizable by a Court of Small Causes—and that therefore, a second appeal is barred. To answer this preliminary objection the appellants have relied upon a variety of matters, to all of which I do not propose to refer. In my opinion the preliminary objection is of no substance.

What dasturat exactly means is a question on which, notwithstanding repeated enquiries, I have failed to elicit any satisfactory answer from either of the parties. As far as I can understand the word is a plural of the word "dastur" which is a Persian word meaning "dues." The plaintiffs in the plaint merely stated: That the predecessors of the defendants having obtained the mauza under purchase from the predecessor of the plaintiffs the defendants have been exercising their rights and possession therein (para. 1); that the plaintiffs' predecessor was all along getting from the defendants' predecessors and also from the defendants Rs. 28 odd as dasturat and annas 14 odd as cesses every year amicably or by suit (para. 2); that the plaintiffs have inherited the right from their predecessor (para. 3). This is all the information that the plaintiffs have chosen to give us of this dasturat in their plaint. They have headed the plaint as a "plaint in a suit under S. 148, Ben. Ten. Act." They have described their claim in this plaint as "zemindari dasturat." They laid their claim in the plaint for a period of four years. Their claim is for dasturat and for cesses. They also claimed damages at the rate of 25 per cent. If the character of the suit is to be judged from the plaint alone, as in the first instance it must be, the suit must be taken as having been commenced by the plaintiffs as a suit for rent. To these should be added a few more facts. In the written statement the defendants alleged that the tenants of the mauza used to pay in addition to the rent a cess on account of dasturat and that is what the plaintiffs' predecessor used to get from the defendants and their predecessors: but (1) that the plaintiffs as heirs of their predecessor are not entitled to get it; (2) that dasturat is an illegal cess which can no longer be realized from the tenants and so the plaintiffs cannot get it, and (3) that the plaintiffs are not entitled to get it as they have not got it recorded as a

jama fit to be realized. The written statement, therefore, proceeds on the assumption that it is some sort of dues arising out of land, which if realizable at all are realizable only because of the fact that the mauza at one time belonged to the plaintiff's 'predecessor. Again, when the suit was decreed by the trial Court and the defendants preferred an appeal in one of their grounds of appeal they said:

The Court below was wrong in decreeing the suit for damages and for cesses. The plaintiffs are not entitled to get any decree for cesses or damages. The defendants are the maliks of the mauza and there is no relationship of landlord and tenant between the plaintiffs and defendants and, therefore, the plaintiffs are not entitled to a decree for dasturat rent or for any rent at all.

The Court below should have dismissed the plaintiffs' suit holding that the defendants are not liable therefor. Next we have it that the parties fought the case in all the Courts 'up till now on the footing that dasturat is some sort of rent. The Munsif has referred to the suit as "a suit for recovery of dasturat rent," and on that basis he gave the plaintiffs a decree for four years. He noted in his judgment that the amount was claimed "on account of use and occupation of land by the defendants" and that therefore it should be treated as "rent". When the matter came up before this Court the learned Judges (Greaves and Graham, JJ.), were given to understand that "the suit was commenced by the plaintiffs against their tenants for the recovery of rent." All these leave not the faintest shadow of a doubt that whatever may be the exact character of the defendant's liability to pay dasturat and cesses to the plaintiff, it is founded on some sort of conception that notwithstanding the sale of the mauza by the plaintiffs' predecessors to the defendants' predecessors some sort of interest in the mauza was retained by the former which entitled them to realize the amount every year from the latter; and that the transaction created in the latter some sort of obligation to pay rent to the former; or in other words that the transfer that was made had not the effect of substituting the defendants' predecessors entirely in the place of the plaintiffs' predecessors but gave them all the rights of absolute owners of the mauza subject to the reservation of their liability to

pay the said amount. To judge of the effect of this transfer by the definition of "sale" as given in the Transfer of Property Act, is in my opinion an anachronism and a fallacy; and to apply to the transaction the juridical conception of an out-and-out sale is not permissible. I am fully conscious of the principle that no amount of estoppel to which the respondent may be subject, even if any question of estoppel really arose in the case, would give this Court jurisdiction to entertain an appeal which it has not under the law; but I am not prepared to assume against the appellants that it was merely a contract wholly independent of the transfer, upon which their liability must rest, a contention that has never been urged by the plaintiffs at any stage of the proceedings. The course of the proceedings in the suit to which I have already referred unmistakably suggests that the plaintiffs were insisting on their right to realize dasturat and cesses by virtue of their superior title and the defendants were resisting the claim and repudiating the assertion that they had but a subordinate title. The suit, therefore, in my opinion, is in essence a suit for rent and so excepted from the cognizance of a Court of Small Causes by Art. 8, Sch. 2, Provincial Small Cause Courts Act.

Assuming but not conceding that the suit cannot be put so high as to bring it within Art. 8, I do not see how it can be taken out of the purview of Art. 13. That article, so much of it as is relevant, is thus worded:

A suit to enforce payment of . . . cesses or other dues when the cesses or other dues are payable to a person by reason of his interest in immovable property.

To my mind whatever may be the legal or juridical relation between the parties the dues and cesses are being claimed in the suit only by reason of the interest in immovable property which the plaintiffs, notwithstanding the sale, claim to have retained in the mauza and which in their view is still continuing in their favour. The words "by reason of his interest in immovable property" have been interpreted as contemplating payments which a person is entitled to as representing his interest in immovable property and not because he possesses some interest in such property: see *Maharaja of Vizianagram v. Kota*

Veeramma (1), Jairam v. Doma (2) I agree in this view and hold that Art. 13 in any event covers the suit. The preliminary objection, therefore, in my opinion should be overruled.

On the merits I do not think I am called upon to go into detail as my learned brother is of opinion that no appeal lies and the result of this difference will be to affirm the decree of the trial Court. For myself I am decidedly of opinion that nothing has been established in the case which can legally form the foundation of a decree against the defendants. The fact that between predecessors of the present plaintiffs and the present defendants decrees for dasturat rent were passed for certain years, as the Munsif has found, and the fact that the manager of the defendants' estate, when the estate was under the Court of Wards, admitted liability for the rent for a certain other year, are hardly sufficient to dispose of the grounds upon which the defendants have sought to resist the claim in the present suit. The District Judge has said that the admission shows that the rent is still payable and the mere fact of non-payment does not put an end to the defendants' liability. I fail to see how the question of the defendants' liability can be legally disposed of in this way. The appellants have conceded that so far as the amount and period in suit are concerned they do not object to the decree standing against them, but as the issue decided in the suit goes the length of determining the validity and legality of the demand for all times to come, a reservation should be made to the effect that the decision is not to be taken as binding between the parties in respect of any future claim. As there is no legal basis for this determination, left to myself I should have dismissed the appeal, but should have made the reservation prayed for in their favour, because in my opinion, there is nothing on which a decision of this general issue can possibly rest.

N.K.

Appeal dismissed.

(1) [1913] 36 Mad. 18=21 M. L. J. 819=11 I. C. 760=(1911) 2 M. W. N. 139.
(2) [1915] 11 N. L. R. 100=29 I. C. 815.

A. I. R. 1928 Calcutta 713

MITTER, J.

Jharu Mondal and others—Defendants—Appellants.

v.

Mahatabuddin Mondal and others—Plaintiff and Proforma Defendants—Respondents.

Appeal No. 1934 of 1927, Decided on 15th June 1928, from appellate decree of Sub-J., Zillah Jessore, D/- 3rd May 1927

Transfer of Property Act, S. 111 (g)—Denial of title, to work forfeiture, must be prior to suit for ejectment—Denial by one co-tenant does not work forfeiture—Suit for ejectment is not sustainable—Landlord can recover rent from all tenants.

In order to work as a forfeiture a denial of landlord's title must precede the institution of suit for ejectment. [P 714 C 1]

The denial of a landlord's title by one of the joint tenants cannot be held to bind other co-tenants and such a denial cannot work as a forfeiture, and therefore a suit of ejectment by a landlord of those tenants cannot succeed. However, the landlord can realize rent from all the tenants on the footing that the tenancy still continues: 39 Cal. 903, Rel. on. [P 713 C 2]

Nasim Ali—for Appellants.*Khitish Chandra Chakraborty, Panchanan Ghosal and Bhudar Haldar*—for Respondents.

Judgment.—This is an appeal by the defendants against a decision of the Subordinate Judge of Jessore, dated 3rd May 1927, which affirmed a decision of the Munsif of Bongaon, dated 14th September 1925. The suit in which this appeal arises was brought by the plaintiff for recovery of possession of two plots on the allegation that the plaintiff brought a suit for recovery of rent with respect to plot No. 1 in the year 1921 against defendant 1 who according to the plaintiff's case was holding the disputed lands as the utbondi tenant from the time when plaintiff's vendor was in possession. Defendant 1 denied the title of the plaintiff in that rent suit with the result that that suit was dismissed on 28th March 1923. It is said that the present suit had to be instituted due to the denial of plaintiff's title in the previous suit there has been a forfeiture and the plaintiff is entitled to get khas possession of the lands of plot 1. With regard to plot 2 the case of the plaintiff is that these are lands which are possessed by all the three defendants, 1, 2 and 3 as utbondi tenants and that there has been a denial of the title of the plaintiff by defendant 1 alone and that as de-

fendants 2 and 3 did not admit the title of the plaintiff, plaintiff is entitled to a decree for ejectment as against all. The Munsif found that the plaintiff has a niskar title to the property in suit, i. e., both in plots 1 and 2. He further found that as defendants 1 and 2 did not claim any right in tenancy under the plaintiff, whatever title they had as tenants had been extinguished by the denial of the title of the plaintiff in the rent suit or by the execution of the deed of surrender in 1927. The Munsif further held that there was a denial of the title of the plaintiff in respect of both the plots in the rent suit and further that by the istifanama the tenancy was repudiated in respect of both the plots. The Munsif accordingly decreed the plaintiff's suit declaring his niskar title to both the plots and held that the plaintiff was entitled to recover possession by evicting defendants 1—3 from both the plots. There was also a decree for mesne profits. Against this decision an appeal was taken to the Court of the Subordinate Judge of Jessore with the result that the decision of the Munsif was affirmed.

A second appeal has been taken to this Court and on behalf of the appellant it has been argued that the decree in so far as it grants khas possession to the plaintiff in respect of plot 2 cannot be sustained. It is to be observed that the learned vakil for the appellant does not challenge the findings of both the Courts that the plaintiff has established his niskar title to the disputed property. So far as plot 1 is concerned it appears that defendant 1 was the utbondi tenant and as he denied the title of the plaintiff in the rent suit the decree granting the relief with regard to khas possession in respect of plot 1 seems to be correct. So far as plot 2 is concerned it appears that the denial was by defendant 1 alone and in such circumstances as the denial cannot be held to bind the other two defendants 2 and 3 such denial cannot work as a forfeiture. The disclaimer by defendant 1 of the title of the plaintiff cannot operate as a forfeiture of the tenancy in so far as defendants 2 and 3 are concerned and as there cannot be a forfeiture of the tenancy in part the result is that the tenancy still subsists and the suit for ejectment, so far as plot 2 is concerned, must fail. But there must be no reason why the plaintiff should not realize rent

from all the defendants on the footing that the tenancy still continues. If any authority is needed, reference may be made to the case of *Brendra Kishore Manikya v. Bhubaneswari* (1). The plaintiff prayed in the alternative for rent as will appear from para. 8 of the plaint. It remains to notice the argument of the respondents that as there has been a denial in this suit of the title of the plaintiff and defendants 1—3 did not claim to be his tenants, a decree in ejectment should follow with regard to plot 2. It is to be observed with regard to this argument that in order to work as a forfeiture a denial must precede the institution of the suit. Consequently the denial in the present suit cannot entitle the plaintiff to a relief for ejectment.

The result is that the decrees of the Courts below are affirmed in so far as they award khas possession with regard to plot 1. The decrees of the Courts below are set aside in so far as they award khas possession to the plaintiff in respect of plot 2. The case will, therefore, be remitted to the Court of first instance in order that it may determine what is the fair and equitable rent payable to the plaintiff in respect of plot 2 including the arrears of rent which have not been realized. There will be no order as to costs.

N.K.

Case remanded.

(1) [1912] 39 Cal. 903 = 15 I. C. 629.

A. I. R. 1928 Calcutta 713

RANKIN, C. J., AND MUKHERJI, J.

Sm. Tilottama Dasi—Defendant—Appellant.

v.

Madhu Sudan Giri—Plaintiff—Respondent.

Appeal No. 24 of 1926, Decided on 8th June 1928, from appellate decree of Dist. Judge, Zillah Midnapore, D/- 9th June 1925.

Limitation Act, Art. 143—Forfeiture by remarriage—Remarriage must be valid.

To succeed under Art. 143 on plea of forfeiture by remarriage it must be established that there was a valid remarriage, a marriage recognized by custom amongst the people of the caste to which the widow and her second husband belonged. [P 715 C 2]

Panchanon Ghose and Bhupendra Narain Bera—for Appellant.

Gopendra Nath Das—for Respondent.

Mukherji, J—The plaintiff instituted this suit to establish his title to certain properties and to recover possession of some of them and to have his possession confirmed in respect of the rest. The plaintiff's case was that he is the reversioner to one Kamal Giri, who died leaving a widow named Gayamani, and that the latter having died he has become entitled to the properties as such reversioner. His case further was that the defendant Tilottama Dasi who is really an illegitimate daughter of Gayamani had got certain erroneous entries made during the settlement operations in respect of the properties and had dispossessed him from some of the properties and was disturbing his possession in the others. The defence, on the merits, was that the defendant is the legitimate daughter of Kamal Giri and as such is entitled to and is in lawful possession of the lands in suit. As regards a part of the lands, namely a plot of two kattas of land, the plaintiff's title was admitted, it being said that the plaintiff had made a purchase of this plot from the defendant. The Munsif held that the defendant was the legitimate daughter of Kamal and so dismissed the suit, except as regards the two kattas in respect of which the plaintiff's title was admitted. The District Judge, on appeal by the plaintiff from that decision, has decreed the suit in its entirety. He has held that a document in the nature of a deed of gift which Gayamani had executed in favour of the defendant and in which there was a recital to the effect that the defendant was the daughter of Kamal and it was also recounted that Gayamani herself had contracted a Sanga marriage after she had become a widow and had thus forfeited her rights to the properties left by Kamal, was a collusive document executed for the purpose of creating a title for the defendant by means of false recitals. He was not inclined to accept the defendant's story that the plaintiff had purchased the two kattas of land from her—a fact, which if true, would indicate a recognition of the defendant's title on the part of the plaintiff. He has held that the defendant is an illegitimate daughter of Gayamani. The defendant has then preferred this appeal.

The only ground upon which the appeal is pressed is the question of limitation. It is said that as Gayamani re-

married as a widow she forfeited her rights to the property left by Kamal and so plaintiff had, under Art. 143 of the Schedule to the Limitation Act, 12 years from the forfeiture. In Mr. Starling's Limitation Act there is an observation to the effect that when a Hindu widow remarries and forfeits her rights to her husband's estate under S. 2, Act 15, 1856 the reversionary heir must bring his suit for possession within the time allowed by this article; and it is on this observation that the appellant chiefly relies. The appellant has also argued on the lines of the decision in the case of *Nathun v. Nai Babu* (1), a case of the Court of the Judicial Commissioner of Nagpur that it is Art. 143 that should govern the case, but if Art. 141 applies the plaintiff is also out of time as the remarriage of Gayamoni amounted to her civil death and she being on account of the marriage dead in the eye of law, the plaintiff had 12 years from the remarriage to institute a suit.

Now, as at present advised, I should be extremely reluctant to agree in the contention either that the remarriage of a Hindu widow amounts to her civil death or that "death" in Art. 141 includes a remarriage which entails a forfeiture, or again that Art. 143 was intended to apply to a forfeiture of this kind. If the latter article applies—I am not saying that it does—a further question may arise, namely, whether the plaintiff had the option to waive such a forfeiture. I do not, however, desire to decide these questions as in my opinion they fall outside the pleadings in the present suit. If it had been necessary to decide them, it would perhaps have been necessary in the first instance to get a clear finding from the lower appellate Court as to whether a Sanga marriage had, in fact, been contracted by Gayamoni. The Munsif found that Gayamoni had contracted such a marriage, but the District Judge has not recorded any finding on the point though what he has said in his judgment strongly indicates that he was not inclined to believe that such a marriage had taken place.

The allegations in the plaint constitute a simple case coming under Art. 141. The defendant's allegations in the written statement were to the effect that she herself was in adverse possession as

(1) [1915] 11 N. L. R. 86=29 F. C. 612.

Gayamoni has lost her rights on remarriage. The allegations of the defendant may raise either a case under Art. 144 or under Art. 143. A case under Art. 144 would ordinarily be untenable, for adverse possession against the widow will not, in the absence of special circumstances, bar the reversioner. To succeed under Art. 143 the defendant will have to establish that there was a valid remarriage, that is to say that the Sanga marriage was a marriage recognized by custom amongst the people of the caste to which Gayamoni and her supposed second husband belonged. The defendant has made no endeavour in that direction. Beyond a very general statement by some of the witnesses, that there was such a marriage, contracted by an equally general statement by others that there was not, there is nothing else on the record. There is no evidence to show the incidents which would establish the validity of this marriage, if in fact it had taken place. To allow the case to be reopened and permit the question of the validity or otherwise of the alleged marriage to be agitated at such a late stage and especially at the instance of defendant 1 who has been found to have no title to Kamal's properties, in my judgment, will not be right.

I would accordingly dismiss the appeal with costs.

Rankin, C. J.—I agree.

A.L/R K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 715

B. B. GHOSE AND N. K. BOSE, JJ.

Shaikh Niamat—Judgment-debtor 2—Appellant.

v.

Shaikh Jalil—Decree-holder—Respondent.

Appeal No. 88 of 1928, Decided on 30th July 1928, from appellate order of Sub-Judge, Mymensingh, D/- 22-11-1927.

Civil P. C., O. 21, R. 2—R. 2 is not confined to money decrees; it applies also to decree for partition.

Provisions under O. 21, R. 2, are not confined to money decrees only but apply to every kind of decree. Where a decree for partition is passed and parties make a private adjustment but the same is not certified by the Court, the executing Court cannot be asked to recognize such an adjustment: *A. I. R. 1922 Bom. 380, Foll.: A. I. R. 1926 Mad. 749, Diss. from.*

[P 717 C 1]

Birendra Kumar De—for Appellant.

Annada Charan Karkun—for Respdt.

B. B. Ghose, J—This is an appeal on behalf of the judgment-debtor No 2. The matter in controversy in this appeal arises in this way : There was a decree for partition in which the plaintiff was allotted certain lands and the defendant got certain lands. When the commissioner went to the locality for delivery of possession of the allotments made defendant 2 said that there had been an adjustment of the decree between himself and the plaintiff by which the plaintiff gave up his claim to have possession of certain plots of land in lieu of other plots and as a consideration for this concession on the part of the plaintiff he had been paid defendant 2 a sum of Rs. 85. The result of this agreement, if given effect to would be that the plaintiff would get 2.82 acres of land instead of 4.36 acres of land to which he was entitled under the decree. The plaintiff denied this adjustment. The Munsif believed the story of defendant 2 and made an order purporting to have been made under S. 47, Civil P. C., in favour of defendant 2. The plaintiff appealed against that order. The learned Subordinate Judge, while throwing some doubt on the merits of the case, stated that he need not decide the question as regards the merits of the application as he held that the application could not be given effect to as being time barred. What he held was that this judgment alleged by the judgment-debtor No 2 falls within the provisions of O 21, R. 2, Civil P. C., and the adjustment ought to have been certified by the Court. As no application was made by the judgment-debtor No 2 within the period provided by Art. 174, Lim. Act, the judgment-debtor cannot ask the Court to take cognizance of the adjustment. The period for making the application by the judgment-debtor had expired before he presented the application and on that ground the Subordinate Judge set aside the order of the Munsif and directed that the possession delivered by the amin should be affirmed.

From that decision the judgment-debtor No. 2 appeals to this Court and the contention on his behalf is that the Subordinate Judge is wrong in holding that the application of the appellant before the Munsif fell within the provisions of Art. 174, Limitation Act, or, in other words that it was not an adjustment referred to in O. 21, R. 2, Civil P. C.,

and it was not necessary to have a certificate as provided in that rule in order to enable the Court to give effect to the adjustment. It is broadly contended that R. 2, O 21, Civil P. C., applies only to decrees for money. It is next urged that even if it does not apply solely to decrees for money there must be a decree for money even if there be other reliefs allowed under the decree, and special stress is laid upon the commencing words of R. 2 (i). It is provided there :

where any money payable under a decree of any kind is paid out of Court.

and so forth, and it is urged that if there is no money payable under a decree of any kind that rule has no application. Again, it is urged that the words or the decree is otherwise adjusted in whole or in part

must refer to the class of decree meant in the preceding clause, that is to say, the decree must be a decree where money is payable.

In support of this contention the case of *Narayanasami Naidu v. Rangasami Naidu* (1), is cited. There has been a difference of opinion between this Court and the Madras High Court as regards the interpretation of S. 258, Civil P. C. of 1882. It was held by this Court in the case of *Baba Mohamed v Webb* (2), that S. 258 of the Code of 1882 applied to any decree. It was said in the course of the judgment delivered by Morris, J. :

It is urged on behalf of the judgment-debtor that S. 258 has reference only to money decrees, and that this is apparent from its position in Ch. 19 of the Code in connexion with this particular section relating to money decrees alone. But a consideration of the terms of the section leads us to a different conclusion. That section corresponds in all material respects, and carries with it the same meaning as S. 206, of the former Procedure Code (Act 8 of 1859) which manifestly deals with adjustment of any decree.

That decision of 1881 stands unquestioned so far as this Court is concerned. S. 258 has been replaced by O. 21, R. 2 and the difference between the two provisions is that after the word "decree" in the first sentence of sub-R. (i), R. 2, the words "of any kind" have been added, and in my judgment this addition shows that the legislature wanted to make it clear that the rule applies not only to money decrees but also to other decrees. The learned Judges in the case

(1) A.I.R. 1925 Mad. 749=19 Mad. 71c.

(2) [1891] 6 Cal. 786=8 C.L.R. 36.

of Narayanasami Naidu, above referred to, observed at p. 723 that the addition of the words "of any kind" after the word "decree" in the second line of O. 21, R. 2 were intended to set at rest the difference of view between the Madras High Court and Calcutta High Court and the conflicting views as regards the meaning of S. 253 of the Code of 1882. By the addition of the words "of any kind" it cannot be said that the legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court.

I respectfully dissent from the expression of opinion by the learned Judges. In my judgment the addition of the words "of any kind" goes to show that the legislature intended to approve of the rule adhered to by the Calcutta High Court. It has been held by the Bombay High Court in the case of *Ellis Enas Pavlo Gharry v Kitter Philip Gowrya* (3), that the provisions of O 21, R 2, Civil P. C., are not confined to money decrees but refer to any decree. It seems to me that it stands to reason that the provisions of that rule should apply to every kind of decree, as Macleod, C. J., has observed in the Bombay case, that the provisions of O 21, R. 2 would be entirely defeated if it was permitted that an uncertified adjustment of decree should be discussed in execution proceedings. The object of this rule is that any adjustment out of Court should be brought to the notice of the Court by the judgment-debtor and decided in the presence of the decree-holder within a short period of time. To hold that this rule has no application to decrees other than decrees for payment of money would be to leave disputes with regard to adjustment of other decrees open for discussion, say, for three years after the passing of the decree and it may be for a longer period after any application for execution is made by the decree-holder. Under these circumstances I am of opinion that the rule in question is applicable to every kind of decree and the judgment-debtor cannot ask the Court executing the decree to recognize any adjustment which has not been certified or recorded under the provisions of that rule.

This appeal must therefore stand dismissed with costs. The hearing-fee is assessed at three gold mohurs.

Bose, J.—I agree.

A.L./R.K.

Appeal dismissed.

* * A I. R. 1928 Calcutta 717

SUHRAWARDY AND GRAHAM, JJ

Ayetonnessa Bibi—Defendant. 12—Appellant.

v.

Amjed Ali and others—Respondents.

Appeals Nos 506 and 507 of 1925, Decided on 1st March 1923, from appellate decrees of Addl. Sub. Judge, Bakarganj, D/- 10th December 1924.

* * (a) *Civil P. C., S. 11—Decision on a question of law, though erroneous, is res judicata except where causes of action in two suits are different*

A decision, however erroneous it may be, on a question of law, may not operate as res judicata only in cases where the causes of action are different, but in all other cases it must operate as res judicata between the parties: *A. I. R. 1927 All. 297*; *A. I. R. 1921 Bom. 87 (F. B.)*; and *11 C. L. J. 461, Rel. on.*; *32 Cal. 749* and *A. I. R. 1925 Cal. 1193*; *Dist. : A. I. R. 1924 Pat. 265, Ref.* [P 718 C 2]

(b) *Civil P. C., S. 11—Decision on question of facts is res judicata.*

A decision on a question of fact, however erroneous it may be, constitutes res judicata between parties to the previous suit. [P 719 C 2]

* (c) *Civil P. C., S. 11—Decision holding prior decision res judicata is conclusive.*

A previous decision holding that a decision prior to that on a point of law was or was not res judicata between the parties, is conclusive between the parties: *19 C. W. N. 1290, Rel. on.* [P 719 C 2]

(d) *Civil P. C., S. 11 — Decision against a defendant is binding on him though he did not appear.*

A decision in a suit against defendant who did not choose to appear is as much binding upon him as on the defendants who appeared and contested: *A. I. R. 1928 Cal. 650* and *A. I. R. 1925 Cal. 427, Ref.* [P 720 C 1]

Rupendra Kumar Mitter and Radhica Ranjan Guha—for Appellant

Gunada Charan Sen, Rakhal Chandra Bose, Jyotish Chandra Guha and Sitangshu Bhushan Bose—for Respondents

Biraj Mohan Majumdar—for Deputy Registrar.

Suhrawardy, J—These appeals arise out of suits for rent for the year 1326 to 1329 B. S. The defendants held a jama under the miras ijara of the plaintiffs. The Government thereafter claimed a portion of the land included in the jama as accretion and started dearah proceedings under Act 31 of 1858 in respect of it. In those proceedings the dearah officer purported to settle separate rent in respect of that portion of the land which he found to have been alluvial accretion. In 1917 the plaintiffs brought suits for rent as settled by the dearah officer. One

Asmat Ali, one of the defendants in those suits and who is also a defendant in the present suits and who seems to be the most prominent figure in this fight, appeared and contested the suits on the ground that the dearah officer had no authority under the law to split the jama and assess rents thereupon. In spite of the contest the suits were decreed by the Munsif. Shortly after the decrees were passed, a petition was filed on behalf of the plaintiffs and Asmat Ali in which he admitted the jama as decreed and agreed to pay rent to the plaintiffs at the rate decreed. In 1919 the plaintiffs again brought suits for rent and Asmat Ali contested them on the grounds taken by him in the previous suits. Those suits were also decreed according to the claim of the plaintiffs. The present suits were brought in 1923 claiming rent at the rate claimed in the previous suits. The same defence was raised not on behalf of Asmat this time, but on behalf of the appellant a parda-nashin lady. The trial Court upheld the defence and decreed the suits in a modified form. The appellate Court on appeal by the plaintiffs has decreed the suits according to the rent claimed by the plaintiffs. These appeals are by one of the defendants and several points have been raised before us by the learned vakil appearing in support of them.

It is contended in the first place that the findings arrived at in the lower appellate Court with reference to the decrees of 1917 and 1919 are inconsistent and that the Court having held that the decrees in the previous suits did not operate as *res judicata* in the present suits he should have further held that rents assessed by the dearah officer are not recoverable in the present suits. The learned Subordinate Judge has held that the decisions in the suits of 1917 and 1919 are not *res judicata* because they were erroneous decisions on a question of law. He considered the attitude of the appellants in the previous suits and relying upon the petition filed by Asmat above referred to and the circumstances in the cases including the previous decisions against the defendants he decreed the plaintiff's suits in full. I must admit that the reasoning of the learned Subordinate Judge is not very consistent and clear. But the learned advocate for the respondents has attempted to defend the decree of the lower appellate Court on a

ground on which the Subordinate Judge took a different view. His contention is that the decrees in the previous suits ought to operate as *res judicata* in the present suits. In the circumstances of the present case it seems to me that this contention is well founded. In the suits of 1917, in spite of the contest by one of the defendants who had appeared, the Court held that the plaintiffs were entitled to recover rent as settled by the dearah officer. It is said that it is a wrong decision on a pure question of law and therefore cannot operate as *res judicata*. Now, the question whether a decision on a question of law ought to operate as *res judicata* or or not is a question on which it is difficult to find any uniformity in the decisions in the various reports. The principle which ought to govern decisions of this question has been lucidly laid down in *Aghore Nath v. Kamini Devi* (1) which has been followed in a number of cases which it is not necessary to examine as they are based on the principle laid down in that case. A weighty pronouncement on this subject has been made by the Bombay High Court in the Full Bench case of *Sitaram Sakharam v. Lakshaman Vishnu* (2), where Shah, J., observed :

It seems to me that the plea of *res judicata* is not dependent upon the merits of the reasons given for a particular conclusion. The conclusion, whether right or wrong, is binding upon the party. . . . Its binding character does not depend upon the correctness of the reasons for the conclusions . . . The Sec. (11, Civil P. C.), does not make any distinction between an issue of law and other issues ; it refers generally to questions directly and substantially in issue and heard and finally decided, and I do not think that the distinction can be accepted without restricting the scope of the section in a manner not justified by the words of the section. It would involve the reading of words in the section which are not there.

The result of all the decisions upon this point is that a decision, however, erroneous it may be on a question of law, may not operate as *res judicata* only in cases where the causes of action are different ; but in all other cases it must operate as *res judicata* between the parties. The view that an erroneous decision on a question of law should not constitute *res judicata* is based on the consideration that otherwise an error of law would be perpetuated by Courts of justice for all time to come. But it is settled

(1) [1910] 11 Q.L.J. 461=6 I.C. 554.

(2) A.I.R. 1921 Bom. 87=45 Bom. 1260 (F.B.).

that an erroneous decision based upon a mixed question of law and fact will operate as res judicata though the decision on the question of law involved is erroneous *Bamal Malikand v. Deodhari Rai* (3) and *Hublal v. Gulzarilal* (4). In the latter case a view has been broadly stated that an erroneous decision on the question of law will be as much res judicata between the parties as upon any other questions. This unqualified expression of opinion may not be consistent with that which has prevailed for a long time in other Courts, but it is not wholly unjustifiable. Reliance has been placed on behalf of the appellant, in support of his submission that the decision in the suits of 1917 and 1919 were erroneous in law and therefore cannot operate as res judicata in the present suits, upon the decision in *Alimunnissa Chaudhuran v. Shama Charan Roy* (5). In that case the previous decree was given on a certain view taken on the question of law as then understood. Subsequent to that decision the Judicial Committee laid down the law what it should be. After the decision of the Judicial Committee a subsequent suit was brought and it was contended that the decision in the previous suit was res judicata. The learned Judges held that a change in the law as affected by the decision of the Judicial Committee will have the same effect if it was effected by a statute and therefore the decision of the question of law in the previous suit was not res judicata in a subsequent suit. In the concluding portion of the judgment Maclean, C. J., remarked :

I do not desire to be understood as saying that a point of law can never constitute res judicata.

This decision was upheld on similar facts in *Nabin Chandra v Dudu Meah* (6). These cases, therefore, do not support the contention that an erroneous decision on a question of law does not constitute res judicata between the parties to the suit.

Now, let us examine the particular facts on which the plea of res judicata is based. In the suits in 1919 the Court held that the issue involved in the suit of 1917 was not restricted to that suit

but was of general application and therefore, the decision on the question of the amount of rent payable by the defendant would operate as res judicata. But it went on to observe that apart from the question of res judicata, there were other circumstances on which the defendants must be made liable to pay rent according to the plaintiffs' claim and one such circumstance referred to was the agreement entered into by the defendant Asmat in the previous suit by which he admitted the jama as claimed by the plaintiff. The learned vakil for the appellant argues that his client is not bound by the act of Asmat or by any admission made by him. The learned Subordinate Judge, in the Court below, has held upon some authorities that an admission by a defendant is receivable in evidence against other defendants. But apart from that consideration the decision of the Munsif in 1919 upon this question was at most erroneous on a question of fact and there can be no doubt that a decision on a question of fact, however erroneous it may be, constitutes res judicata between parties to the previous suits. According to the judgment of the Munsif in the suits of 1919 the defendants (meaning all the defendants to the suits) waived the ground taken by them in those suits and they could not come forward again to challenge the decision in the previous suits. Whatever may be the decision with regard to a decree in the suit in 1917 there does not seem to be any doubt that the decree in 1919 must be binding on the defendants.

There is another aspect of this question from which it may be viewed. The erroneous decision on a question of law in the suits of 1917 was upheld by the Court in the suits in 1919 by following it or treating it as res judicata. This latter decision should be conclusive between the parties; otherwise there can be no finality in any judgment unless it is right in law. In support of this view reference may be made to the decision in *Mohendra Nath Biswas v. Shyam Sunnessar Khatun* (7). There, in the previous suit it was wrongly held that a decision in the suit before that was not res judicata. Their Lordships held that the latter decision even if it was erroneous became conclusive between the parties and that it was not open to any one of

(3) A.I.R. 1924 Pat. 265=2 Pat. 771.

(4) A.I.R. 1927 All. 297=49 All. 543.

(5) [1905] 32 Cal. 749=9 C.W.N. 466=1 C.L.J. 176.

(6) A.I.R. 1925 Cal. 1193.

(7) [1915] 19 C.W.N. 1280=27 I.C. 954=21 C.L.J. 157.

them to plead that the former decision still operated as *res judicata*.

There is another consideration which has induced us to hold that the decision in the previous suit ought to operate as *res judicata*. In the suits of 1919 one of the issues that were placed before the Court for decision was

whether the plaintiffs were entitled to claim rent for the dearah land as alleged, if so, at what rate?

This issue was not restricted to the period in suit in those cases; but was an issue directed to the general right of the plaintiff to recover rent at a certain rate in respect of that land. The appellant was the defendant in those suits and she did not choose to appear in them. The decisions in those suits are as much binding upon her as on the defendants who appeared and contested them, *Gnanada Govind v Nalini-bala Devi* (8) and *Sarojini Debya v. Lakhipriya Guha* (9).

Though the learned Subordinate Judge in these cases has held that the previous decision ought not to be treated as *res judicata* he has referred to other circumstances in support of his decision that the plaintiffs are entitled to recover rent at the rate claimed by them from the defendant. He holds that these cases were really conducted by Asmat Ali who is behind this pardanashin lady and is carrying on this litigation in her name. He also relies upon the petition filed by Asmat in 1917 as constituting an admission by the defendants represented by Asmat of the rate of rent and he also observes that under the decrees in the previous suits the decretal amounts were realized. Relying upon all these circumstances he has held that the plaintiffs are entitled to decrees against the defendants. We cannot say that this finding is based upon an erroneous view of the law.

As a result of the above considerations these appeals fail and are dismissed with costs, to the respondents represented by Mr Gunada Charan Sen and Babu Jyotish Chandra Guha.

Graham, J.—I agree.

D.D.

Appeal dismissed.

* * A. I. R. 1928 Calcutta 720

B. B. GHOSE AND CAMMIADE, JJ.

Kasi Nath Ghosh and another—Defendants 1 and 2—Appellants.

v.

Himmat Ali Chaudhury and others—Plaintiff and Defendants—Respondents.

Appeal No 307 of 1926, Decided on 27th February 1928 from the original order of Sub-Judge, Dinajpur, D/- 19th May 1926.

* (a) *Civil P. C., S. 97—Final decree passed—Appeal from preliminary decree is competent.*

Right of appeal from a preliminary decree cannot be taken away by a final decree being passed either before or after the person appeals from the preliminary decree: *A. I. R. 1925 Cal. 790, Dist.* [P 721 C 1]

* (b) *Civil P. C., O. 43, R. 1—Order refusing to set aside preliminary ex-parte decree—Final decree passed—Appeal from the order is still competent.*

An appeal from an order refusing to set aside an ex-parte preliminary decree in a mortgage suit is competent, even though a final decree has been passed before the filing of the appeal: *10 M. I. A. 203 (P. C.), Appl.*

[P 721 C 1]

Jogesh Chandra Roy and Bankim Chandra Banerji—for Appellants.

Sarat Chandra Bose and Gopendra Nath Das—for Respondents.

Suresh Chandra Taluqdar—for Dy. Registrar.

B B. Ghose, J.—This appeal arises from an order refusing to set aside an ex-parte decree passed in a suit on a mortgage brought on 20th December 1924. After the suit had been pending for some time, an application was made by the defendants on 4th November 1925 for further time. The application was ostensibly on the ground of illness of witnesses and so forth. That application was rejected. The plaintiff also filed an application which was also rejected. Upon that the defendants' pleader alleged that he had no further instructions and retired from the case. The plaintiff proceeded to prove his case ex-parte and obtained a decree. The present application was made on 2nd December 1925 for setting aside the ex-parte decree. The Subordinate Judge has stated his grounds for rejecting the application. From that order, the present appeal has been presented.

(8) A I R. 1926 Cal. 650.

(9) A.I.R., 1925 Cal. 427.

A preliminary objection has been taken that no appeal lies. The ground is that the application under O. 9, R. 13, Civil P. C., was dismissed on 19th May 1926. The final decree in the mortgage suit was made on 23rd June 1926. It is contended on the authority of the case *Jogendra Narayan Das v. Satyendra Chandra Ghose* (1) that the appeal is incompetent because of the passing of the final decree in the mortgage suit. With great respect I am unable to agree with the reasons of the judgment. An appeal is allowed against an order under O. 9, R. 13 Civil P. C., by O. 43. There is no provision in the Code which debar an appeal from such an order unless there is an appeal from the ex-parte decree itself, and surely there is no basis for the argument that an appeal from the order is incompetent if there is no appeal from the final decree. The reported case appears to be based on certain cases in this Court where it has been held that an appeal against the preliminary decree is not incompetent, if before the appeal is filed, the final decree in the case has been made and there is no appeal from the final decree. In my opinion, those decisions based upon the provisions of the Civil Procedure Code of 1882 cannot be sustained upon proper grounds. The Code of 1882 allowed a preliminary decree to be questioned in an appeal from the final decree and the basis of the decisions under the Code of 1882 was that after the final decree is passed, the preliminary decree ceases to exist and is absorbed in the final decree. The preliminary decree having no separate existence, an appeal from such a decree was held to be infructuous when the final decree was made. Under the present Code, the two decrees are independent and separate. One cannot now question the validity of the preliminary decree by an appeal from the final decree.

Under S. 97 if a person aggrieved by a preliminary decree does not appeal from it he is precluded from disputing its correctness by his appeal from the final decree. In my opinion therefore where a preliminary decree has an independent existence and a person aggrieved by it is bound to appeal from it, that right cannot be taken away by a final decree being passed either before or after the person appeals from the pre-

liminary decree. If a proper case had arisen before us, we would have referred this question to the Full Bench for the point being settled once for all, as we think that the view taken by the Madras and Allahabad High Courts is the correct view to take under the present Code and that the view taken in a series of cases in our Court can not be sustained upon principle. But this is not such a case in which a reference may be made.

In the present case the question is with regard to an appeal from an order refusing to set aside an ex-parte decree. In deciding this matter the question of the merits of the case does not arise for consideration; and what does it matter whether a final decree has been made in such a case or not? If the order refusing to set aside an ex-parte decree is reversed by this Court on appeal, the preliminary decree, as well as the final decree being all dependent decrees, must all fall to the ground. This principle follows from what was observed by Lord Justice Turner in the Privy Council case, *Shama Purshad Roy v. Hurro Purshad* (2). This would be a question of dependent decrees. We need not differ from the actual decision in the case in *Jogendra Narayan Das v. Satyendra Chandra* (1) because there the appeal was against an order dismissing an application for setting aside an ex-parte decree for default, and also an application for setting aside the dismissal for default was made which was again dismissed. It might very well reasonably be held in that case that the appeal from those two orders was not at all sustainable. We, therefore, think that the preliminary objection taken in this case is not sound.

But coming to the merits, however, we find that the appellants have got no case. The grounds which the appellants stated for having the ex-parte decree set aside were not believed by the Subordinate Judge, and in the petition which they presented they stated that the moharir of their pleader assured them that there would be an adjournment. No person is entitled to act upon the assurance of his pleader's moharir that a particular case should not be taken up on the date fixed. The other reason given by the appellants does not also commend itself to us.

(2) [1863-86] 10 M. I. A. 203=3 W. R. 25 (P. C.).

(1) A. I. R. 1925 Cal. 790.

They said that they called for certain records which did not arrive on the date fixed. But they did not file certified copies of the records which would have proved what they wanted to prove by the order sheet of the case, that the defendant was in hijot on a particular date. It seems to us that the defendants were only trying to delay matters and were not desirous to have the case tried. On these grounds we dismiss the appeal with costs, the hearing-fee being assessed at three gold mohurs

Cammiade, J—I agree

D D.

Appeal dismissed.

A. I. R 1928 Calcutta 722

B B GHOSE AND BASU, JJ

Krishna Chandra Bhowmik—Defendant 1—Appellant.

v.

Pabna Dhan Bhandar Co, Ltd and others—Plaintiffs—Respondents.

Appeal No. 7 of 1927, Decided on 23rd May 1928, from original decrees of 2nd Sub-Judge, Zillah Pabna, D/- 22nd July 1926.

(a) *Evidence Act, S. 101—Affidavit of peon about proper service of—Party impugning the fact must prove that there was no service.*

When there is an affidavit, of the peon serving the notice, of proper service thereof, the party who impugns the fact ought to prove that there was no service. [P 724 C 1]

(b) *Bengal Revenue Sale Law (11 of 1859), S. 7—It is not a question between the defaulting proprietor and the Collector as to whether notice under S. 7 was served or not—Non-service of notice under S. 7 is neither illegality nor irregularity vitiating sale.*

Notices under S. 7 are only for the purpose of forbidding the tenants from paying their rent to the defaulting proprietor. If such notice is not served and the tenants pay the rent due to the defaulting proprietor, then it would be a question whether the auction-purchaser would again be entitled to recover that rent. It is not a question between the defaulting proprietor and the Collector as to whether notice under S. 7 was served or not. It is neither an irregularity nor an illegality which can vitiate a sale if notices under S. 7 are not served. [P 725 C 1]

(c) *Bengal Revenue Sale Law (11 of 1859), S. 5—Notice under, is expedient when mortgage has been found to be a good one by judicial decision, but non-service of notice is not an illegality.*

It may be expedient to serve notice under S. 5 when a mortgage has been found to be a good one by judicial decision, but if such notices are not issued where there is no order of attachment by any judicial authority, the law cannot be said to be contravened. [P 725 C 2]

(d) *Bengal Revenue Sale Law (1859), S. 13—Estate in arrear—Particular separate share in arrear should be sold but not the share not in arrear at the kist in question though in arrear in previous kist.*

When an estate is in arrear the Collector should look to his books to find which of the separate shares or which number of them was in arrear for that kist. If no separate share is in arrear for that kist, the entire estate is liable to be sold, but no separate share can be sold for an arrear of a previous kist. [P 725 C 2]

(e) *Bengal Revenue Sale Law (11 of 1859), S. 13—No arrears due for the kist for which an estate is sold—Sale is not valid.*

If no arrear is due for the kist for which an estate is sold, the sale is without jurisdiction: 38 Cal. 537 (P. C.), Rel. on. [P 727 C 1]

H. D. Bose, Rudha Binode Pal, Nagendra Nath Bose, Hem Kumar Bose and Tarakeswar Nath Mitter—for Appellant

Sarat Chandra Roy Chowdhury and Krishnā Kamal Moitra—for Respondents.

B. B. Ghose, J.—This is an appeal by defendant 1 against the judgment and decree of the Subordinate Judge, Second Court Pabna, setting aside a revenue sale. The facts are these: There was an estate touzi 10. Defendants 2 to 11 who are the respondents in this Court opened a separate account No. 10/6. They mortgaged their interest in this separate account along with some other property to the plaintiff company who are respondents along with the other defendant. It is not necessary to state in detail the provisions of the mortgage-deed. A suit was brought on the mortgage by the plaintiff company which was Suit No. 125 of 1918. They obtain a decree and a sale proclamation was issued in execution of their mortgage decree by the Subordinate Judge on 2nd October 1923. The property was sold and purchased by the plaintiff company on 19th November 1923. Eight applications were made by the several judgment-debtors for setting aside the sale. There was default in payment of the revenue of the estate in the separate account No. 10/6. The 12th January 1924 was the last date of payment and the amount due on that date was Rs. 35-2-0. On that date however the general account of estate No. 10 showed that there was an excess credited to the account of the estate to the extent of seven annas. Therefore nothing could be done as to the sale of the separate account for arrears of revenue on ac-

count of that default. The next date for payment of revenue for the subsequent quarter was 28th March 1924. On 27th March 1924, that is, on the previous date, the proprietors of the separate account No. 10/6 paid the amount due for that kist for that separate estate which was Rs. 20-13-0. On 28th March, however, there was arrear of revenue due in general account of the estate No. 10 to the extent of six annas and five pies, so there was an arrear of revenue due on account of the estate No. 10 for which the estate was liable to be sold. On 22nd May 1924 the Collector issued a notification for sale of the separate estate No. 10/6 for arrears due to the extent of Rs. 35-2-0 the amount due on it for the January kist and the separate estate was sold on 26th June 1924, and purchased by defendant 1 for Rs. 2,050. There was an application under S. 25 of the revenue sale law to the Commissioner by the plaintiff company. That was rejected. The sale was confirmed and the sale certificate was issued in favour of defendant 1 on 10th December 1924. In the meantime the applications that were made by the judgment-debtors in the mortgage suit for setting aside the sale of their properties in execution of the mortgage decree of the plaintiff was settled on compromise on 16th June 1924. It is not necessary for the present purpose to state the terms of the compromise in detail. It is sufficient to say that the sale was set aside with regard to some of the properties. It was confirmed with regard to some and certain stipulations were entered into between the parties for the debt to be considered to have been paid off in certain circumstances.

The present suit was brought on 10th July 1925. The defaulting proprietors were made defendants, but they take no interest in the litigation. The only contending parties are the plaintiff company and defendant 1. The Subordinate Judge has decreed the suit on several grounds. They are as follows:

(1) That there was no arrear due for the March kist of 1924 for this separate account No. 10/6. The sale was, however, effected for the March kist as shown by the Rubakari and the notification of the Collector. Therefore the sale was without jurisdiction;

(2) As the plaintiff had obtained a decree on their mortgage a notice was necessary under the provisions of S. 5, Act 11, 1859: see paragraph commencing as thirdly, and as no such

notice was served there was a serious irregularity;

(3) Notice under S. 6 was not served before 30 days of the sale as required by S. 6, Act 11, 1859. That the name of the proprietor was wrongly given as Rai Sahab Girish Chandra Brighi, whereas it was known at the Collector's office, that he was not the proprietor. This misled the plaintiffs and, therefore, payment was not made. It was also held that service was not effected on the properties;

(4) Notices under S. 7 of the Act were not served. These irregularities caused substantial injury to the plaintiff as the property was sold at an inadequate price.

There was another prayer in the plaint that a declaration might be made if the sale is not set aside that defendant 1 has purchased the property subject to the mortgage lien of the plaintiffs. This was an alternative prayer and the Subordinate Judge held that if he had not set aside the sale he would have granted the alternative prayer in respect of the properties of which the sale has been set aside by the compromise dated 16th June 1926.

I propose to deal with the points separately. The learned advocate for the appellant has contended that the Subordinate Judge is wrong in his conclusion with regard to every one of the questions. His contention is that with regard to many of the questions under the third head decided by the Subordinate Judge the plaintiffs did not specifically raise the objections in their petition of appeal before the Commissioner; for instance they never urged as a ground before the Commissioner in their appeal that the name of the petitioner has been wrongly given; nor did they allege that notices had not been served on the various properties. What the plaintiffs said in ground No. 4 in their grounds of appeal was that the sale was held less than 30 clear days from the date of affixing the notification under Ss. 6 and 13 of the Act in the office of the Collector, but no other point was taken. There seems to be a good deal of substance in the contention. But apart from this, there is nothing to show that as a matter of fact notices were not served according to law. There is no evidence in support of the allegation of the plaintiffs. On the other hand it will appear from Ex F and Ex. R, that notices were served on 23rd May 1924. The peon who served the process was called by the plaintiffs to prove service of process in the mortgage suit. But no question was put to him

as to whether he had actually served the notices in question or not. It was suggested in the judgment of the Subordinate Judge that it was the duty of defendant 1 to get this fact from the peon. I do not think that the Subordinate Judge was right in so holding. When there was an affidavit of the peon of proper service of notice, the party who impugns the fact ought to have proved that there was no service. The plaintiffs fought shy of the question for the obvious reason that there was no substance in their plea. Therefore it must be taken as a fact that there was service as proved by the various returns Ex. F, Ex. R, Ex 4 (f) and Ex H, and therefore this objection on the part of the plaintiff is untenable. There is one matter in this connexion which I think I ought to state here. In Ex. 4 (e), which is a copy of the Rubakari of the Collector ordering service of notification for sale of the property in question on 26th June 1924, there are some entries at the top showing certain demands on the property for cesses and so forth. These demands were made under the Public Demands Recovery Act for which a certificate was filed on 2nd June 1924. This appears from Ex 9 (b) and Ex 11 (a).

The Subordinate Judge argues from this fact that the notification must have been issued subsequent to the 2nd June 1924 and therefore the whole story of service in May must be entirely false. It does not appear, however, from the evidence as to who made the entries on the top of the Rubakari Ex. 4 (e) and when. It cannot be conceived for a moment that these entries were made by the Collector who signed the Rubakari on 22nd May 1924, or the Deputy Collector who asked for an order for the notification on 20th May 1924. Who then made the entries and when? The Subordinate Judge assumes that these entries must have been made before the notice was made over to the peon for service. A person was called from the collectorate. No question was put to him about this. The defendant made a prayer to the Subordinate Judge to recall the witness so that questions might be put to him as regards this matter. That was refused. The entries appear in the certified copy. Whether they were made by some person after the certificate was lodged for the purpose of calculating as to how much was due from

that particular estate so that the money might be realized from the surplus sale proceeds or for any other purposes, these questions are left wholly uninvestigated, and I cannot agree with the opinion of the Subordinate Judge that purely because there are these entries made on the top of the Rubakari the whole story of due service of process must be disbelieved. So much for the third point as regards service of notice under S. 6. My conclusion is that it has been satisfactorily proved that the notices were properly served and there was no contravention of the provisions of S. 6 of the Act.

The fact that the name of the proprietor of this separate estate was given as Rai Saheb Girish Chandra Bagchi appears in Ex. G, the notification for sale. The Subordinate Judge says that the people in the collectorate knew that the interest of Rai Saheb Girish Chandra Bagchi in the property ceased some time in August 1923 and therefore it was a grave irregularity on the part of the Collector to insert the name of the Rai Saheb as the proprietor of the property in the sale notification. It appears from Ex. 10 that a certificate was filed by public demands with regard to this property, and apparently the Rai Saheb was said to be the certificate debtor (which was contracted into C. D., but wrongly elaborated as Collector's Department). It appears from Order 10, dated 16th April 1924, that the certificate-debtor had transferred his interest to Joy Durga Devi on 14th August 1923. The Subordinate Judge next says that the certificate was issued on 2nd June 1924 in the name of Joy Durga Devi, that is, Ex. 9 (b), and therefore it was wrong on the part of the clerk in the Collectorate to insert the name of the Rai Saheb in the notification for sale Ex. G. But it appears that the name of Rai Saheb is registered in Register D of the Collector. This appears from the evidence of witness No. 3 for the defendant, and also in the evidence of defendant's witness No. 1 Atul Chandra Bhattacharjee, who were cross-examined on the question on behalf of the plaintiff. The Collector in giving the name of the owner of an estate which is sought to be sold was quite right in giving the name which was in the D register, and it was not an irregularity to put in his name; nor does it appear that the plaintiffs made any grievance of the fact that on

that ground they were unable to pay the arrears due. Besides, it seems to me that this irregularity, if there is any, has not been shown to have caused any substantial injury to the plaintiff. This disposes of point No. 3.

With regard to the 4th point, assuming that notices under S. 7 of the Act were not served, I do not think that the sale can be vitiated on that account. Notices under S. 7 are only for the purpose of forbidding the tenants from paying their rent to the defaulting proprietor. If such notice is not served and the tenants pay the rent due to the defaulting proprietor, then it would be a question whether the auction-purchaser would again be entitled to recover that rent. It is not a question between the defaulting proprietor and the Collector as to whether notice under S. 7 was served or not. It is unnecessary to elaborate the point as in my opinion it is neither an irregularity nor an illegality which can vitiate a sale if notices under S. 7, Act 11, 1859 are not served.

The next question which I take up is question No. 2 as to service of notice under S. 5 of the Act. S. 5 of the Act requires that a notification should be made specifying the amount of the arrear or demand of certain descriptions and the latest date on which payment thereof shall be received for a period not less than 15 clear days preceding the date fixed for payment according to S. 3 of the Act, in certain places and paragraph "thirdly" specifies

arrears of estates under attachment by order of any judicial authority or managed by the Collector in accordance with such order.

The learned counsel on both sides admit that there was no date fixed for payment of the arrears according to S. 3 of this Act in this case. What was admitted by both parties before us is this : that the arrears fell due and were payable on 12th January and on 28th March, and if not paid by sunset of those dates the property would be liable to be sold. If that be so I do not see how any notification can be affixed as required by the first part of S. 5 of the Act. In that view it seems to me that that section would not be applicable to the particular facts of this case ; and the learned advocate for the respondent was unable to explain to us how upon his own statement that there was no date fixed for payment under S. 3

of the Act it was possible for the Collector to affix any notification as directed by S. 5 in this case. Then again as this point has been argued before us by both sides, I think I ought to record my opinion as to the proper interpretation of the paragraph beginning as "thirdly" of that section. It refers to arrears of estates under attachment by order of any judicial authority. The Subordinate Judge has referred to Note 4 under that section in the Board's Manual which runs thus :

In mortgage decrees when the decree contains a direction to sell, such decrees have the force of an attachment and hence formal attachments are unnecessary ; but the revenue Courts get notice of such decrees when the sale proclamations are issued under S. 289, Civil P. C., (O. 30, R. 67 of the Code of 1908), and should then consider the estate as being under attachment by judicial authority and issue notices prescribed by this section.

The reference is Board's Miscellaneous proceedings of 11th May 1895. It is argued by the learned counsel for the appellant that the words of the Act are "under attachment by order of any judicial authority". An order for sale or sale proclamation issued under a mortgage-decree is not an order for attachment under judicial authority", and it is wrong to say that an order for sale has the effect of such attachment, and therefore this paragraph of S. 5 of the Act has no application to a sale proclamation. True, it seems to be somewhat anomalous that a mere attaching creditor would be entitled to have notice served under S. 5, but not a mortgagee who has got a contractual lien on the property. Attachment is only a judicial lien and does not confer any interest on the property; whereas a mortgage creates an interest in the property itself. As I have already said the position seems to be anomalous. But one cannot extend the meaning of the words "under attachment by order of any judicial authority" as meaning an order for sale in execution of a decree on a mortgage. It may be expedient to serve notice under S. 5 when a mortgage has been found to be a good one by judicial decision, and very rightly the Board has directed the revenue authorities to serve notices as prescribed by that section. But it cannot be said that if such notices are not issued, where there is no order of attachment by any judicial authority, the law has been contravened. On this point I

am unable to agree with the decision of the Subordinate Judge.

Now there remains the first point which to me seems to be the most important of all, and to my mind it is not free from difficulty. The question must be answered with reference to S. 13 of the Revenue Sale Law. That section runs as follows:

Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due.

The learned Subordinate Judge has upon the facts which I have already stated found that there was no arrear due on account of the March kist for this separate account. Therefore the sale for the March kist which the Collector ordered was without jurisdiction there being no arrears left. The learned Subordinate Judge took some trouble in finding that the sale was held for arrears of March kist, and he found that the March kist having been paid by the defaulting proprietor of the separate account No. 10/6 there was no arrear due. There was some argument before us on behalf of the appellant as to whether the sale could be said to have been held on account of the March kist. Reference was made to the sale notification in which it is not stated for which kist the property was going to be sold. That notification was in accordance with the form sanctioned by the Government, and no kist for which the sale is to be held is mentioned in that form. The Subordinate Judge, however, refers to the Rubakari Ex. 4 (e) and Ex. 8. It is entered there that the sale is to be for the March kist of 1924, and that is also to be found in Ex. F which is described as hukumnama, order of the Collector on the Nazir dated 23rd May 1924. On these documents the Subordinate Judge based his conclusion that the sale was but for an arrear of revenue for the March kist of 1924, and as there was no arrear of revenue for the March kist of 1924 the sale was without jurisdiction.

The question is whether under the circumstances of this case the separate account No. 10/6 could be sold for arrears of revenue which was undoubtedly

unpaid on 12th January 1924 for this separate account. As I have already pointed out the property could not have been sold for the arrears in January, because the estate was not liable to be sold on that date there having been an excess payment of 7 annas on account of the estate, although this particular separate account was in default. On the expiry of 28th March 1924, the estate was liable to be sold because there was an arrear of 6 annas 5 pies for the estate. Now when the Collector found that there was an arrear due for the estate and the estate was liable to be sold, what was he next to do? He had to find, when there are separate accounts, which separate account or which number of them were in arrears. The Collector had to see the shares of the estate from which arrear of revenue was due. Now turning to his books he would find that no arrear was due for March from estate No. 10/6. The question then is: Was he entitled to go back and find that this separate account or any other separate account was in arrear on any previous date in the course of the year? The learned counsel for the appellant argues that he was so entitled, while the respondent contends that he was not. This seems to be the crucial point in the case, and it seems to me that the respondent's contention should be given effect to. Suppose there were two or more separate accounts, as in this case there are several. No. 10/6 was not in arrears in March. But suppose No. 10/1 was in arrear in March and 10/6 was in arrear in January. Which of the two properties should be sold, or should both be sold? and then, going a step further, could the Collector go beyond that date and find if in September some other separate share was in arrear? To my mind that would lead to confusion.

The simple construction, therefore, should be that when an estate is in arrear the Collector should look to his books to find which of the separate shares or which number of them was in arrear for that kist. If no separate share is in arrear for that kist the entire estate is liable to be sold, but no separate share can be sold for an arrear of a previous kist. It is further contended on behalf of the respondent that the default in payment of revenue of the share of 10/6 in January was not an arrear of

revenue' because the estate was not in arrear. If the estate was not in arrear, then the separate account could not be sold on account of the default of the proprietor of the separate account 10'6 for the January kist under S. 13. This has also been explained in R 90 at p. 284 of the Manual of Revenue and the Patni Sale Laws published under the authority of the Board of Revenue in 1928. Reference has been made on behalf of the respondent to the case of *Mahomed Jan v. Ganga Bishun Singh* (1). That case has some bearing upon the present case, in which it was held that if no arrear was due for the kist for which an estate was sold, the sale was without jurisdiction. I am of opinion that the disputed share could not be sold for the arrear of the estate for the March kist.

Under these circumstances it must be held that on the first ground this appeal fails and should be dismissed. I should add that with reference to the alternative prayer of the plaintiffs that it is not maintainable. If the plaintiffs had any right as mortgagees they might bring a suit for enforcing their right and ask for any consequential relief in a properly framed suit. Their prayer for the declaration they have asked for cannot be maintained, and if I hold that the sale was a good one their prayer for the alternative relief would have been refused. In the result this appeal is dismissed. There will be no costs either in this Court or in the lower Court to either of the parties, as the plaintiffs had unnecessarily prolonged the hearing by raising untenable grounds on the facts.

Basu, J—I agree.

N K/D.D.

Appeal dismissed.

(1) [1911] 33 Cal. 537=10 I. C. 272=38 I. A. 80 (P. C.).

A. I. R. 1928 Calcutta 727

RANKIN, C. J., AND MUKHERJI, J.

Bisweswar Das Mondal—Plaintiff—Appellant.

v.

Guru Charan Das—Defendant—Respondent.

Appeal No. 1598 of 1926, Decided on 27th July 1928, from appellate decree of Dist. Judge, Mymensingh, D/- 12th April 1926.

Contract Act, Ss. 215, 216—Agent arranging for loan for the principal—Agent lending his own money representing that the loan was from a third person—Mortgage executed on terms settled by agent—The transaction is voidable at the option of the principal.

Where an agent arranges for a loan on behalf of his principal, it is his duty to get that loan on the best terms possible. He cannot put himself in a position in which his interests conflict with his duty and, without full disclosure to his principal, he cannot validly lend his own money to his principal upon terms which he has adjusted. Such a transaction is exactly like the transaction of an agent for sale buying the property for himself or like the transaction of a stockbroker who sells his own shares instead of the shares of a third person. The effect of the breach of this fiduciary relationship which is inherent in all agencies is that the principal is entitled to regard the transaction as a voidable transaction and to have it set aside in the usual way. The consequence is not that the transaction in a case of this sort is void altogether, but it is voidable and equity will avoid it in all cases where the parties can be remitted to their former position.

[P 728 C 1]

An agent arranged for a loan on behalf of principal, in fact lending his own money, but representing that the loan was from one S. Mortgage was executed in favour of S on terms adjusted by the agent, as the mortgage could not have been executed in favour of the agent without finding out how much of the money of the principal was in his hand, he having not accounted for certain sums received on his behalf. A suit was brought by S on the basis of the mortgage:

Held: that the mortgage should be set aside and that an account must be taken of the sums due from the agent to the principal on all accounts, entitling the mortgagee to a charge upon the property comprised in the mortgage at a reasonable rate of interest.

[P 723 C 2]

Naresh Chandra Sen Gupta and Surjya Kumar Guha—for Appellant

Jahnabi Charan Das Gupta and Surendra Lal Mukerji—for Respondent.

Rankin, C. J.—In this case, the plaintiff one Bisweswar brings his suit for the enforcement of a simple mortgage bond for a sum of Rs. 500 with interest. The defendant is one Guru Charan who is the nephew of one Ram Durlav, the plaintiff's father. The facts found by the learned District Judge are, in substance, these: Guru Charan bought certain land and, as regards that land, Ram Durlav was his bargadar. This land appears to have been let out to tenants and the management of the land and the receipt of the part of the produce which belonged to Guru Charan were committed to Ram Durlav who was his uncle. In these circumstances Guru Charan, at the time of the mortgage in question having got

into litigation, had been in need to raise a loan and commissioned Ram Durlav to arrange a loan for him. Ram Durlav represented that he had arranged the loan from one Satish Kabiraj, but in truth and fact, the money that was being lent was being lent not by Satish Kabiraj at all but by Ram Durlav himself, the plaintiff Bisweswar being a mere benamdar for Ram Durlav and not as Guru Charan was told benamdar for Satis Kabiraj. Now, on these facts, the equitable principle is reasonably clear that, if A is B's agent for arrangement for a loan, it is his duty to get that loan on the best terms possible. He cannot put himself in a position in which his interests conflict with his duty and, without full disclosure to his principal he cannot validly lend his own money to his principal upon terms which he has adjusted. Such a transaction is exactly like the transaction of an agent for sale buying the property for himself or like the transaction of a stockbroker who sells his own shares instead of the shares of a third person. The effect of the breach of this fiduciary relationship which is inherent in all agencies is that the principal is entitled to regard the transaction as a voidable transaction and to have it set aside in the usual way. The consequence is not that the mortgage in a case of this sort is void altogether but it is voidable and equity will avoid it in all cases where the parties can be remitted to their former position.

It is quite clear, therefore, that when Guru Charan was sued upon the mortgage in question in this case he was entitled to take the equitable defence that this mortgage was voidable and to say :

So far as I am concerned here is your money back with interest at a reasonable rate and the mortgage must be set aside.

The question is whether, in these circumstances the right of Guru Charan is not something further. The learned Judge has held that Ram Durlav, acting as an agent for the management of Guru Charan's land, had received the produce and dealt with it and had not accounted to Guru Charan at the time of the mortgage. He has further found that the reason why the name of Satish Kabiraj was put forward was that it was impossible to suppose that at that time Guru Charan would execute a mortgage in favour of Ram Durlav without finding

out how much of his own money Ram Durlav had in his hand. In these circumstances, it seems to me that it is only right that the amount advanced upon this mortgage with interest should not be ordered to be brought into Court by Guru Charan and handed over to Ram Durlav without Ram Durlav first accounting for the various sums of money that he had received on behalf of Guru Charan. In my judgment the equity in this case is that the mortgage is liable to be set aside and that the mortgagee can only be given a charge upon the mortgaged subject for the net balance that is now due to him from Guru Charan account being taken of all moneys of Guru Charan in Ram Durlav's hand.

In my opinion, the learned Judge was wrong in dismissing the suit. It will be necessary to allow this appeal and to make an order declaring that, in the opinion of this Court, the mortgage sued upon should be set aside and that an account must be taken of the sums due from Ram Durlav to Guru Charan on all accounts and also that that account must include on the other side the sum of Rs. 500 which was lent and a proper rate of interest thereon not necessarily the contractual rate and that Ram Durlav is entitled to a charge upon the land comprised in the mortgage for the ultimate balance due to him if that sum be less than Rs. 500 plus interest. The suit will be remitted to the trial Court for taking the account and making the proper decree.

I think, however, on consideration, on the question of costs that, as the whole matter has been, on these findings, brought about by the conduct of Ram Durlav, it would be only right that Guru Charan should have his costs in the trial Court, before the District Judge and in this Court. Ram Durlav cannot in any event have a charge for more than Rs. 500 plus reasonable interest.

Mukherji, J.—I agree

A.L./R K.

Appeal allowed.

* A. I. R. 1928 Calcutta 729

Full Bench

RANKIN C. J., C. C. GHOSH AND
BUCKLAND, JJ.

Vernon Milward Bason—In the matter of.

Decided on 22nd December 1927.

* *Income-tax Act (1922), S. 16—Assessee a share holder in a company—Company keeping aside for some years a certain sum to be distributed as bonus to the directors — Assessee objecting to such payment — Matters compromised after some years and the assessee paid a lump sum as his share in the amount reserved—The amount is part of his income in the year of receipt and does not represent assessee's profits for the previous years.*

The assessee was a shareholder in three private companies limited by shares who pooled their profits. On 6th November 1917 a resolution was passed by the directors of one of the companies that after a certain dividend had been paid out of the net pooled profits a particular fraction of the balance remaining of the net pooled profits should be applied to the distribution of a bonus between the working directors. In the company's books entries were made on the basis of the resolution but the assessee having brought a suit the special bonus proposed was not in fact handed over to the directors. The matter was ultimately compromised and the assessee was given one lakh of rupees as his share of the bonus claimed by him to 31st December 1923. This sum of one lakh was included in computing his total income under S. 16 and the assessee was assessed to super-tax in respect of this total income.

Held: that no part of this sum was due or payable to the assessee until the company declared it as dividend or otherwise and dealt with it by making a payment thereof to the assessee, and the amount was part of his income in the year of receipt. It cannot be regarded as representing the assessee's profits for the previous years. [P 730 C 1]

B. L. Mitter, H. R. Pankridge and S. M. Bose (Sr.)—for Commissioner of Income-tax.

H. D. Bose—for Assessee.

Rankin, C. J.—In this case the assessee, Mr. V. M. Bason, is a shareholder in three private companies limited by shares. In 1917 and after, it would appear that these companies had some arrangement for pooling their profits. The three companies were Samuel Fitze & Co., Ltd., Murray & Co., Ltd., and Devereux & Co., Ltd.

On 6th November 1917 a resolution was passed by the directors of Samuel Fitze & Co. Ltd. to the effect that after a dividend of not less than 10 per cent. had been paid out of the net pooled pro-

fits of the three companies on any year's working, a sum equal to one-third of the balance remaining of the said net pooled profits should be applied to the distribution of a bonus between the working directors, in India. The assessee, as a substantial shareholder in each of these three companies, objected to this proposal and claimed that the resolution was ultra vires and illegal. It would appear that in the companies' books entries were made on the basis of the resolution, but the assessee having brought a suit and obtained an injunction, the special bonus proposed to be given to the working directors out of the companies' profits was not in fact handed over to the directors. The sums in dispute appear to have been held in suspense by the companies concerned pending a decision as to the validity of the resolution. In the end the matter was compromised as appears from a resolution passed at an extraordinary general meeting of the shareholders of Samuel Fitze & Co., Ltd., held on the 16th December 1924 which shows that the bonus scheme was ultimately confirmed upon certain terms as regards the assessee of which the following is the chief :

The company with the consent of the directors will pay Mr. Bason one lakh of rupees which shall be accepted by him upon the basis that it represents the share of the bonus claimed by him to 31st December 1923, which has been set aside for the directors in terms of the resolution of 6th November 1917 which Mr. Bason has objected to and in respect of which these suits have been filed.

The present question has reference to this payment of one lakh of rupees. As the companies have in each year paid income-tax, together with the companies' super-tax upon their profits, the assessee has not been required by the assessment now in dispute to pay income-tax upon this figure. But this figure has been included in computing his total income under S. 16, Income-tax Act of 1922 and he has been assessed to super-tax in respect of this total income.

The assessee's real grievance is that if the resolution of 6th November 1917, which he regards as illegal, had not been passed and acted upon, he would in each of the years between 1917 and 1923, have received a larger dividend upon his share, a dividend upon which income-tax would not have been payable by him and which

would not have been in amount sufficient in any year to expose him to super-tax.

The Commissioner of Income-tax has stated for the opinion of the Court two questions, namely :

(1) Whether under the circumstances of the present case the lakh of rupees could be said to be the income of the petitioner for 1924-25 as dividends or otherwise, and whether the whole or any portion of it is assessable under the Income-tax Act.

(2) Whether their liability to assessment attached to each of the directors, as he received each year for several years his share of the bonus either by actual withdrawal or by credit to his private account with the companies, and whether this liability was in any way modified or in any way transferred to the petitioner by the subsequent payment to him of a lump sum on 26th July 1924, as recorded in the terms of settlement in the High Court suit of 1920.

The only question which really requires to be answered is the first. The Commissioner of Income-tax has in my opinion correctly held that the sum in question was income assessable in 1925-26. No part of this sum was due or payable to the assessee until the companies declared it as dividend or otherwise dealt with it by making a payment thereof to Mr. Bason and the amount was part of his income in the year of receipt. It cannot be regarded, as the assessee has claimed, as representing the assessee's profits, for previous years.

The second question stated to us, as framed by the assessee, appears to be altogether misconceived. The directors in fact did not receive the money and it never was taxed or taxable in their hands. The claim to assess the assessee upon this sum does not in any way rest upon any theory that the directors' liability to income-tax has been transferred to the assessee. The Commissioner of Income-tax has rightly held that the correct answer to this question is that it does not arise.

In my opinion the assessment is in order; the questions referred to us should be answered in the sense which I have indicated and the assessee should pay the cost of this reference.

C. C. Ghose, J.—I agree

Buckland, J.—I agree.

R K.

Reference answered.

A. I. R. 1928 Calcutta 730

RANKIN, C. J. AND MUKHERJI, J.

Kandarpa Narain Mazumdar and another—Plaintiffs—Appellants

v.

Bindu Bashini Dasi and another—Defendants—Respondents.

Appeal No 2478 of 1925, Decided on 21st May 1928, from appellate decree of the Dist. Judge, Birbhum, D/- 15th August 1925.

(a) *Bengal Tenancy Act, S. 170 (3)*—*Transferee of a holding allowed to make deposit without notice to landlord—Landlord withdrawing deposit is estopped from questioning transfer—Not giving notice is immaterial.*

An occupancy holding was put to sale in execution of rent decree. The transferee of the holding was allowed to deposit the decretal amount under S. 170 (3). The order was passed without notice to the landlord. The landlord withdrew the amount deposited.

Held, that it must be presumed that the landlord had knowledge of the transfer and hence he was estopped from questioning the validity of the transfer: *A. I. R. 1923 Cal. 1215, Dist.* [P 731 C 2]

Held, further, that it did not matter that no notice was given to the landlord before allowing deposit to be made, 27 *C. L. J. 383, Foll.*

[P 731 C 2]

Gopendra Nath Das—for Appellants.

Miss Cornelia Sorabji and Ramani Mohan Banerji—for Respondents.

Mukherji, J.—This appeal arises out of a suit instituted by the plaintiffs for recovery of khas possession of certain lands from the defendants on the allegation that the tenant thereof had abandoned the tenancy and made a transfer of the same in favour of the defendants. It was alleged that the tenancy in suit was a non-transferable occupancy holding. The suit was resisted on the ground that the tenancy in question was a mokurari one and further that, when in execution of a decree for rent which had previously been obtained by the plaintiffs as against the then tenant the holding was put up to sale, the defendants made a deposit under the provisions of S 170, Cl. (3), Ben. Ten. Act and the landlords, that is to say, the plaintiffs, withdrew the same. The suit was decreed by the trial Court but, on an appeal being preferred by the defendants, the learned District Judge has dismissed the suit. The plaintiffs have thereupon preferred this second appeal.

Now, the facts upon which the learned District Judge has held that the plaintiffs are estopped from questioning the

validity of the transfer that was made by the previous tenant in favour of the defendants are these: The decree that had been previously obtained by the plaintiffs as against the previous tenant was put into execution and, after the attachment and the sale proclamation were issued, the defendants applied for permission to deposit the decretal amount under S 170, Ben. Ten Act, alleging that they had purchased the holding, and, in support of the application that they made on that occasion, they filed an affidavit and the kobala under which they alleged they had made the purchase. The Munsif, in whose Court the execution case was pending, permitted the defendants to make the deposit, but did not issue any notice on the plaintiffs and eventually passed the following order:

Challan received. Money deposited. Decree-holders are directed to withdraw the money. Case disposed of on full satisfaction.

This order was passed on 20th December 1917 and thereafter, on 17th January 1918, an application being made on behalf of the plaintiffs, a payment order was made in their favour and the amount deposited as aforesaid was withdrawn by the plaintiffs. What is contended before us on behalf of the plaintiffs-appellants is that, inasmuch as the order allowing the deposit to be made was passed without notice to the plaintiffs and the money was withdrawn by the plaintiffs' pleader under circumstances which would not definitely show that, in point of fact, the plaintiffs had knowledge of the fact that the money had been deposited by a person who had claimed to have a right in the holding, the plaintiffs are not estopped from questioning the validity of the purchase. The learned vakil for the appellants has sought to distinguish some of the decisions upon which the judgment of the learned District Judge on this point is based. It is true that the facts of some of the cases on which the learned District Judge has relied are distinguishable from those of the present case but, after all, it seems to be perfectly clear that when the plaintiffs withdrew the money that had been deposited, they were bound to make enquiries as to the circumstances under which it came to be deposited in Court and, inasmuch as they did, in point of fact, withdraw the money, it is to be presumed that they did so with

knowledge of those circumstances. It does not very much matter that no notice was given to the plaintiffs before any order was passed allowing the deposit to be made. As has been pointed out by this Court in the case of *Gadadhar v. Midnapur Zemindary Co. Ltd.* (1), in which case also it was not clear upon the materials on the record whether any notice was given to the decree-holder of the fact that an application had been made for permission to make the deposit when the decree-holders found that the money had been deposited by one who asserted a title by purchase, they should have made enquiries and, if they had done so, they would have discovered every thing. In that case, the decree-holders without adopting that course withdrew the amount and, upon that it was held by this Court that, in those circumstances, they could not be permitted to urge that the transfer was inoperative. The circumstances of that case are very similar to those of the case before us and I am of opinion that, in view of those circumstances, it must be held in the present case that the plaintiffs are no longer competent to question the validity of the transfer. There is one case of this Court to which, our attention has been specially drawn namely, the case of *Suck Chand Das v. Girdhari Das* (2). In the judgment of Suhrawardy, J., in that case, there are certain observations, which apparently support some of the contentions that have been urged on behalf of the appellants in this appeal. But when the facts of that case are examined closely it would appear that the money that was withdrawn by the landlord was deposited by certain persons who were found to have acquired no interest in the tenancy at all and were strangers to the holding. The observations, therefore, that are to be found in that case must be taken to be limited to the particular circumstances of that case.

In these circumstances I am of opinion that the view taken by the learned District Judge is correct and that this appeal should be dismissed with costs.

Rankin, C. J.—I agree.

D.B./R.K.

Appeal dismissed.

(1) [1918] 27 C. L. J. 335=43 I. C. 742.

(2) A. I. R. 1926 Cal. 1215.

* A. I. R. 1928 Calcutta 732

CUMING AND GREGORY, JJ.

Emperor

v.

Ram Chandra Roy—Accused.

Jury Reference No. 35 of 1927, Decided on 5th December 1927.

* (a) *Criminal P.C., S. 307, Cl. (3)*—*Between the opinions of Judge and jury weight should be given to the Judge.*

The Code does not put the opinion of the jury on any higher plane than the opinion of the Judge; both should be given due weight. There is no suggestion that more weight should be given to the opinion of the jury than to that of the Judge. As a general rule, more weight should be given to the opinion of the Sessions Judge. He equally with the jury hears the witnesses and is able to observe their demeanour. He is trained to weigh and appreciate evidence and further he must give reasons for his opinion. The jury are a body of laymen unaccustomed to weigh or appreciate evidence, who give no reasons for their opinion. An opinion supported by reasons carries more weight than an opinion entirely unsupported by reasons.

[P 733 C 2]

(b) *Criminal P. C., S. 221, Cl. (2)*—*Person charged with specific offence—It is not necessary to give the ingredients of the offence with which the accused is charged.*

It is not necessary in a charge of rioting to set out the allegation that there were five or more persons actuated by a common object. Rioting is an offence with a specific name and it is sufficient to describe the offence by that name and that name only. S. 221, Cl. (2) contemplates a case of this description and is enacted to meet a case of this kind. When a person is charged with rioting, it means that the prosecution alleges that all necessary ingredients constituting the offence of rioting are present. It is not necessary for the prosecution to set out what these ingredients are.

[P 733 C 2, P 734 C 1]

(c) *Evidence Act, S. 155—Report after 24 hours—Officer having no power to investigate—Report though it can be used under S. 155 cannot be used under Evidence Act, S. 157.*

A report of an offence, not made at or about the time of the occurrence, to an officer, who has no powers to investigate the matter, though it can be used under S. 155 to impeach the credit of the person making the same, cannot be used to corroborate the witness under S. 157.

[P 734 C 1]

Tarakeswar Pal Chaudhury—for the Crown

N. K. Bose and Pashupati Ghose—for Accused.

Cuming, J.—This is the case of three persons, Ram Chandra Roy, Kala Chand Roy and Maniruddin Mondal, which has been referred to us under S. 307 by the learned Sessions Judge of Murshidabad. These three persons were tried on three charges: one under S. 395, I. P. C., one

under S. 147, I. P. C., and one under S. 342, I. P. C. The jury unanimously found them not guilty under all the three sections. The learned Sessions Judge accepted the verdict of the jury so far as S. 395, I. P. C., was concerned. He, however, disagreed with the jury so far as their verdict under Ss. 147 and 342, I. P. C., was concerned. He was of opinion that all the three accused persons were guilty under S. 147, I. P. C., of rioting and that one of them, Ram Chandra Roy, was guilty under S. 342, I. P. C., of unlawful confinement. The facts of the case are briefly these: One Shashi Bhusan Chowdhury who was the proprietor of the Nadhai estate died some time in 1918 leaving as his heirs two minor sons, Ahi Bhusan and Bibhuti Bhusan, under the guardianship of their mother Shailabala Chowdhurani and a grandson Phani Bhusan, the son of a predeceased son of his. This boy who was also a minor was under the guardianship of his mother Harimati Chowdhurani. The usual disputes appear to have arisen between these two ladies or more correctly between persons looking after their interests and on 28th April 1925 Sreemati Harimati Chowdhurani, the mother of Phani Bhusan, applied to the District Judge on behalf of her minor son for the appointment of a common manager under S. 93, Ben. Ten. Act.

At the time of making this application she asked that an ad interim receiver might be appointed for certain reasons which are not necessary to state here. This prayer for the appointment of an ad interim receiver was granted ex parte on the day that the application was filed and one Babu Jnanendra Chandra Chowdhury, a pleader of the District Judge's Court, was duly appointed as the ad interim receiver. This gentleman furnished the necessary security and received his letter of appointment on 9th May 1925 and on the following day left Rajshahi and reached Nadhai on 11th May 1925. He then proceeded to take over charge of the estate. On 15th May 1925, at about midnight when the receiver was sleeping in the toshakhana room which he apparently used as his bed-room, a number of persons, some seven or eight in number including the three accused persons, came to the house and called upon the zemindari officials to turn the receiver

out. The receiver informed them that he was there under the orders of the District Judge. This only apparently served to further exasperate the accused persons. They came into the house, entered the receiver's room and pulled him out and took him to the Dewankhana where they surrounded him. He was there made to produce the keys which he had received from one of the zemindari officials and also any papers what he might have with him. He was then taken by these persons back to the toshakhana and the door of the room was bolted from outside so that he was unable to leave the room. The next morning he was escorted to the railway station by the accused persons and a number of others. He came back to Rajshahi and reported the matter to the District Judge. Under the learned Judge's order he went to Nawabganj and there laid a formal complaint before the police. An enquiry was instituted. After considerable delay, due to the fact that this Court was moved and the case was transferred to the Court of the Sessions Judge of Murshidabad, the case was heard with the result that I have already noted.

The plea of the accused persons was a simple plea of not guilty. They neither denied nor did they admit their presence at the time of the occurrence; neither, as far as I can see, do they admit or deny that any occurrence took place. Ram Chandra filed a written statement in the Magistrate's Court in which he seemed to have alleged that the receiver had no right or authority to go and take possession and suggested that the receiver's father owed the estate some money. What was really urged on behalf of the defence or what exactly was their case in the Sessions Judge's Court or what was the case made for them in the Sessions Court, it is somewhat difficult to say, though it might appear from the cross-examination of the prosecution witnesses that Ram Chandra and Kala Chand would admit their presence at Nadhai at the time when the receiver was there. It was suggested to the prosecution witnesses that they were actually taking tea with the receiver. In this Court, as far as I can understand, the case would seem to be that the story of the receiver is false and that in any way the facts alleged, even if found to be correct, are not sufficient to support a case of rioting or

unlawful confinement so far as the present three accused persons are concerned.

Mr. Bose, who has appeared for the three accused persons, has first argued that before we can interfere with the jury's verdict, we must be convinced that this verdict is perverse or patently wrong and that we should not interfere with the jury's verdict unless it is manifestly or patently wrong. The point of view from which reference under S 307 should be considered by the High Court has been the subject of numerous judicial decisions. They seemed to vary from the extreme view that the High Court should be very reluctant to interfere with a verdict of a jury to the view that the High Court in dealing with these references is to be guided by the plain words of the Code Speaking for myself, I have always thought that I am upon far firmer ground if I adhere to the strict words of the Code and do not attempt to interpret the Code in the light of the practice in other countries where law and conditions are different. Here the Code is clearly explicit. The High Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and of the jury, acquit or convict the accused. The Code would not seem to put the opinion of the jury on any higher plane than the opinion of the Judge; both should be given due weight. There is no suggestion that more weight should be given to the opinion of the jury than to that of the Judge. Speaking for myself, I should, as a general rule, be inclined to attach more weight to the opinion of the learned Sessions Judge. He equally with the jury has heard the witnesses and has been able to observe their demeanour. He has been trained to weigh and appreciate evidence and further he must give reasons for his opinion. The jury are a body of laymen unaccustomed to weigh or appreciate evidence who give no reasons for their opinion. Obviously, an opinion supported by reasons is likely to carry more weight than an opinion entirely unsupported by reasons.

The next point Mr. Bose has argued is that the charge does not set out that there were five or more persons engaged in the riot and hence there can be no case of rioting. It was not necessary in a charge of rioting to set out the allega-

tion that there were five or more persons actuated by a common object. Rioting is an offence with a specific name and it is sufficient to describe the offence by that name and that name only. S. 221, Cl. (2), Criminal P. C., clearly contemplates a case of this description and was enacted to meet a case of this kind. Where a person is charged with rioting it means that prosecution alleges that all the necessary ingredients constituting the offence of rioting are present. It is not necessary for the prosecution to set out what these ingredients are.

Mr. Bose has next asked us to hold that the prosecution should have proved the report made by the receiver to the District Judge which admittedly he made on his return to Rajshahi and as they did not do so we should presume that this report would not, if put in evidence, support the prosecution story. Now the answer to this contention is that this report could have only been used by the prosecution to corroborate the witnesses, if it came within the provision of S. 157, Evidence Act. The report, however, was not made at or about the time of the occurrence but some 24 hours after. Neither does it come under the second part of the section for it was not made to a person who can legally investigate the fact. It was made to the District Judge who had no power to investigate the matter. Probably if any attempt had been made by the prosecution to use it, strong objection would have been taken to it. Obviously, it is open to the defence to have used it under S. 155, Evidence Act to impeach the credit of the receiver. No attempt was, however, made by the defence to do so.

I will now deal very shortly with the evidence in the case. The most important witness is the receiver, Babu Jnanendra Chandra Chowdhury. This witness is a member of the Rajshahi Bar of some 5 or 6 years' standing. He gives at great length and in great details an account of the occurrence of 19th May. As far as I can see no serious attempt was made in the cross-examination to challenge the correctness of these details. There is a suggestion in the cross-examination that this gentleman had tea with two of the accused persons. He himself denies this and the accused persons did not themselves suggest that they did so. But the

suggestion would, I think, seem to show that the accused were admitting their presence at the time of the occurrence. This witness is a respectable gentleman, a pleader, as I have already stated, of 5 years' standing of Rajshahi Bar. No good reason whatever has been given why this gentleman should invent the story. Admittedly he was appointed a receiver of the estate by the District Judge and went to the place on 11th May under the orders of the District Judge; admittedly also he came back to Rajshahi on 16th May having been forced to leave Nadhai. His story explains why he was obliged to leave Nadhai and no attempt is made to put forward any other explanation as to why the receiver appointed by the District Judge was obliged to leave his charge. It has not been shown to our satisfaction that this gentleman had any reason whatever for inventing the story. It has not been suggested by the accused themselves that he had any enmity with any of them. A somewhat vague suggestion is put forward as is frequently done that the case has been engineered by one Lalit Mohan Chatterjee. No attempt, however, has been made to explain why the receiver should lend himself to support a false case for the benefit of Lalit Mohan, whoever this gentleman may be. The way in which the story was told and its details leave no doubt in my mind that it is a true story and represents faithfully the events of the night in question. The witness is corroborated by a number of other witnesses. I need not deal, in view of the opinion I have already expressed, in detail with the evidence of the witnesses who corroborate him; they are some 11 in number. No serious discrepancies have, as a matter of fact, been pointed out between their evidence.

Mr. Bose has then argued that even accepting the story as told by the receiver as true, it does not establish the charges against these three accused persons. He contends that it would not show that the three accused persons were actuated by any common object or that there were the necessary five persons to constitute an unlawful assembly actuated by the common object. So far as the charge under S. 147, I. P. C., is concerned it runs as follows:

That you, on or about 15th day of May 1925 at Nadhai, police-station Nawabganj, commit-

ted riot, the common object of your unlawful assembly being to forcibly dispossess the complainant receiver Jnanendra Chandra Chowdhury from the Nadhai estate or by criminal force or show of criminal force to compel the said receiver to discontinue his work as such.

What are the facts proved? The receiver was duly in charge of the estate. At about midnight the three accused persons with some others, in all about 8 or 9, came armed with guns, spears and swords. Ram Chandra, one of the accused, called upon the estate officials to turn the receiver out of the house. Ram Chandra was informed by the receiver that he was there under orders of the District Judge. On this Ram Chandra merely continued to abuse the receiver and also apparently the District Judge. The party then entered the house. The receiver was pulled out of the room and was taken to the Dewankhana surrounded by the three accused persons and a number of other persons. The door was locked up under Ram Chandra's orders. Maniruddin, one of the accused now before us, is described as being one of those, who surrounded the receiver, with a lathi in his hand. Ram Chandra and Kala Chand then forced the receiver to give up the keys and papers and then Khokna and other persons took the receiver to the Toshakhana and locked him up during the night. Next day he was sent forth to the Dewankhana by Ram Chandra and Kala Chand and was finally escorted to the railway station by Ram Chandra, Kala Chand and Maniruddin together with a large number of other persons. What other inference is possible but that all these persons certainly more than 5 in number, were acting with the common object, namely, to force the receiver to give up possession of the estate and to discontinue his work as receiver. There were at least five persons so engaged, Dhiren, Khokna, Ram Chandra, Kala Chand and Maniruddin, and there were others each committing a different act or in some case the same act in furtherance of the common object. Certainly force was used, the receiver was pulled out of the room and he was afterwards looked up for the night; thus certainly criminal force was used and there was also a show of criminal force, for these men were armed with swords, guns and spears. The evidence, I think, shows beyond any doubt that these three accused persons Ram Chandra, Kala

Chand and Maniruddin took part in this riot.

Ram Chandra and Kala Chand certainly took the leading part while Maniruddin who is obviously merely a servant a somewhat more minor part. I find that Ram Chandra, Kala Chand and Maniruddin are all guilty under S. 147, I. P. C. As to the charge of dacoity, it has not been pressed, and the three accused persons stand acquitted of the charge of dacoity. As to the charge of unlawful confinement, it has been, I think, clearly brought home to one of the accused persons, Ram Chandra. It was under his orders that the receiver was shut up in the Toshakhana. I am satisfied from the evidence that the receiver was so confined and that he was unable to leave the room. Ram Chandra is, therefore, guilty also under S. 342, I. P. C. With regard to the two others Kala Chand and Maniruddin, I am not convinced that there is evidence necessary to implicate them in the charge under S. 342, I. P. C., of unlawful confinement. They are, therefore, acquitted of the charge under S. 342, I. P. C.

It is now necessary to deal with the question of sentence. The charges against the accused persons and the facts which have been proved disclose a very serious offence. Jnanendra Chandra Chowdhury was an officer appointed by the Court. Ram Chandra and Kala Chand knew that he had been so appointed; they did not suggest for one moment that they did not. The receiver tells us that he himself informed Ram Chandra of his appointment before he left for Nadhai. Whether the appointment of the receiver was subsequently set aside by the High Court and another person was appointed a receiver or not is absolutely immaterial. At the time when the occurrence took place, he was a person duly appointed by the District Judge to take charge of the estate. So far as Ram Chandra and Kala Chand are concerned they are educated persons. Ram Chandra has been managing the zemindari for some time—they must have been well aware that they could have their remedy in the Court itself or by way of appeal if they thought that they were aggrieved by the order. The riot on the night of 15th May was obviously not the work of a moment. They had known for some days that the receiver had been appointed by the Judge

and had gone to take charge. Obviously, therefore, this attack upon the receiver was thought out and planned after due consideration. None of them were inexperienced persons—Ram Chandra is aged 44 years and Kala Chand is a man of 33 years. In view of the serious nature of the offence, we sentence them to undergo each one year's rigorous imprisonment under S. 147, I. P. C. No separate sentence is passed on Ram Chandra under S. 342, I. P. C. With regard to Manirundin, he is apparently a servant acting under the influence of the other two. In his case, we inflict a sentence of six months' rigorous imprisonment under S. 147, I. P. C. The accused must surrender to their bail to serve out the sentences.

Gregory, J.—I agree.

A.L./R.K. *Reference accepted.*

A. I. R. 1928 Calcutta 736

PAGE AND MALLIK, JJ.

Chairman of Municipal Commissioners, Chittagong—Defendant—Appellant.

v.

Assam Bengal Ry. Co. Ltd.—Plaintiff—Respondent.

Appeal No. 101 of 1926, Decided on 10th July 1928, from decree of Dist. Judge, Chittagong, D/- 12th August 1925.

Specific Relief Act, S. 42—Declaration for the status as a voter in order to insert his name in the register of voters—Conditions not fulfilled entitling him to have his name inserted—Declaration cannot be claimed.

The plaintiff claimed a declaration that he was qualified to have his name inserted as a voter in the register, but he only sought that declaration for the purpose of obtaining an order upon the Chairman of the Municipality to insert his name in the register of voters. He did not comply with the conditions which were required to be fulfilled in order that he should be entitled, if otherwise qualified, to have his name inserted: *Held*, he is not entitled to a declaration that he has the status of a voter, which is merely ancillary to the main relief which he seeks, namely, that his name should be in the register. [P 736 C 2]

Chandra Sekhar Sen and Sachchida Nanda Roy—for Appellant.

Nripendra Chandra Das—for Respondent.

Judgment.—This suit was brought in order to enforce the plaintiff's right to be on the register of voters for the election of Commissioners of Chittagong to be held in March 1925. All these

proceedings have become merely academic in the events that have happened, because there was a fresh election for the Commissioners of Chittagong in 1928, and for the purpose of and prior to that election the plaintiff's name was inserted in the register of voters. The learned Additional District Judge, from whose decree the present appeal is brought, found as a fact that the plaintiff-respondent had not complied with the rules which would entitle his name, if otherwise qualified, to be inserted in the register of voters. It is conceded by the respondent that that is a finding of fact which, in second appeal, we are not at liberty to reconsider. The learned Additional District Judge, having arrived at the finding of fact that the plaintiff had failed to fulfil the conditions precedent to having his name registered ought to have dismissed the plaintiff's suit. The plaintiff claimed a declaration that he was qualified to have his name inserted as a voter in the register; but he only sought that declaration for the purpose of obtaining an order upon the Chairman of the Municipality to insert his name in the register of voters; as he had not complied with the conditions which must needs be fulfilled in order that he should be entitled, if otherwise qualified, to have his name inserted, he would be not entitled to a declaration that he had the status of a voter, which was merely ancillary to the main relief which he sought, namely, that his name should be in the register.

In these circumstances we are not disposed to consider the question as to whether the plaintiff was qualified to be a voter at the election of the Commissioners of Chittagong; and we express no opinion upon the question one way or the other. That is a matter which may arise for consideration if and when his qualification is challenged hereafter. It is sufficient for the disposal of this suit to hold that whether he was qualified to be a voter or not, he was not entitled in the events that happened to have his name inserted in the register of voters for the election of 1925.

The result is that the appeal is allowed and the plaintiff's suit dismissed. There will be no order as to costs.

A.L./R.K.

Appeal allowed.

* A. I. R. 1928 Calcutta 737

SUHRAWARDY AND GRAHAM, JJ.

Juran Mandal and others—Plaintiffs—Appellants.

v.

Ram Mandal and others — Defendants—Respondents.

Appeal No. 1508 of 1925, Decided on 22nd November 1927, from appellate decree of Sub-Judge, 24 Parganas, D/- 13th March 1925.

** (a) Lease—Construction — Rent agreed to be paid in paddy—Price of paddy mentioned—Tenant failing to deliver the paddy — He is liable to pay damages which would ordinarily be market price of the paddy.*

The material passages in the kabuliyat were as follows: "After settling a quantity of 1 bishi 5 aris of paddy, the price of which is Rs. 50 as annual gula rent (paddy rent), and Rs. 25 as selami, I execute this mourashi mokarrari kabuliyat to the following effect: I shall pay the rent, that is deliver the gula paddy according to the kists noted below, year after year, x x x. There shall not be any variation as regards the jama and area settled at any time. If I fail to deliver the gula paddy according to the kists, I shall be dealt with according to law x x x. I shall deliver the said paddy measuring it out with a five seer *dou* after drying and winnowing it and making it fit for being stored in a gola." The schedule which was appended to the kabuliyat contains the following: "Instalment of rent: 1 bishi, 5 aris of paddy in the month of Magh."

Held: that the primary intention of the parties was that the rent should be paid in kind, and not in cash, and, in the event of failure to deliver it, the landlord would be entitled to damages by recourse to the Court, which would ordinarily be the market price of the paddy. [P 739 C 2, P 740 C 2]

** (b) Evidence Act, S. 92—Contract capable of different interpretations—Court must put a proper construction upon its terms and find with what intention a particular expression was used as a matter of pure construction.*

Suhrawardy, J.—Where the wording of the contract is capable of different interpretations the Court is not only justified, but it is its duty, to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. [P 739 C 2]

Sarat Chandra Roy Chowdhury and Anil Chandra Roy Chowdhury — for Appellants.

Nasim Ali—for Respondents.

Suhrawardy, J.—I agree with my learned brother in the construction he has put upon the contract in this case. I only wish to refer to certain vernacular expressions on which the parties have attempted to put different constructions.

The kabuliyat in suit is a mourashi mokararri kabuliyat. After describing the land leased under it, it recites: *ukto jomir barshik gula ekbisa panch adi dhan jahar mulya panchas taka hoytechhe abdharityey*. Translated literally the clause will stand thus: Of the aforesaid land the annual paddy rent, 1 bishi and 5 aris of paddy, the price of which is Rs. 50, having been fixed or settled. The word *abdharityey* according to the context refers to *gula* or paddy rent which was settled at 1 bishi and 5 aris. The learned vakil for the respondent has laid great stress upon the word *abdharityey* and suggests that it should go, not with the paddy rent, but with Rs. 50, the price of the paddy rent. He bases his argument on certain observations made by Banerjee, J, in the case of *Dwarika Nath v. Dwijendra Nath* (1). In that case there was cash rent and a portion of the rent was to be paid in kind, the value of the paddy in money was stated and the total amount of rent including the cash rent and the price of the paddy rent was also stated. Then followed the words *ekune 89-10 jama abdharityey*.

The learned Judge there interpreted the words *jama abadharityey* as meaning the fixed jama which according to the context was Rs. 89-10-0. The words therefore were taken to mean the total amount of rent fixed. The word *abadharitey* has been used in this kabuliyat in quite a different context and has been placed in a different position. The *jama* has been fixed as paddy rent of 1 bishi 5 aris and the words *jahar mulya 50 taka hoitechhey* are parenthetical mentioning the price of the paddy rent fixed as the rent for the tenure. As my learned brother has observed, the word (*hoitechhey*) in the sentence *jahar mulya 50 taka hoitechhey* is significant. It makes the sentence mean "the price of which is Rs. 50" or "the price of which is at present Rs. 50." In my judgment there can be no doubt that the word *abadharitey* refers only to the *gula* rent fixed and not to the price of the paddy. This sentence is followed by another which is *san san khajnar taka nimner kishiti mato adai purbak orthat gular dhanya nimner kishiti mato adai purbak jamir semana chau hadda bajay rukhiya*, (1) [1897] 47 Cal. 139n=53 I. C. 103=30 C. E. J. 37.

etc. Rendered in literal English it means: "Having paid every year the rent money according to the kist mentioned below, i. e., the *gula* paddy according to the kist, and keeping the boundaries of the land intact, etc. The learned vakil for the respondent has laid stress on the words *taka khajnar taka*. The sentence clearly shows that the words *khajnar taka* are used in place of rent or rental without reference to the kind of rent to be paid inasmuch as the words *khajnar taka* have been explained as meaning the *gula* or paddy rent. Thereafter, as my learned brother has observed, come expressions about the payment of the paddy rent only and there is nowhere stipulated any mode of payment of the equivalent money rent. In the sentence that I have quoted above it is stated the *khajnar taka* will be paid according to the kist at foot. The schedule which we find in the document states that 1 bishi 5 aris of paddy must be paid in the month of Magh every year.

There have been numerous cases dealing with contracts of this kind; but there can be no question that every case must depend upon its own particular facts and the particular terms of the contract which the Courts are called upon to interpret in that case. But it may be useful to refer to some of the cases to show how the contracts have been interpreted though differently worded. The cases may be divided into two groups: one in which it was held that though the contract spoke of paddy rent and in lieu thereof a money rent, the intention of the parties was that in the event of failure of payment of paddy rent the landlord would be entitled only to recover the money rent. Under this head may be mentioned the cases of *Bipro Charan v. Suchand Roy* (2), *Afar Morole v. Surja Kumar Ghose* (3), *Nil Madhab v. Keshab Lal* (4), *Dwarika Nath v. Dwijendra Nath* (1) and *Asutosh Mukhopadhyaya v. Haran Chandra Mukherji* (5).

It will be observed that in most of these cases there was a cash rent and also paddy rent. The equivalent of the paddy rent was mentioned in money and it was stated that the total amount of

rent (the cash and the equivalent money rent together) was the rent of the tenure and was the amount recoverable on the failure of the tenant to pay the paddy rent. I have been relieved of the necessity of discussing every case in detail as almost all the cases on the point have been admirably analyzed and examined in the case of *Gurudas Sen v. Gobinda Chandra Sinha* (6). In that case too, on the particular wording of the kabuliyat, the learned Judges held that the landlord could only recover the equivalent money rent mentioned in the document. There is one point in that case which may be profitably referred to in construing the present contract. In that case there was an express contract that if the tenant did not deliver the paddy, the landlord would be entitled to realize by suit the equivalent amount mentioned therein as the price of the paddy. In the present case the kabuliyat says that if the tenant fails to deliver *gula* paddy according to the kist, he shall be dealt with according to law which I take to mean that the landlord will have the right to proceed in a Court of law and then claim damages for non-delivery of the stipulated quantity of paddy. If the intention of the parties was that on failure to deliver the paddy the landlord would be entitled only to recover Rs. 50 as the price thereof, nothing would have been easier than to mention the terms in plain language as it was mentioned in *Gurudas's* case.

The cases that have taken a different view and have interpreted the kabuliyats under consideration in those cases as meaning that the contract was for payment of paddy rent and not the equivalent hereof in money are the cases of *Sohor Ali v. Abdool Ali* (7), *Akbar Ali v. Durga Kripa Sen* (8), *Isaf v. Gopal Chandar* (9), *Sarat Chandra v. Abbas Ali* (10) and *Hem Chandra Jelia v. Satya Kinkar Sen* (11). A similar view was taken in *Baneswar Mukherji v. Umesh Chandra* (12). I mention this case last as it is an extreme case in support of the view that when paddy rent is mentioned the parties must be taken to mean that

(2) [1910] 12 C. L. J. 595=8 I. C. 94.

(3) [1910] 12 C. L. J. 649=7 I. C. 812=15 C. W. N. 249.

(4) [1916] 26 C. L. J. 94=40 I. C. 819.

(5) [1919] 47 Cal. 133=30 C. L. J. 41=53 I. C. 382=23 C. W. N. 1021.

(6) [1919] 24 C. W. N. 85=54 I. C. 914.

(7) [1898] 3 C. W. N. 151.

(8) [1900] 12 C. L. J. 589=8 I. C. 944.

(9) [1910] 12 C. L. J. 593=8 I. C. 896.

(10) [1917] 21 C. W. N. 140n=41 I. C. 833.

(11) [1925] 43 C. L. J. 171.

(12) [1910] 37 Cal. 626=7 I. C. 875.

that rent should be paid in kind though the price of it in money is also given. The contract there was that the tenant should pay the annual rent of Rs. 12-14 0 in cash and 40 maunds of paddy of which the value was mentioned as Rs. 37, the total rent, Rs. 49-14-0 being settled in perpetuity. Jenkins, C. J., held, on the construction of the kabuliyat, that the landlord was entitled to recover 40 maunds of paddy and should not be compelled to recover annually on failure of payment of rent in kind the price mentioned in the kabuliyat. The view taken by the learned Chief Justice in that case is in conflict with that taken in the cases which I have mentioned above. But as the case before us does not go so far as the case of *Baneswar Mukherji* (12), it is not necessary for us to consider the matter further. The nearest case to the case before us is the case of *Hem Chandra Jelia v. Satya Kinkar Sen* (11). There the contract was almost in similar terms. It ran thus:

A jama of ten maps of sanja paddy measured . . . (the price whereof is Rs. 50) and ten pous of straw (the price whereof is Rs. 2) at a jama of the said sanja paddy . . . the total price being Rs. 52 per annum.

Then follow some other terms with respect to the delivery of paddy and straw and it is stated that in default of delivery of the paddy and straw the landlord will be entitled to claim bari or additional quantity of paddy.

It is not permissible to interpret one contract with the help of the wording of a different contract between different parties. I have no desire to quarrel with the decisions in the cases which have held that the landlord is entitled to recover only the money equivalent of the paddy rent fixed because on the contracts in those cases the decisions were probably justified.

I should like to say a word with reference to a remark made in the case of *Afar Morole v. Prosonno Kumar Ghose* (3). There an attempt was made to prove by evidence that the price of the paddy given in the kabuliyat therein was mentioned for the purpose of fixing the proper stamp or for registration of the document. Mookerjee, J., very rightly held that such evidence is inadmissible under S. 92, Evidence Act, as the learned Judge observed:

We feel no doubt whatever that the case

before us indicates an attempt on the part of the plaintiff to supersede the clear unambiguous provisions of the lease No question of interpretation of the language of the document arises here.

So far I agree with the learned Judge, but he goes on to observe that in the case of *Sohobut Ali v. Abdool Ali* (7), *Akbar Ali v. Durga Kripa Sen* (8), and *Shaikh Isaf v. Gopal Chunder Dey* (9), S. 92, Evidence Act was not brought to the notice of the learned Judges and the suggestion therein made is that if the Court was invited to consider the effect of S. 92, Evidence Act, the result of those decisions might have been different. I cannot persuade myself that S. 92, Evidence Act, has any reference to the interpretation of the terms of a contract. Where, as Mookerji, J., has observed, the terms are unambiguous and clear, there can be no question that the evidence to prove that the terms of the contract were used in a different sense must be excluded under S. 92, Evidence Act; nor is the Court in such a case entitled to speculate as to the meaning of words in the contract. But where the wording of the contract is capable of different interpretations the Court is justified, and in my judgment it is its duty, to put a proper construction upon the terms of the contract and is justified in finding with what intention a particular expression was used as a matter of pure construction. Now in the present case the words "the price whereof is Rs. 50" were to my mind used for the purpose of stamp duty to be put upon the kabuliyat and might also be for the purpose of registration. In a kabuliyat, which even in the plainest language expresses that the rent is to be paid in paddy, it is necessary in order to complete the document to put a money value for the purpose of stamp, just as in the case of a simple gift where the value of the property given away is immaterial, it is necessary to mention some value, however fanciful, of the property dealt with under the document for the purposes of stamp and registration. Against putting such a construction upon the wording of a lease I do not think that S. 92, Evidence Act, presents a bar. After giving my careful consideration to the terms of the contract in the present case I agree with my learned brother that the intention of the parties was that rent should be paid in paddy. The penalty clause I understand

to mean that on failure of the tenant to pay the stipulated quantity of paddy in a particular year the landlord is entitled to damages. It is not necessary for me to say that damages must be the market price of the paddy at the time when the contract is sought to be enforced, for there may be other considerations which are likely to influence the Court in assessing damages though ordinarily the market price is the measure of damages. I accordingly agree in allowing the appeal and making the order which my learned brother has made.

Graham, J. — This appeal by the plaintiff arises out of a suit to recover the price of paddy for the years 1326 to 1328 B. S. The father of the defendants had executed a kabuliyat in favour of the plaintiff's vendor, and the defendants contended that according to the terms thereof they were liable to pay Rs. 50 only per year, the price mentioned in the kabuliyat, and not the market value of the paddy prevailing during the years in question. The decision of the case turns upon the construction of the kabuliyat (Ex. 2) which was admitted by both parties. Suits of this nature have formed the subject-matter of numerous reported decisions and those decisions have been far from uniform. This much, however, emerges from a consideration of these cases that nothing in the nature of a general rule can be laid down for their determination, and that the decision in each instance must depend upon the particular facts proved, and in the main upon the terms of the particular kabuliyat under consideration. The material passages in the kabuliyat, which we are now called upon to construe, are to the following effect :

After settling a quantity of 1 bishi 5 aris of paddy, the price of which is Rs. 50, as annual gula rent (paddy rent), and Rs. 25 as selami. I execute this mourashi mokarrari kabuliyat to the following effect. "I shall pay the rent, that is, deliver the gula paddy according to the kists noted below, year after year, There shall not be any variation as regards the jama and area settled at any time. If I fail to deliver the gula paddy according to the kists, I shall be dealt with according to law I shall deliver the said paddy measuring it out with a five seer *dou* after drying and winnowing it and making it fit for being stored in a gola."

The schedule which is appended to the kabuliyat contains the following :

Instalment of rent—one bishi, five aris of paddy in the month of Magh.

There can be no possible doubt, reading this document as a whole, that the primary intention of the parties was that the rent should be paid in kind. That much seems to be clear not only from the manner in which the promise to pay gula paddy is thrice reiterated, but also from the terms of the schedule.

The question then arises as to what is to happen in the event of the lessee failing for some reason whether from inability or otherwise, to deliver the paddy. In that eventuality is the plaintiff to be held to be entitled to recover the price of the paddy at the market rate, or is he only entitled to recover the sum of Rs. 50 as price thereof as contended by the defendants ?

The Courts below have taken the view that the intention of the parties was to fix Rs. 50 per annum as the money equivalent of the bhag paddy for all time, and that their object in so doing was to avoid future disputes. The lease being a mokarrari lease there is something to be said for this interpretation, and in somewhat similar reported cases this view has found favour. Speaking for myself I must admit that I was at first very much impressed with it, and I should certainly hesitate ordinarily to differ in opinion upon the construction of a vernacular document from two Indian Judges both of whom are well versed in their own language and therefore eminently competent to come to a right conclusion.

Upon careful consideration, however, I cannot persuade myself that that conclusion is correct. The point that first occurs to me is that nowhere in this document is any intention revealed, much less expressly stated, that the method of paying the rent should be an alternative at the option of the lessee ; in other words, that it was left open to him to pay either in kind, or in cash, as he pleased. On the contrary it is reiterated several times, as already mentioned above, that the rent is to be paid in paddy, and in order that there may be no possible doubt upon the point it is stated in the schedule that the paddy is to be delivered in one instalment annually in the month of Magh. Such contracts for the payment of bhag rent are very common, and the object in view, there can be little doubt, is to make sure of obtaining a certain quantity of paddy for the consumption of the family independent of, and un-

affected by, fluctuations in the price. If the kabuliyat is construed as giving an option to pay in cash or in kind, and as fixing the price at Rs. 50 in perpetuity this object will be defeated since a rise in the price of paddy would result in less paddy being obtained for the family consumption. For the defendants great stress was laid on the words "the price (or value) of which is Rs. 50." It is to be observed, however, that the verb is used in the present tense which would seem merely to mean that the price or value at that time was Rs. 50. If the intention had been that the price should be Rs. 50 for all time that intention could easily have been expressed. But, as I have already said, there is nothing in this particular kabuliyat to suggest that it was ever contemplated that the payment should be other than in kind.

The position then is this : The parties mutually agree for payment in kind. The lessee, through inability or from wilful default, fails to deliver the paddy. The plaintiff then naturally asks to be put in the same position as he would have been if the default had not occurred ; in other words, that he should get such a price as will enable him to purchase the paddy in the market. To this the defendants reply that the plaintiff can in no circumstances recover more than the sum of Rs. 50 mentioned in the kabuliyat. It seems to me that it was never intended that this was to be regarded as the fixed price of the paddy. It is perhaps not permissible to speculate whether this figure was so inserted for the purpose of ascertaining the registration fee or fixing the stamp duty payable. This much, however, can be said that it does not in plain terms fix Rs. 50 as the price for all future time of the paddy. On the contrary the word "*haitechhe*" seems to preclude such a construction.

If we place upon the kabuliyat the construction which the defendant-respondents seek to put upon it, then it is obvious that in the easiest way possible the lessee can always defeat the original intention of the parties by the simple device of withholding delivery of the paddy and insisting on payment of the money equivalent of Rs. 50. But that was certainly never intended in this case as is clear *inter alia* from the emphasis laid in the document on the delivery of the paddy and the clause which says that in the

event of failure to deliver the gula paddy the defendants would be dealt with according to law. The meaning of this clause, and of the document taken as a whole is, I think, this: that the rent was to be paid in paddy and not in cash, and, that, in the event of failure to deliver it, the plaintiff would be entitled to damages by recourse to the Court.

For these reasons I would allow the appeal, set aside the decrees of the Courts below, and send the case back to the trial Court for a determination of the amount due to the plaintiff as damages and for making a decree in accordance therewith. The appellant is entitled to his costs in all the Courts. The costs of the further hearing in the Court of first instance will be at the discretion of that Court.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 741

SUHRAWARDY AND GARLICK, JJ.

Purna Chandra Khan and another—
Defendants—Appellants.

v.

*Nalini Kanta Khan and others—*Plaintiffs—Respondents.

Appeal No. 1390 of 1926, Decided on 30th July 1928, from appellate decree of the Sub-Judge, Howrah, D. 4th March 1926.

Civil P. C., O. 1, R. 8—Suit by a plaintiff on behalf of a community for recovery of rent on behalf of village deity—Amount of rent disputed—Other members added as plaintiffs but plaint not amended—Newly joined plaintiffs siding with the defendant—There is no change in the constitution of the suit and the plaintiff does not lose his representative character.

Under O. 1, R. 8, the necessary conditions are that there should be numerous persons having the same interest in one suit and some of them should have obtained the permission of the Court to sue on their behalf. If some persons out of the numerous persons whose interest is common in the suit, subsequently side with the defendant the representative character of the plaintiff is not lost. [P 742 C 2]

Plaintiff was chosen by the members of a community to recover rent on their behalf in respect of their village deity. Plaintiff filed a suit under O. 1, R. 8 for recovery of rent against defendant who disputed the rate of rent. Some other members of the community were added as plaintiffs. No amendment was made in the plaint. Some of the added plaintiffs sided with the defendant on the point of rate of rent and also gave evidence in favour of defendant. The trial Court believed the plaintiff and decreed the suit. In appeal by the defendant some of the added plaintiffs filed a petition admitting defendant's case.

Held : that there was no change in the constitution of the suit and the plaintiff did not lose his representative character : 40 Bom. 158, Dist. [P 742 C 2]

Urukramdas Chakravarti—for Appellants.

Khitish Chandra Chakravarti and Panchanan Ghosal—for Respondents.

Judgment.—The two persons who are now the respondents before us brought a suit for recovery of rent from the defendants in respect of some lands which they hold and which belong to a village deity called Shib Thakur. The two original plaintiffs claimed to be collecting shebait's of the Thakur and said that they were chosen as the persons who were entitled in the name of the village community to realize the rent payable to the Thakurs. The entire village community was the shebait of the Thakur and they had appointed these two plaintiffs for collecting rent due to the Thakur. The community included the present defendants also. The rent was claimed from the defendants at Rs. 25-8-0 a year. The defendants admitted it to be Rs. 14-4-0 a year. Both the Courts below have believed the plaintiffs' evidence and given a decree against the defendants. Some time after the institution of the suit 18 villagers applied to be added as plaintiffs, and they were so added. These added plaintiffs did not take any exception to any statement of the plaintiffs in the trial Court; but some of them gave evidence in support of the defendants. In the appellate Court they filed a petition admitting the defendants' case and the rate of rent mentioned by them.

It is argued in this appeal on behalf of the defendants that some of the plaintiffs having supported the defendants' case, the original plaintiffs have lost their representative character and are unable to maintain the suit under O 1, R. 8, Civil P. C.; and in support of this reliance has been placed on *Harkisan Das v. Chhaganlal Narsi* (1). In that case some persons of the case of Banias brought a suit against the defendants for accounts and for recovering from them the amount as might be found due. It was found that the meeting at which the plaintiffs said that they were authorized to institute the suit was irregularly convened. The plaintiffs attempted to

prove subsequent acquiescence of the caste members of their proceeding with the suit. This evidence was regarded by the Court as valueless. On these facts the learned Judges held that the plaintiffs could not represent nor sue on behalf of those numerous members of the community on whose behalf they purported to have brought the suit as they were in diametrical opposition to them in the controversy. The facts of that case are not similar to those of the present one. There is no denial in this case that the plaintiffs were appointed collecting shebait's by the village community. Their right to proceed with the suit was not as a matter of fact seriously challenged. After the suit was brought it was easy enough for any defendant to get some member of a large community whom the plaintiffs represent to side with him. But that does not take away the representative character of the plaintiffs at the institution of the suit. It is not necessary to consider the ratio of the Bombay case; but on a plain reading of R. 8, O. 1, it will appear that the necessary conditions are that there should be numerous persons having the same interest in one suit and some of them has obtained the permission of the Court to sue on their behalf. If the contention of the appellant be accepted, namely that when some persons out of the numerous persons whose interest is common in the suit subsequently side with the defendants (and it should be noticed that the defendants are also some members of the community) it will be almost impossible to continue any representative suit for it is never difficult for a party to win over on his side some of the members of the class on whose behalf the suit is brought. This objection is therefore overruled.

Then it is argued that as some of the plaintiffs have accepted the defendants' case no decree should have been passed in the suit. But the 18 added plaintiffs were added five months before the hearing of the suit; there was no amendment of the plaint and they did not take any action in the matter. Two of them only gave their evidence in the trial Court in favour of the defendants. But in the appellate Court they filed a petition supporting the defendants. We do not think that there was any change in the constitution of the suit.

(1) [1916] 40 Bom. 158=33 I. C. 264=18 Bom. L. R. 1.

The last point taken is with reference to a certain document which was executed by one of the defendants cosharer stating the rent as Rs. 14-4-0. One of the plaintiff's witnesses was a witness to that document. There is no question of law connected with this point as the Court of appeal below has refused to give much importance to this document.

The appeal fails and is dismissed with costs.

A L /R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 743

RANKIN, C. J. AND C. C GHOSE, J.

Corporation of Calcutta—Defendant—Appellant.

v.

Asoke Kumar De—Plaintiff—Respondent.

Appeal No. 99 of 1927, Decided on 1st February 1928, from original decree in Civil Suit No. 134 of 1927, D/- 27th July 1927, reported in *A. I. R.* 1928 Cal. 542.

(a) *Calcutta Municipal Act* (1923), S. 538—*Provisions are not applicable to a suit for payment of money of the Provident Fund—Provident Funds Act* (9 of 1897), S. 5.

A suit against the Calcutta Corporation for payment of money in the account of the Provident Fund of the deceased by his legal representative is not one in respect of any act purporting to be done by the Corporation under the Calcutta Municipal Act, and so the provisions of S. 538 as to limitation do not apply to such a suit. *A. I. R.* 1928 Cal. 542, *Affirmed*. [P 744 C 1]

(b) *Calcutta Corporation Provident Fund Rules*, R. 19—*Meaning explained.*

The manager should pay the deposit money to the person entitled to receive it as a matter of testate or intestate succession: *A. I. R.* 1928 Cal. 542, *Affirmed*. [P 744 C 2]

(c) *Provident Funds Act* (9 of 1897), S. 3, Cl. (b)—*Cl. (b) takes effect in absence of any special rule of a particular Fund—Special rule providing payment to the legal representative—Payment to uncle as de facto guardian was held not to be valid discharge—Calcutta Corporation Provident Funds Rules*, R. 19.

The provision in Cl. (b) that the manager may pay the money to any person entitled to receive it, is a provision intended not to defeat the rules of any Fund; but to take effect only in those cases where the rules of a particular Fund do not tell the manager what person is the proper person to be paid. The intention of the Act was that particular funds might make simple and clear rules which they could easily administer and if the rules did not apply to any particular case, the officer or the

manager should not necessarily at his peril find out the proper legal representative. But the intention of the Act has been defeated by the character of R. 19, itself which assumes the duty of finding out the proper legal representative. [P 745 C 1]

Where the manager of the Provident Fund paid the deposit money in the credit of the deceased to his brother as a guardian of the deceased's son producing a certificate from an Honorary Magistrate that he was his nephew's guardian:

Held: that the payment to the uncle is not a good discharge and the claim of the nephew should be decreed: *A. I. R.* 1928 Cal. 542, *Affirmed*. [P 745 C 2]

*Benode Mitter and N. C. Chatterji—*for Appellant.

*N. Sarkar and A. K. Roy—*for Respondent.

Rankin, C. J.—In this case the plaintiff Asoke Kumar De sues the Corporation of Calcutta to recover a sum of money which is under Rs. 1,000. His case is that his father Brojo Lal De was an employee of the defendant Corporation, that he was a contributor to the Provident Fund managed by that Corporation and that he died on 27th November 1920, leaving the plaintiff his only son and heir. It appears that besides the plaintiff there were three unmarried daughters and the plaintiff's mother predeceased his father. At the time of the father's death his brother Kunja Lal De, was, according to the defendants, a person, in whose care the plaintiff and the unmarried sisters were living. In that state of things what happened was this: the plaintiff's uncle Kunja Lal De applied to the Corporation for payment of the sum of money standing in the plaintiff's father's credit in the account of the Provident Fund of the Corporation and they acting under R. 19 of their rules paid that sum of money to Kunja Lal De upon taking an Indemnity Bond from him with security. The plaintiff brings his suit in 1926 having attained majority and he requires the Corporation to pay to him over again the sum of money which was standing to the credit of his father's account. He says that by the payment made to Kunja Lal De, the Corporation has got no discharge against him. The defendants by their written statement set up the fact that at the time they paid to Kunja Lal De he produced a certificate from an Honorary Magistrate saying that Kunja Lal was the plaintiff's

guardian. They say that on the strength of this certificate and on the fact that the mother was dead, they in good faith paid the money to Kunja Lal and they are protected by the provisions of the Provident Funds Act and the Corporation's Provident Fund Rules.

There is no dispute about the amount of the money. As there was a small amount of wages due to the plaintiff's father and a small amount contributed by him for the purchase of war bonds on the one hand, and as on the other it appears that the plaintiff's father had taken an advance from the Provident Fund, these matters had to be adjusted. But there is no dispute as to the amount that was due to the proper representative of the plaintiff's father or that it may be regarded as a case of compulsory deposit within the meaning of the Provident Insurance Societies Act, 1912 and the argument advanced before us on behalf of the Corporation proceeds on that assumption. At the hearing of the suit Mr. S. N. Banerjee for the Corporation raised two issues. The first is whether the suit was barred by limitation. That appears to have reference to the special provisions of S. 538, Calcutta Municipal Act. It says certain suits should be commenced within four months after the accrual of the cause of action. The learned Judge has rightly refused to entertain that argument because that section applies to suits against the Corporation in respect of an act purporting to be done under the Calcutta Municipal Act or under any rule or bye-law made thereunder. This is not a suit against the Corporation for any act which they justify or can justify under the powers conferred by the Calcutta Municipal Act, 1923.

This is not a suit for damages for having paid money to Kunja Lal. It is a suit against the Corporation asking them to pay a sum of money which the plaintiff says they owe to him. Issue 2 refers to S. 3, Provident Funds Act (9 of 1897), and that is the matter which has been chiefly in debate before us. If one looks at the provision made by S. 3 of that Act with regard to small sums of money, meaning thereby sums which do not exceed Rs. 2,000 standing to the credit of a depositor at the time of his death, one finds that it says that the officer or person whose duty it is to

make payment of such sum may pay it to any person entitled to receive it according to the rules of the Fund. There is a little complication introduced in order to provide that unless the rules of the Fund prescribe to the contrary they shall be deemed to include a power to the depositor to nominate in writing somebody to receive the money. But if one puts aside that complication the first provision is that the officer may pay the money to any person entitled to receive it according to the rules of the Fund.

The next thing is this :

In any case not hereinbefore provided for, he may pay it to any person appearing to him to be entitled to receive it.

Now, in the present case the argument has reference to R. 19 of this fund which is in the following terms :

On the death of any subscriber the manager shall pay to his representatives, executors or administrators the amount standing to his credit in the account prepared in accordance with the provisions of R. 14.

As regards the meaning of the word "representative" some light is perhaps thrown by the fact that in another rule reference is made to heirs, representatives and also to the next of kin. But the meaning of that rule is not, I think, in doubt. The law in this country is well known to be that it is not necessary in all cases to take out probate or letters of administration in order to confer a title upon the persons who are generally called in this country by the word "heirs". In the case of Hindus even where the Probate and Administration Act is applicable it is not always true to say that an heir must take his title through a probate or through letters of administration. The meaning of this rule appears to me to be that the manager is to pay the money to the person entitled to receive it as a matter of testate or intestate succession. It is said that in the present case as there was no executor or administrator and as the heir was a minor son, the present case is not provided for by R. 19 and accordingly it is contended that Cl. (b) to S. 3, Provident Funds Act, can be resorted to, because as the minor was not entitled to receive it in the literal sense the case was one not provided for by Cl. (a) and that accordingly in this case the manager might pay the money to any person appearing to him to be en-

titled to receive it. In my judgment that argument cannot be accepted. The provision that in any case not provided for by Cl. (a) the manager may pay the money to any person entitled to receive it, is a provision intended not to defeat the rules of the Fund ; but to take effect only in those cases, where the rules of the Fund do not tell the manager what person is the proper person to be paid. In my judgment the corporation, while they would be quite entitled by their rules to make a simple provision to the effect that on the death of a depositor the money should be paid to his eldest son or to his youngest son or to make any other provision they liked, have chosen to make a provision that it is to be paid to the man's representatives, executors or administrators and they have, therefore, taken upon themselves the duty of ascertaining who it is that complies with that description ; and it does not seem to me that it is open to them under such a rule, merely because the representative happens to be a minor, to claim that they may pay the sum to anybody whom they think to be the proper person to receive the money on behalf of the minor. The intention of the Act was that these funds might make clear and simple rules which they could easily administer and that if these rules did not apply to any particular case, the officer or manager should not necessarily at his peril find out the proper legal representative. But that intention of the Act has been defeated by the character of the rule itself which assumes the duty of finding out the proper legal representatives and dealing with them in the ordinary way. It seems to me, therefore, that neither of these defences set up by the Corporation is a valid defence.

It is somewhat curious that at the end of the arguments in this case a defence much more simple and direct than any of these others was indicated, which seems a very satisfactory defence to the plaintiff's claim, namely, that the Corporation have already paid him : that is to say that in paying Kunja Lal De they paid it in such a way that the payment is a good discharge against the plaintiff on the ground that Kunja Lal De was a de facto guardian with power to give a discharge. I cannot help observing that that should have been the

first defence. If a man is sued for money the first thing he would take for his defence is that he has already paid it. That was not suggested, so far as I can see, before the learned Judge and Sir Benode Mitter has to concede that it is not open to him to proceed upon any doctrine of natural guardianship. The defence he indicates in this direction is that the uncle may have been the de facto guardian. But it appears as he frankly admits that while certain powers are allowed to be exercised by persons who are managing a minor's property it is very necessary that any case of that sort should be based upon investigation of the facts.

Mr. Sircar for the plaintiff points out that no such case was pleaded. It is quite clear that the learned Judge was not asked to investigate such a case and we are informed that Mr. Sircar disputes the fact that the uncle was de facto manager of the infant's property. It seems to me that line of defence raised very late is not now open either on the pleadings or having regard to the issues and the conduct of the case in the lower Court. On the whole it seems to me that the Corporation have no answer to this claim.

I will only advert in conclusion to the suggestion that there might be some defence in the provisions of S 5, Provident Funds Act. That section runs thus :

No suit or other legal proceeding shall lie against any person in respect of anything done or in good faith intended to be done in pursuance of the provisions of this Act.

There again it seems to me that this is not such a suit. It is not a suit for damages. It is a suit to require the Corporation to make payment of a sum of money which is due to the plaintiff.

In my judgment this appeal must be dismissed with costs.

C. C. Ghose, J.—I agree.

A L / R.K. Appeal dismissed.

A. I. R. 1928 Calcutta 745

C. C. GHOSE AND JACK, JJ.

Latafat Hossain Biswas and others —
Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 294 of 1928, Decided on 3rd August 1928.

Evidence Act, S. 144, Ill. (b) — Evidence of an approver sought to be corroborated with the evidence of confessing accused will not justify conviction of co-accused.

Where the evidence of an approver is principally on the question of conspiracy and where that evidence is sought to be corroborated by the evidence of the confessing accused, it amounts to this that one tainted piece of evidence is sought to be corroborated by another tainted piece of evidence and would not justify the conviction of co-accused. [P 747 C 2]

Mrityunjay Chattopadhyaya and Porimal Chandra Guha—for Appellants.

C. C. Ghose, J.—In this case there are four appellants before us. Appellant 1 Latafat Hossain Biswas has been convicted under S. 307 read with S. 34, I. P. C. and under S. 120-B I. P. C., appellant 2 Engraj Sekh has been convicted under S. 307 read with S. 34 and also under S. 120-B. I. P. C., appellant 3 Khedarali Sekh has been convicted under S. 307 read with S. 34 and appellant 4 Kaser Sekh has been convicted under S. 120-B I. P. C.

The facts involved in this appeal, shortly stated, are as follows : Saferuddin Biswas and the accused Latafat Hossain Biswas are step-brothers. Their father Naimuddin died in 1327 B. S. and they occupy his pucca house in village Gournagar, P. S. Meherpur. In 1332 B. S. they partitioned the house and property. Latafat occupied the north part of the house, Safer the south part. Since then they have been on bad terms. There were quarrels over the partition of the house and the partition of the property, particularly certain Post Office Cash Certificates left by the father. Also Latafat used to sing low songs insulting Safer's wife. While Safer retaliated by singing similarly insulting songs about Latafat's wife and daughters. About 13th August last Safer was singing some such songs and playing on a harmonium which he had acquired from a creditor when Latafat threatened to shoot him. Safer reported this at the thana. Latafat's hate against his stepbrother became so great that he decided to have him put out of the way altogether. So he called his halsana Engraj Abdul Gain and Alam Sardar and offered them Rs. 150 between them if they would assist him in murdering Safer. On the night of Sunday, 1st Aswin (18th September) Engraj, Kaser, Alam, Abdul Gain, Taherali met in Latafat's baita-

khana and Latafat proposed that they should kill Safer that night. He asked the others to wait and went out to watch Safer's movements, his intention being to catch him on his way from his baitakhana into his inner house (andar-bati). Safer, however, went too quickly into his house and bolted the door so that the attack had to be abandoned for that night. Next night (Monday) Abdul Gain, Kaser, Engraj, Taherali, Alam met again at Latafat's baitakhana. Latafat told them that the work must be done that night positively and that if there were any troublesome consequences he would spend money and save them. He then went out to see what Safer was doing and coming back reported that Safer was having supper with Meghlal and Mansab and that they would not have long to wait. Presently Saferuddin, Mansab and Meghlal came out of Safer's house and sat in his baitakhana. After a little Meghlal got up and saying it was time for him to be going home to bed took his departure. Presently the watchers heard Safer say to Mansab that he (Mansab) might also turn in (at the baitakhana) as he (Safer) was also going off to bed.

Immediately Latafat, Kaser, Taherali, Engraj, Alam and Abdul Gain ran to the door of Safer's inner house. At the door, the approver Abdul Gain says, he saw another man standing but in the darkness he did not recognize him. Meantime Safer came out of the baitakhana with a lantern in one hand and an ink-well and some papers in the other. As soon as he had stepped inside the door of his inner compound and was approaching the screen wall which is just beyond it on the inside, Latafat and Khedarali came from inside and while Khedar ran past him and took his stand by the door Latafat seized him clapping one hand at the back of his head and the other over his mouth. Safer dropped the lantern, the ink-well and papers on the ground and as he struggled and shouted the others seized him and threw him down, two of them seizing him by the legs. Latafat cut him twice on the neck with a hasua. Safer seized the hasua getting his hands cut in the process but succeeded in wresting it from the grasp of his assailant. Possessed of this weapon he hacked at the two men who were holding him down and then

another man hit him on the head with a lathi and he fell back, was assaulted again and became senseless. Before he threw the lantern down he had recognized by its light Latafat and Kedar among his assailants. Presently he came to as he lay with his head down on the ground and perceived that 'somebody was holding a hand over his nostrils; so he stopped breathing in order to make believe that there was no more life left in him. In the belief that he was dead his assailants left him there. Before that, while the attack was in progress, Mansab who was lying in the baitakhana heard Safer's cries and went up to the door of the andarbat. It was closed; so he pushed it open and just then somebody hit him with a lathi on the arm and side. So he rushed off in fear and began raising an outcry to rouse the neighbours. Meantime the injured Safer picked himself up and went outside to the village road near by groaning and trying to call for assistance. There he was found by Mansab, Sabdal, Reajtulla, Belat, the village Chowkidar Eadali and other neighbours who had been roused by Mansab's shouts. Belat was sent to fetch Dr Manmatha Nath Biswas from Dariapore about two miles off and first aid was rendered to Safer, some rags being clumsily tied round his bleeding wounds. He told them that he had just been attacked by some 5 or 6 men, that among them he had recognized his stepbrother Latafat and Kedar and that he had caught hold of a hasua and with it wounded two of his assailants. He was brought to the house of Mansab Biswas where presently the doctor arrived and dressed his wounds.

On behalf of the appellants two contentions have been put forward before us first that the confession of the appellant Engraj should not have been admitted in evidence under S. 30, Evidence Act, as it was not self-incriminatory; and, secondly that the evidence against the appellants is that of the approver Abdul Gain and the evidence of the approver, in the absence of independent evidence cannot be corroborated by the evidence of the confessing appellant Engraj.

We have had placed before us the confession of the appellant Engraj. In our opinion so far as the charge of conspiracy under S. 120-B I. P. C. is con-

cerned, that confession was certainly self-incriminatory, and therefore it was admissible in evidence under S. 30 Evidence Act. But having regard to the circumstances of this case where the evidence of the approver is principally on the question of conspiracy and where that evidence is sought to be corroborated by the evidence of the confessing appellant Engraj it amounts to this that one tainted piece of evidence is sought to be corroborated by another tainted piece of evidence. That being so, the rule that has been laid down for observance in criminal trials, namely, that it would be unsafe to allow the conviction on a charge to remain where the circumstances are such as are indicated above must be followed in this case, and therefore the result is that the conviction of the appellants Latafat Hossain and Kaser Sekh, so far as S. 120-B is concerned, must be set aside. As regards Engraj, there is his own statement which, as indicated above, was admissible in evidence under S. 30, Evidence Act, and there is no reason why he should not be convicted under S. 120-B, I. P. C.

As regards the conviction under S. 307 read with S. 34, there is a large body of evidence, namely, the evidence of Saferuddin who received no less than 21 injuries and of Mansab, Yasin and the doctor Manmatha Nath Biswas. That evidence was placed before the jury in a very fair manner and nothing that has been said in the course of argument before us can induce us to interfere in any way with the conviction under S. 307 read with S. 34, I. P. C.

The result, therefore, is that the conviction under S. 120-B of the appellants Latafat Hossain and Kaser Sekh is set aside and the conviction of the appellants Latafat Hossain, Engraj and Khedarali under S. 307 read with S. 34 I. P. C. is maintained intact. The appellant Kaser Sekh whose conviction under S. 120-B is set aside must be forthwith released from custody.

Jack, J.—I agree.

A.L./R.K. *Appeals partly allowed.*

A. I. R. 1928 Calcutta 748 (1)

B. B. GHOSE AND CAMMIADÉ, JJ.

Maffizuddin Bepari—Plaintiff—Appellant.

v.

Jelaluddin and others—Defendant and Pro-forma Defendants—Respondents.

Appeal No. 466 of 1926, Decided on 3rd February 1928, from order of Officiating Sub-Judge, Faridpur, D/- 6th September 1926.

Civil P. C., O. 41, Rr. 27, 28 and 29—Local investigation accepted by trial Court—Appellate Court if not satisfied with it can direct trial Court to take evidence under Rs. 27, 28, 29 but cannot order retrial.

Where the trial Court has accepted a certain local investigation made by a commissioner, but the appellate Court is dissatisfied with it, the latter has no power to reverse the judgment of the former and send it for re-trial. The proper procedure for the appellate Court is to issue a commission or direct the trial Court to take evidence as provided by O. 41, Rr. 27, 28 and 29. [P 718 C 1]

Sarat Chandra Basak, Nalini Kumar Mukerji and Satya Charan Pal—for Appellant.

Nurul Huq—for Respondents.

Judgment.—In this case the Subordinate Judge has made an order of remand by setting aside the judgment of the trial Court. His order is not warranted by the law. If he was dissatisfied with the local investigation that was made by the commission and accepted by the trial Court he might have himself issued a commissioner or directed the lower Court to take evidence as provided by Rr 27, 28 and 29 of O. 41, Civil P. C. The order reversing the judgment of the Munsif and sending it back for re-trial is wrong. We are further informed that the observation made by the Subordinate Judge that the landlady or her successor-in-interest should also be made a party is inaccurate and unnecessary, because the landlord was already a party to the suit. Even if the landlord is not a party he would not be bound by the result of the litigation and at the appellate stage the Court ought not to have allowed any third person to be added as a party. The opinion that if necessary the public should be made a party again is unwarranted, whatever might be the result of the suit, the public would not be bound and it was not necessary for the Subordinate Judge to say that the public should be made a party.

With these directions we set aside the order of the Subordinate Judge and send back the case for trial of the appeal according to law.

The costs will abide the final result. We assess the hearing-fee at three gold mohurs.

A.D./R.K.

. Case remanded.

A. I. R. 1928 Calcutta 748 (2)

CAMMIADÉ AND S. K. GHOSE, JJ.

Benode Behari Mandal—Plaintiff—Appellant.

v.

Jitendra Prosad Chatterji and others—Defendants—Respondents.

Appeal No. 1198 of 1926, Decided on 16th July 1928, from appellate decree of Sub-Judge, Burdwan, D/- 21st January 1926.

Bengal Tenancy Act, S. 87—Sale of non-transferable holding—Part of it in tenants' possession—There is no abandonment and landlord has no right of re-entry.

A landlord can question the sale of a non-transferable occupancy holding only, if it has been followed by complete abandonment of the lands by the tenant. Where a tenant remains in possession of some of the lands, it follows that there has been no abandonment which entitles the landlord to re-enter on the lands in possession of the purchaser, as he has not taken possession of all the lands in the holding.

[P 749 C 1]

Naresh Chandra Sen Gupta and Urukramdas Chakrabarti—for Appellant

Mritunjoy Chatterji for Pramatha Nath Bandopadhyaya—for Respondents.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of possession of certain lands on declaration of his title. The lands in suit formed parts of two different occupancy holdings, one bearing a rental of Rs. 37-8-0 and the other bearing a rental of Rs. 9-4-0. Those two tenancies were brought to sale in execution of a money decree and they were purchased by the plaintiff, and the plaintiff took delivery of possession on 12th December 1921. He was subsequently dispossessed of some of the lands by defendant 1 in collusion with other defendants, including the landlords; and the plaintiff brought the suit in order to recover possession of the lands of which he had been dispossessed. The first Court decreed the suit so far it related to lands of the tenancy of Rs. 9-4-0 and dismissed it in respect of the lands of the other tenancy. Both parties appealed and the learned Subordinate Judge dismissed the

suit entirely. As will appear from the judgment of the learned Subordinate Judge, the plaintiff took care not to take possession through Court of the whole of the lands of the two tenancies, and the plaintiff is now in possession of some of the lands of these tenancies, and he claims to recover possession of only those other lands which were delivered to him, and of which he was subsequently dispossessed. The defendants set up a story that the tenant whose tenancies were sold in execution of the money decree had surrendered the holding to the landlords prior to the date of the execution sale, and that the landlords had held the lands khas for some time and had subsequently settled them with defendants 1 and 6. Therefore, even according to the case for the defence, defendant 6, the original tenant, is still in possession of some of the lands of the two tenancies.

As regards the story of the surrender, the learned Courts below have found that the story is false, and that it has been concocted with a view to cheat the plaintiff. The learned Subordinate Judge has however dismissed the plaintiff's suit, holding that because the plaintiff had purchased the entire holding at the execution sale, his purchase was of no effect as against the landlords; and the Subordinate Judge considered this argument sufficient for dismissing the plaintiff's suit. In this he was in error. So far as the tenant defendant 6 was concerned it was not open to him to question the sale. The landlords could only question the sale if it had been followed by complete abandonment of the lands by the tenant. As the findings of the Courts below are that the tenant is still in possession of some of the lands, it follows that there has been no abandonment which entitles the landlords to re-enter. The fact that the plaintiff did not take possession of all the lands is a material circumstance which the learned Subordinate Judge has failed to appreciate. It is this circumstance which puts the landlords out of the Court in the matter of re-entry. The plaintiff is in the position of a purchaser of a portion of a non-transferable occupancy holding as against whom no landlord has a right of re-entry.

The appeal therefore succeeds and the suit is decreed in its entirety with costs in all Courts.

A.L./R.K.

Appeal succeeded.

A. I. R. 1928 Calcutta 749

B. B. GHOSE AND CAMMIADÉ, JJ.

Haripada Saha and others—Defendants 1 to 5—Appellants.

v.

Debnath Mandal and others—Plaintiff and Defendants 6 to 9—Respondents.

Appeal No. 243 of 1927, Decided on 31st January 1928, from order of the Offg. Sub-Judge, Berhampur (Murshidabad), D/- 17th December 1926.

Civil P. C., O. 41, Rr. 27, 28 and 29—Unsatisfactory investigation by the trial Court—Procedure to be adopted by the appellate Court laid down.

Where the appellate Court finds that the trial in the trial Court is misconceived, it cannot set aside the whole judgment simply because of the unsatisfactory way in which the trial Court dealt with the matter of local investigation. The proper procedure is to make an order for local investigation itself or direct the trial Court to appoint a Commissioner for making a local investigation and proceed under O. 41, Rr. 27, 28 and 29. After the local investigation is made and any evidence desired by the appellate Court to be taken is taken, the appellate Court should decide the appeal on all questions arising in the suit itself. [P 750 C1]

Urukramdas Chakravarty—for Appellants.

Pyari Mohan Chatterjee—for Respondents.

Judgment.—On first reading the judgment it seemed that the Subordinate Judge passed his order under the inherent jurisdiction of the Court to make an order of remand when the trial in the first Court is altogether misconceived. The trial Court after rejecting the report of the commissioner ought to have in the circumstances stated by the Subordinate Judge issued a fresh commission for the purpose of local investigation. There is, however, one difficulty in maintaining the order as it has been made, and that is this, the Munsif decided all the issues including the question of limitation. The Subordinate Judge does not say anything with regard to the question of limitation. He set aside the whole judgment simply because of the unsatisfactory way in which the trial Court dealt with the matter of local investigation. It appears to us that he was wrong in setting aside the whole judgment including the finding with regard to the question of limitation upon that ground.

We, therefore, set aside the order of the Subordinate Judge remanding the case after setting aside the judgment of the Munsif and in lieu of the order made by the Subordinate Judge we direct that the appeal be sent back to him for decision. He may make an order for local investigation himself or direct the trial Court to appoint a commissioner for making a local investigation and he will proceed under Rr. 27, 28 and 29 of O. 41. After the local investigation is made and any evidence that the Subordinate Judge desires to be taken is taken the Subordinate Judge will decide the appeal on all the questions arising in the suit himself.

The costs will abide the final result. We assess the hearing fee at two gold mohurs.

A.L./R.K.

Case remanded.

A. I. R. 1928 Calcutta 750

MITTER AND MALLIK, JJ.

Sibesh Chandra Pakrashi—Defendant
—Appellant.

v.

Bibi Bhusan Roy and others—Plain-
tiff and Defendants—Respondents.

Appeal No. 1229 of 1926, Decided on 26th March 1928, from appellate decree of 1st Sub-Judge, Pabna, D/- 26th January 1926.

Bengal Local Self-Government Act 3 (B. C.), (1885)—Election Rules 1 and 42—Civil Court has jurisdiction to set aside an election.

Where a person is elected as a member of the Local Board, a civil Court has jurisdiction to entertain a suit to set aside the election as the decision by the presiding officer under R. 42 is not final. [P 751 C 1]

Radha Benode Pal and Jitendra Mohan Banerjee—for Appellant.

Panchanon Ghose and Krishna Lal Banerjee for Girish Chandra Banerjee—for Respondents.

Judgment.—This is an appeal by the defendant from a decision of the Subordinate Judge of Pabna dated 26th January 1926 which affirmed the decision of the Munsif of Serajgunj, dated 9th May 1925. The suit in which this appeal arises was for setting aside the election of defendant 1 who was elected as a member of the Serajgunj Local Board and for an injunction restraining him from taking his seat as a member of the said Board. The main ground on which the plaintiff came to Court seems to be

this, that one Tarak Chandra Banerji proposed the plaintiff as a candidate for election. Objection was taken by defendant 1 to Tarak's proposing the plaintiff as a candidate for the election, as it was said that Tarak was not a qualified voter. This objection of defendant 1 seems to have prevailed with the presiding officer. The plaintiff was also duly seconded by another qualified voter and that seconder also was held by the presiding officer not qualified to vote. The result was that the name of the plaintiff was removed from the list of nominated candidates. Both the Courts below concurrently found that the presiding officer did erroneously hold that Tarak and the seconder were not qualified voters and that the decision of the presiding officer was wrong. The Munsif, accordingly, declared

that the plaintiff was duly proposed and seconded as a candidate for election as a member of the Serajgunj Local Board at the Sadiya Chandpur Centre and his name was wrongly removed from the list of candidates there, that the election of defendant 1 as a member of the said Board from the Chauhati thana be set aside as invalid and that he, the said defendant 1, be restrained by an injunction from sitting and acting as a member of the said Board for the said thana.

This decision was, as I have already stated, affirmed by the learned Subordinate Judge.

In second appeal, the only substantial ground which has been taken by Dr. Radha Benode Pal, who has appeared for the appellant, is that a suit of this description does not lie in a civil Court and that the civil Court has no jurisdiction to entertain the present suit. Reliance has been placed on the Election Rules under the Local Self-Government Act and special reference is made to R. 1-A. These rules were framed under S. 138 (a), Bengal Local Self-Government Act 3 (B. C.), 1885. It appears, however, that R. 1-A is of no assistance to the defendant-appellant, for it seems to us that the objections which were taken by the plaintiff were such objections as fell within R. 42, Election Rules. In order to determine as to whether Tarak was a qualified voter, it was necessary for the presiding officer to determine the objections to voters within the meaning of R. 42. R. 1-A provides that all disputes arising under these rules other than objections under Rr. 15 and 42 shall be decided by the Magistrate and his deci-

ion shall be final. So according to this rule, any objection decided by the presiding officer under R. 42 is exempted from the rule which makes all other decisions of the Magistrate final and not liable to be challenged in a civil Court. Objections which were determined, as it appears clear from para. 5 of the plaint do come under R. 42 and are, therefore, cognizable by the civil Courts. We think in this view the decision of the lower Court is correct and that the appeal must, accordingly, be dismissed with costs.

A L/R K.

Appeal dismissed.

A. I. R. 1928 Calcutta 751

CUMING AND MUKHERJI, JJ.

Madhab Chandra Mandal and others—
Defendants—Appellants.

v.

*Tilottama Dasi and others—*Plaintiffs
and 'Pro-forma Defendant—Respondents.

Appeal No. 829 of 1925, Decided on 5th February 1928, from appellate decree of Addl Dist. Judge, Midnapore, D/- 22nd January 1925.

(a) *Bengal Tenancy Act, S. 103-B—Record-of-rights—Entry is presumed to be correct.*

Every entry in a record of rights shall be presumed to be correct until it is proved by evidence to be incorrect. [P 752 C 1]

(b) *Civil P. C., S. 100—Finding in disregard of presumption from an entry in the record-of-rights can be interfered.*

Where the presumption of possession by an entry in the record-of-rights in favour of a certain person is entirely disregarded, such a finding of fact can be set aside in second appeal. [P 752 C 1]

*Panchanon Ghose and Ganendra Krishna Ghose—*for Appellants.

*Hira Lal Chakrabarti and Apurba Tharan Mukerji—*for Respondents.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiffs sued for a declaration of their title and confirmation of possession and for a declaration that a certain entry in the record-of-rights was incorrect.

This entry in the record of rights refers to Dags Nos. 1053 and 1057. In the record-of-rights these dags are recorded as being held by the Gramya Thakurani through the shebait Madhab Chandra Mandal as a tenant under plaintiff 3 rent-free. Plaintiffs 1 and 2 are the widows and plaintiff 3 is the daughter of one

Birkishore Manna. Their case was that the dags in dispute were in their khas possession. The case of the defence was that the lands in suit never belonged to the plaintiffs' alleged landlords and were never included in the plaintiffs' jote but that they belonged to the idols Sitala, Kali and Mahamaya who were the village goddesses of Mauza Golabari, that the plaintiffs were never in possession of the same but that defendant 2 possessed them on behalf of the deities as a shebait. Further that the suit was barred by limitation.

The trial Court found that the plaintiffs had title to the lands as claimed by them but held that the suit lands were held by the deity as a tenant under the plaintiffs without payment of any rent. On these findings the trial Court dismissed the plaintiffs' claim for confirmation of khas possession or recovery of khas possession.

The plaintiffs appealed to the District Court. The District Court found that the title was with the plaintiffs and further found that the plaintiffs were in khas possession and were, therefore, entitled to the confirmation of their khas possession.

The defendants have appealed to this Court and their contention is that the learned Judge has wrongly placed the onus on the defendants. It is contended that it is not for the defendants to show that the entry in the record-of-rights was right but it is for the plaintiffs who challenge the record-of-rights to show that it is wrong.

The learned Judge has dealt with this portion of the case in the last paragraph of p. 8 of the paper-book where he says:

As regards the second point I cannot support the lower Court's finding. The defendants must show that the presumption claimed by them under the record-of-rights, Ex. 11 (i), is based on sound basis.

He then proceeds to deal with the evidence that the defendants adduced and finally comes to the conclusion that the defendants have not proved their possession or that there is any village deity Mahamaya who holds the lands. He further finds that there is no evidence of the defendants' possession. The learned Judge has obviously approached the case from a wrong standpoint. It was for the plaintiffs to show that the entry in the record-of-rights was incorrect and not for the defendants to show that the entry in

the record-of-rights which was in their favour was correct. See S. 103-B, Ben. Ten. Act. Cl. (3), S. 103-B, Ben. Ten. Act provides that:

Every entry in a record of rights so published shall be evidence of the matter referred to in such entry, and shall be presumed to be correct until it is proved by evidence to be incorrect.

In dealing with the defendants' evidence as regards possession the learned Judge has fallen into the same error. He remarks that:

As regards possession the defendants' evidence is not at all convincing. Plaintiffs have proved their possession both of Dags Nos. 1053 and 1057. Defendants' evidence of possession of the tank is almost nil.

He has entirely disregarded the fact that the entry in the record of rights is in favour of the defendants. It shows that the defendants are in possession.

The order of the learned District Judge is, therefore, set aside and the appeal sent back to him for a re-hearing bearing in mind the observations we have made.

With regard to the question of title it has already been decided in favour of the plaintiffs and has not been challenged by the defendants in this Court. That question will not be re-opened.

Costs of this appeal will abide the final result.

Mukherji, J.—I agree.

A.L./R.K.

Case remanded.

A. I. R. 1928 Calcutta 752

C. C. GHOSE AND JACK, JJ.

Nawabali and others — Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 284 of 1928, Decided on 3rd August 1928.

Penal Code, Ss. 302 and 109 — Accused ordering to beat certain men — As a result of beating some persons dying—accused is guilty of abetment of murder.

Where a person orders his men to beat the other party and in consequence of that order the people of that party are beaten and as a result some men are killed, that person is guilty of abetment of murder : A. I. R. 1928 Pat. 100, Foll. [P 752 C 2]

Mritunjoy Chatterjee, Prem Ranjan Roy Chowdhury and Biraj Mohan Roy—for Appellants.

Khundkar—for the Crown.

C. C. Ghose, J. — This appeal was argued at considerable length yesterday

and also to-day. Various points have been urged before us with a view to show that there are serious misdirections in the learned Judge's charge to the jury. As a matter of fact, the learned Judge's charge to the jury has been subjected to very minute criticism; but on the fullest consideration we are unable to say that any portion of the charge can be assailed on the ground of misdirection.

There is, however, one point which requires consideration and it is this. It is said that as regards the appellant, Nawab Ali, who was charged under S. 302 read with S. 109 I. P. C., among other sections, the learned Judge's explanation of S. 109 was defective in this that he used language from which it might be construed that the learned Judge was of opinion that if Nawab Ali ordered his men to beat and if the killing of Hamijuddin was committed in consequence of his order to beat, Nawab Ali was to be held guilty of abetment of the act of killing. The sentence in the charge referred to above, by itself, may be open to misconstruction; but we have got to read that sentence bearing in mind the facts of this case and the facts are as follows: According to the case for the prosecution, the complainant Ismail, who had mortgaged the land (plot No. 118) to Nawab Ali, retook possession of the same as Nawab had not paid the rent due to the superior landlord. It is said that on the day of the occurrence Ismail was cutting paddy of that plot when the accused with a large number of men about 40 in number came in a boat armed with lejas, lathis and ramdaos and protested against Ismail's cutting of the paddy. A quarrel ensued in the course of which, under Nawab Ali's orders, Ismail's party was attacked and assaulted, as a result of which Hamijuddin and Abdul Majid were seriously wounded and as the result of the wounds they died. Now, if, as a matter of fact, the facts were, as indicated above, then if the learned Judge had said that upon Nawab Ali ordering his men to beat the opposite party and in consequence of which order the people who were opposed to Nawab Ali's party were beaten and as a result two men were killed, Nawab Ali would undoubtedly be held guilty of abetment of murder, then in the circumstances of this case there was and would have been nothing wrong. We are for-

tified in the view we take by the decision of the Patna High Court in the case of *Ghanshyam Singh v. Emperor* (1), the passage with which we are concerned occurring at p. 635. That being so, we see no reason whatsoever for interfering in this appeal with the order made by the learned Sessions Judge.

The result is that the appeal is dismissed.

Jack, J.—I agree.

A.L./R.K. *Appeal dismissed.*

(1) A. I. R. 1928 Pat. 100=6 Pat. 627.

A. I. R. 1928 Calcutta 753 (1)

CAMMIADÉ, J.

Gobinda Ram Agarwala — Plaintiff—Petitioner.

v.

Dulu Pada Dutta and others — Defendants—Opposite Parties

Civil Rule No. 381 of 1928, Decided on 15th June 1928.

Court-fees Act, S. 7 (11) (cc)—*Determination of tenancy—Tenant not holding over, is a trespasser holding over—Suit for ejectment cannot be valued under S. 7 (11) (cc).*

A tenant whose tenancy has been determined and is not a tenant holding over, is a trespasser holding on. A suit for ejectment of such a tenant does not fall within the meaning of S. 7 (11) (cc) and the suit must be valued otherwise than under its provisions. [P 753 C 2]

Herambo Chandra Guha, Jnan Chandra Roy and Probbat Chandra Das—for Petitioner.

Byom Kesh Basu—for Opposite Parties.

Judgment—The question arising for decision in this rule is whether or not the Courts below have rightly refused to allow the plaintiff, who is the petitioner before this Court, to value his suit under the provisions of S. 7, para. (11), sub-Cl. (cc), Court-fees Act. The tenancy that had existed and had been held by the defendant had been terminated; and the suit was one for ejectment of the defendant as a trespasser. The plaintiff sought to value his suit under the clause referred to above on the assertion that for the purposes of the valuation of the suit the defendant was still a tenant. There is nothing in the wording of the sub-clause to lead to any such conclusion. That sub-clause reads as follows :

For the recovery of immoveable property from a tenant including a tenant holding over after the determination of the tenancy.

Once the tenancy had been determined the person who has been a tenant became a trespasser holding on, and he could only be a tenant holding over provided such holding over was with the consent, express or implied, of the landlord. It is possible that the legislature intended to reduce the Court-fee payable in suits such as the present. But that view may also be doubted considering that the legislature thought it necessary to add that the term "tenant" would include a tenant who held over. It seems as if there can be no room for holding that the legislature intended to include under the term "tenant" persons who had ceased to be tenants altogether. However, we can only act on the words to be found in the statute and as the defendant does not fall within the category of tenants or tenants holding over after the determination of the tenancy the Courts below were right in holding that the sub-clause referred to above does not apply, and the suit must be valued otherwise than under its provisions.

The rule is, accordingly, discharged with costs—hearing-fee, two gold mohurs. Let the record be sent down at once.

A L./R.K. *Rule discharged.*

* A. I. R. 1928 Calcutta 753 (2)

B. B. GHOSE AND BASU, JJ.

Saberjan Bibi and others—Plaintiffs—Appellants.

v.

Kantari Bibi and others—Defendants—Respondents.

Appeal No. 502 of 1927, Decided on 27th July 1928, from appellate order of 2nd Addl. Dist. Judge, Bakarganj, D/- 4th July 1927.

* *Civil P. C., S. 47—Final decree for partition — Dispute regarding adjustment falls under S. 47.*

Where the commissioner went to deliver possession of certain properties in terms of the final decree for partition, and objection was put forth by one of the parties that there was an adjustment of the decree in contravention of the final decree,

Held : that a dispute with regard to adjustment of the decree with regard to possession is a dispute under S. 47 and it must be decided by the executing Court whether there was such an adjustment or not. [P 754 C 1]

Jatish Chandra Guha—for Appellants.
Nausher Ali—for Respondents.

Judgment.—This appeal arises out of application relating to delivery of possession in execution of a partition decree. The appellants before us are plaintiffs 1 to 3 or their heirs and the respondents—plaintiffs 4 to 6. The defendants in the suit have no interest in the proceedings. But in a partition suit every plaintiff may be in the position of a defendant. Therefore the question of the parties being ranged on the same side in the suit is of no moment in this particular case. The controversy between the contending parties to this appeal was with regard to delivery of possession in respect of four lags of the properties in suit, that is to say dags 134 and 135 on one side and lags 164 and 165 on the other. The dispute was that the respondents, the opposite parties before the trial Court, claimed that the final decree had been adjusted between the parties in this way, that the petitioners the appellants before us would get dags 164 and 165, while the opposite parties would get the other two dags. This was, however, in contravention of the final decree as made. The petitioners objected that there was no such adjustment of the decree and this objection arose when the commissioner went to deliver possession in terms of the final decree for partition. The Subordinate Judge allowed the petitioners' objection and made an order that possession should be delivered as in the final decree for partition. The opposite party appealed before the District Judge and the District Judge was of opinion that this matter did not arise under S. 47, Civil P. C., and the order of the Subordinate Judge was without jurisdiction as the decree had been finally satisfied.

Obviously the District Judge was in error. The authority that he cited in support of his opinion has no bearing on the present case. Here possession was asked to be delivered according to the final decree and such delivery of possession must be held to be in execution of the decree, and when the dispute arose with regard to such delivery of possession it was a dispute falling under S. 47, Civil P. C. The District Judge was also in error in holding that the decree had been fully satisfied, because it was not a fact that possession was fully delivered in accordance with the decree as the petitioners the appellants before us objected to the delivery of possession in terms of

the alleged settlement between the parties.

The judgment and order of the District Judge are therefore set aside and the case sent back to the lower appellate Court for decision on the merits as to whether there was really an adjustment or not.

The costs will abide the final result. We assess the hearing-fee at three gold mohurs.

A. I. /R.K.

Case remanded.

* A. I. R. 1928 Calcutta 754

MULLICK AND GARLICK, JJ.

Hemeswar Barua—Plaintiff—Appellant.

v.

Poal Chandra Bora and another—Respondents

Appeals Nos. 2678 of 1925 and 164 of 1926, Decided on 5th July 1928, from appellate decrees of Sub-Judge, Tezpur, D/- 8th July 1925.

* (a) *Specific Performance—Agreement for sale — Possession delivered under an unregistered kobala — Limitation for specific performance dates from knowledge of sale to subsequent purchaser.*

The cause of action for a suit for specific performance of contract for sale by a person who is in possession of the property in pursuance of an unregistered kobala dates from the time when he becomes aware of a subsequent sale by his vendor. [P 755 C 1, 2]

(b) *Registration Act, S. 49—Agreement for sale proved by parol evidence — This evidence reinforced by the fact of possession and payment of revenue—Making use of the document of the agreement is not illegal.*

Where there was parol evidence of an agreement for sale and evidence was reinforced by the fact that the person producing an unregistered document to prove an agreement of sale, was in possession of that land and was also paying Government revenue,

Held : that there is no illegality in making use of that document : 18 C. W. N. 445, *Ref.*

[P 755 C 2]

(c) *Registration Act, S. 48—Subsequent purchaser knowing prior agreement to sell gets no right to the property.*

Where a subsequent purchaser is aware of a previous agreement of sale of the same property to another person, the former acquires no title to the property. [P 756 C 1]

Hemendra Kumar Das—for Appellant
Mrityunjay Chatterjee and Biraj Mohan Roy—for Respondents.

Garlick, J.—The plaintiff-appellant bought the suit land by two separate kobalas from Mt. Abari Defalani, defen-

dant 2, of Suit No 739, and from Taran Dafla defendant 2, of Suit No 752 in April 1923. But defendant 1 prevented him from taking possession of the land saying that he had bought it from the Daflas some years earlier. So the plaintiff filed two suits for declaration of title and delivery of possession. His kobalas are registered kobalas although they did not require registration, the consideration being Rs 80 in the one and Rs 20 in the other.

Defendant 1 says that he bought the suit land in April 1918 from two vendors of the plaintiff and a third Dafla named Hari for Rs. 180. But the sale-deed is unregistered. He has, however, possessed the land and paid Government revenue for it ever since his purchase.

The Daflas left the village, at about the time of the sale to defendant 1. The Court of first instance found that defendant 1 was in possession by virtue of his purchase and that the plaintiff was aware of the sale to him and of his possession at the time when he bought the land. The plaintiff paid a very low price and registered the two kobalas unnecessarily because he knew of defendant 1's purchase and wanted to defraud him.

Both the Courts below have found that though the unregistered kobala of defendant 1 ought to have been registered it is admissible in evidence to prove the agreement to sell; and that that agreement having been part performed by defendant 1 is enforceable as if there had been a complete sale. The plaintiff's two suits have, therefore, been dismissed and he has filed these two appeals. The grounds of the appeals are first that an unregistered kobala with a consideration of Rs 180 was not admissible in evidence, second that without that document there was no foundation for the doctrine of part performance, and third that the doctrine of part performance does not apply because a suit for specific performance of the contract was time barred.

In the present case a suit for specific performance of the unregistered kobala was not time barred at the date of the plaintiff's suit for though the unregistered kobala was executed in April 1918 there is nothing to indicate that the defendants had refused to register it. The cause of action for a suit for specific performance of the contract for sale would date from the time when defendant 1 became aware

that his vendors had sold the land to the plaintiff. The second sale was in April 1923 and this suit was instituted in 1924. A suit for specific performance of the defendants' kobala was not, therefore, time barred when the plaintiff instituted the present suit.

It is argued that S. 49, Registration Act, prevents an unregistered kobala, which ought to be registered from being received as evidence of any transaction affecting the land and that it cannot, therefore, be sued as a basis for the doctrine of part performance. The ruling reported in *Sanjih Chandra Sayal v Santosh Kumar Lahiri* (1) was cited in support of this contention.

In the face of Ss 17 and 49, Registration Act, and the ruling just cited it is difficult to say that this unregistered document was rightly admitted in evidence. But it has often been held that a sale-deed which is not admissible as a proof of title to land is nevertheless admissible for some collateral purpose; and in some cases it has been held that such a document is admissible to prove the existence of an agreement for sale for the purpose of applying the doctrine of part performance. In the present case there is also parol evidence of an agreement for sale. And this evidence is reinforced by the fact that the defendants were in possession of the land and were paying Government revenue for it. Their possession of the land and payment of revenue can only be accounted for by the fact that they had bought the land. Therefore, even without using this unregistered document there is evidence which can be relied on to show that there was an agreement for sale and that they took possession of the land in consequence of that agreement. In a ruling reported in *Puchha Lal v. Kunj Behari Lal* (2) a similar unregistered document was admitted as evidence of the existence of an agreement for sale and was used as a foundation for the doctrine of part performance. We are of opinion, therefore, that the lower Courts committed no illegality in making use of this document.

It has been found that defendant 1 actually paid the consideration agreed upon and took possession of the land in consequence of that payment. His part of the

(1) A.I.R. 1922 Cal. 436=49 Cal. 507.

(2) [1913] 18 C.W.N. 445=20 I.C. 803=19 C. L.J. 213.

contract was performed. And equity requires that the vendors' part of the contract should also be performed. By virtue of the doctrine of part performance the agreement to sell the land to the defendants coupled with the payment of consideration money and delivery of possession was equivalent to a completed sale. The plaintiff, therefore, acquired no title by his subsequent purchase from the same vendors. The lower Courts have held that he was not a bona fide purchaser without notice of the sale but that he was aware both of the sale and of the defendant's possession of the land and that he bought the land at a low price for that reason. Both the appeals are dismissed with costs.

Mullick, J.—I agree.

A L./R.K.

Appeals dismissed.

A. I. R. 1928 Calcutta 756

COSTELLO, J.

Mulchand Jhoomer—Applicant.

v.

G. R. Martindale—Opposite Party.

Civil Suit No. 246 of 1927, Decided on 3rd February 1928.

(a) *Calcutta High Court Rules*—Variation of order—Practice and procedure indicated.

When a draft form of an order is settled, it is the duty of the Registrar at once to pass and enter the order in the register. Any party who desires to object to the terms of it as settled, should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires and then he must move the Court to have the variation made. [P 756 C 2]

(b) *Calcutta High Court Rules*—Court may vary its own order settled, passed and entered by the Registrar.

The Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, it has jurisdiction which it will in a proper case exercise to correct its records in accordance with the order really pronounced. *In re: Swire Mellor v. Swire* : (1885) 30 Ch. D 239, *Foll.* [P 756 C 2]

S. M. Bose—for Applicant.

Barwell—for Opposite Party.

Order.—This is an application to vary an order after it has been passed by the Registrar of this Court and entered. In a matter of this kind I think the practice in this country is the same as it is in England namely as laid down

by Lord Justice Cotton in the case of *In re: Swire Mellor v. Swire* (1) at p. 242, where the learned Lord Justice says :

The regular course is this that when an order is settled any party who desired to object to the terms of it as settled should intimate to the Registrar that he intends to give a notice of motion to vary the order. He must state what variation he desires and then he must move the Court, at the risk of costs, to have that variation made. It is the duty of the Registrar at once to pass and enter the order when settled, unless some of the parties state that they intend to move to vary it. It would cause delay in the Registrar's office if any one, by simply saying "I object to that form of order" without giving notice to vary it, could prevent the Registrar from going on to pass and enter it

Then the learned Lord Justice goes to say ;

but although that is the regular course, and it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy yet in my opinion the Court has jurisdiction over its own records, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction which it will in a proper case exercise to correct its record, that it may be in accordance with the order really pronounced.

I entirely agree with the observations of the learned Lord Justice and as I have said I think that is the correct statement of the law as applicable in this Court as well as the Court in England. The whole question, therefore, which I have to determine is whether or not in the circumstances of this case I ought to interfere with the order which has been passed and entered, because it is clear and it is not disputed that in the present instance the ordinary course was followed and the Registrar sent to the solicitors of the parties the draft form of order and each of these solicitors returned these drafts to the Registrar with certain alterations and signed it as being approved by him subject to such alterations ; the notice of motion in the present case is to the effect that the defendant asks for an order that an order made by me on 12th December 1927, be amended by the deletion of the words "all account books, papers, memoranda and writings relating thereto." The notice also says that the defendant will ask for an order that he is entitled to

(1) [1885] 30 Ch. D. 239=33 W. R. 485=52 L. T. 205.

the possession and delivery to him of all the books and documents whatsoever relating to his business. The draft forms of order which were sent to the parties contained the clause which is now objected to. It is as follows :

And it is further ordered that the plaintiff firm and all persons claiming under them do deliver up quiet possession of the said goods together with all account books, papers, memoranda and writings relating thereto to the said Receivers.

Neither of the solicitors to the parties objected to the presence of that clause in the draft order, but only made certain other alterations in the draft. Accordingly it may be said that they "settled" the order and it was passed by the Registrar and entered by him.

Now it is said on behalf of the defendant that I ought to order the deletion of the clause relating to account books and so on on the ground that the order as it stands does not really represent the intention and meaning of the order which I made on 12th December 1927, and to a large degree that is so, because so far as my recollection goes (and it is admitted on both sides to be correct) nothing whatever was said on that occasion with regard to the account books and papers and other writings relating to the goods in question in the suit. It is true that in his affidavit the defendant did explain at the time that the "financier" on or about the date mentioned seized

my stock-books, bill-books, bill-registers, chalan-books and order books and that they still hold the same and refused to return them in spite of demands.

Now what happened on 12th December was that in a sense there was a consent order or rather an order by consent in that various terms were suggested to the parties and accepted by them as being the kind of order which ought to be made in the circumstances of the case and the effect of that order was that the "Barlock" type-writers which were seized by the plaintiff and also certain other goods which the defendant had in his possession for sale on commission—all those goods would be put into the hands of the Receivers to be sold by them and the sale proceeds retained by them pending the determination of the issues in the suit. It was conceded by the learned counsel for the plaintiff that certain furniture belonging to the defendant had also been seized by

the plaintiff and in particular certain office articles and office furniture was seized and I came to the conclusion that in order that the defendant might properly be in a position to continue carrying on his business those articles ought to be held by the Receivers and made available for the use of the defendant in order that he should not be hampered in the continuance of his business. It may well be that had the question of the account books, papers and memoranda and writing relating to the goods been specifically mentioned I should have made a similar order with regard to them. However as I have pointed out nothing was said with regard to the destination of the documents in the case but on the other hand the order was drawn up in the manner which I have already described. On a subsequent occasion an application was made to me that the terms of that order might be complied with by the plaintiff in that they should be ordered to hand over to the Receivers the books of account and so on and in fact that has been done.

The position now is that these account books, papers, memoranda and other writings etc., are in the hands of the Receivers and in fact in the physical possession of one of the Receivers who happens to be the solicitor of the defendant. The second part of the order now asks for that the defendant himself should be put into the possession of all these books and other documents. I am, however, informed by the counsel for the plaintiff that the question of the ownership and title to these documents is one of the matters in dispute in the suit and the plaintiff also says that he takes the view that there might be a risk that the documents may be tampered with. Be that as it may, I think having regard to the fact that nothing whatsoever was said about the books of account at the time when the matter was originally before me and therefore there can be any real question of carrying the original intention and meaning of the order which I then made, it is not right that I should amend the order as drawn up and apparently settled and approved by the solicitors for the parties. It is desirable that nothing should be done to hamper but at the same time nothing should be done which might in any

way injuriously affect the rights of the plaintiffs seeing therefore that the ownership and title to these documents is in dispute. I think on the whole it is desirable that they should be in the hands of the Receivers. They should however give every possible facility to the defendant for making use of the books for the purpose of carrying on the business pending the trial of the action.

The suit is fixed to be tried on 19th February which is only a short time from this day. In all the circumstances of the case I do not think that the defendant can be seriously damnified if the documents remain in the custody of the Receivers. Looking at the matter as a whole and having regard to the consideration I have mentioned I do not think this is a case where I ought to interfere with the order as settled, passed and entered nor do I think that having regard to the question of title of these documents which has been raised that I ought to deal with the matter on an interlocutory application otherwise than to insure the preservation of the property in dispute and that both parties should have such access as is necessary for protecting their interests. It follows therefore that this application must be dismissed. Costs—costs in the cause.

A.L./R.K. *Application dismissed.*

* A. I. R. 1928 Calcutta 758

CAMMADE AND S K. GHOSE, JJ.

Raj Gopal Bhattacharji and another—
Defendants 1 and 2—Appellants.

v.

Sarat Kumari Debi—Plaintiff—Res-
pondent.

Appeal No 1612 of 1928, Decided on 26th July 1928, from appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 31st March 1926.

* *Civil P. C., S. 11, Expl. (2)—Finding as to possession on a certain date in a suit under Specific Relief Act, S. 9, can operate as res judicata.*

Where it was decided in a suit under S. 9, Specific Relief Act, that the plaintiff was not in possession of a certain property from a certain date, the question covered by that finding cannot be reargued between the parties and is res judicata in a suit for possession on declaration of plaintiff's title. [P 758 C 2]

Hira Lal Chakravarty—for Appellants.
Bhagirath Chandra Das and Mammo-
han Banerji—for Respondents.

Judgment—This is an appeal by defendants 1 and 2 in a suit for recovery of possession of certain lands on declaration of the plaintiffs title. The suit was instituted on 10th May 1922. It would appear that on 3rd June 1910 the plaintiff had instituted a suit against the defendants under S. 9, Specific Relief Act, and that that suit had been dismissed on the ground that the plaintiff had failed to prove that she had been in possession within six months of the date of the suit. The learned Munsif who tried the present suit held that the present suit was barred by limitation under the provisions of Art 142, Lim. Act. The learned Court of appeal below has reversed the decree of the Munsif, holding that the finding in the possessory suit that the plaintiff had not been in possession for at least six months before the date of that suit is not res judicata in the present suit. We are unable to agree with the view of the law taken by the learned Judge. Under the provisions of Expl (2), S. 11, Civil P. C., the fact that no right of appeal exists against a decision does not in any way affect the operation of the rule of res judicata. The decision in the suit under S. 9, Specific Relief Act, was not subject to appeal; but that fact alone will not make the point decided in that case any the less res judicata in subsequent litigation between the parties. It was decided by the Munsif in the suit under S. 9, Specific Relief Act, that the plaintiff had not been in possession at least from 3rd December 1909; and the question covered by that finding cannot be reargued between the parties. It is not open to the plaintiff to reassert that she had been in possession at any time between 3rd December 1909 and 3rd June 1910. As that question was res judicata, it follows that the present suit was not within time.

The appeal is allowed. The judgment and decree of the lower appellate Court are set aside, and those of the Munsif restored with costs in this Court and in the Court of appeal below.

A.L./R.K.

Appeal allowed.

A. I. R. 1928 Calcutta 759

B. B. GHOSE AND BOSE, JJ.

Bharateswari Das — Decree-holder — Appellant.

v.

Bhagaban Chandra Chakraborty and others—Judgment-Debtors—Respondents.

Appeal No. 160 of 1927, Decided on 23rd July 1928, from appellate order of Sub-Judge, Zillah Tippera, D/- 11th December 1926.

(a) *Hindu law—Daughters inheriting the property of their father, dispossessed—Suit for recovery of possession and mesne profits decreed—Death of one of them during an appeal against the final decree for mesne profits—Decree for mesne profits is a part of the estate of the father unless the deceased treated her share as distinct from paternal estate.*

Two sisters *B* and *J*, who had inherited the estate of their father, obtained a decree for recovery of possession and mesne profits against the persons who had dispossessed them. The two sisters sold the land thus recovered. Inter on, final decree ascertaining the mesne profits was made. The judgment-debtor unsuccessfully preferred appeals. During the pendency of those appeals, *J* died and her sons were brought on record in spite of *B*'s application claiming herself as *J*'s legal representative, which was the undecided. *B* then applied for recovery of entire amount by execution.

Held : that a decree for mesne profits should be considered as part of the estate of the father of the two sisters, since *J* had not treated her share of the decretal amount as distinct from the paternal estate. *B* was, therefore, entitled to realize the entire decree : 10 Cal. 324 (P.C.), *Rel. on.* : 22 Mad. 356, 28 Mad. 1; 10 Bom. 478; 41 All. 350; and 20 Cal. 433 (P.C.); *Discussed.*

[P 760 C 2]

(b) *Civil P. C., O. 21, R. 15—Joint decree-holder is not bound by payment to the alleged legal representative which was certified by him without notice to joint decree-holder—Civil P. C., O. 21, R. 2.*

Where alleged legal representatives of one of the joint decree-holders who were not in law entitled to succeed as legal representative received partial payment and certified it without notice to other joint decree-holder, the joint decree-holder is entitled to contest the certificate and is not bound by the payment.

[P 760 C 1]

Birendra Chandra Das—for Appellant.*Upendra Kumar Ray*—for Respondents.

B. B. Ghose, J.—This is an appeal by the decree-holder against an order of the Subordinate Judge modifying the order of the Munsiff by which he directed that the decree-holder could only proceed to execute the decree for only one-half of the decretal amount.

The dispute between the parties arose

in this way. There were two sisters *Bharateswari* and *Jagneswari*, of whom *Bharateswari* is now surviving and she is the appellant before us. It appears that they were dispossessed of a certain property and those two sisters obtained a decree for recovery of possession and mesne profits against the judgment-debtors on 23rd September 1916. On 19th October 1916 the land for which the decree for possession and mesne profits was obtained was sold to one *Purna Chandra Das* by the two sisters. The final decree ascertaining the mesne profits was made by the Court on 15th September 1919. Against that decree there was an appeal and a second appeal, both of which were dismissed. During the pendency of the appeal *Jagneswari* died and her sons were brought on the record at the instance of the judgment-debtors. *Bharateswari* presented a petition to the effect that she was the legal representative of her sister and had obtained her interest in the decree by survivorship. The question does not appear to have been decided by the Court. After the final dismissal of the appeal by the judgment-debtors against the part of the decree ascertaining mesne profits *Bharateswari* made an application for execution of the entire amount of the decree on 7th November 1924, and the present appeal arises out of that application.

The Munsiff allowed the application after rejecting the objection of the judgment-debtors. The objection of the judgment debtors appears to have been twofold, first that they have paid half of the decretal amount to the guardian of the minor sons of *Jagneswari* and that certificate of satisfaction had been made by the executing Court to that extent and therefore *Bharateswari* is not entitled to execute the entire decree. The second objection was that this money in the shape of mesne profits was the separate property of *Jagneswari* as her stridhan which after her death would go to her heir and would not follow the estate. It is necessary to mention that the two sisters had inherited the estate of their father with regard to which the decree for mesne profits was obtained. The Munsiff, as I have already said, held that *Bharateswari* was entitled to execute the entire decree. With regard to the question of satisfaction he seems to have held

that there was no real satisfaction because the guardian of the minor sons of Jagneswari seems to have filed a petition of disclaimer as regards the receipt of money. In any case he held that that payment even if it had been made to the father of the minor sons of Jagneswari would not prevent Bharateswari from executing the decree. The learned advocate for the respondents contends that when there is that certificate of payment of half of the decretal amount the Court could not go behind that order or set aside the previous order of the executing Court. The short answer to that is that the judgment-debtors could not pay any amount as his share to a decree-holder on the record. The decree was never divided into two halves. The order admittedly was not acquiesced in by Bharateswari and it does not appear that she was given notice of this payment and certificate. That being so she is entitled to contest the certificate and the Munsiff was right in holding that she is not bound by it.

The order of the Munsiff was appealed against and on appeal the Subordinate Judge held that the mesne profits could not be a part of the corpus of the father's estate because the two sisters had sold the land for which the decree for mesne profits was obtained. His argument was that at the time when the decree for mesne profits was made in 1919 there was no corpus in the shape of paternal property to which this sum of money can be taken as an accretion as the property had been sold to a third person and there was no paternal estate in the hands of the two daughters. This argument is clearly fallacious and the learned advocate for the respondents does not base his argument upon that view. The property is not gone. The right which accrued to the decree holders was on account of their having been dispossessed of the property and their rights were certainly referable to the ownership of the land in question.

The whole question is whether this sum of money in the shape of mesne profits should be considered as the personal property of the lady Jagneswari or as the assets of her father's estate, and that question it must be admitted is one of considerable nicety. But having regard to the cases that have been cited before us in my opinion the decree for

mesne profits should be considered as part of the estate of the father of the two sisters. If Jagneswari had by any manner or means expressed her intention to keep her share of the decretal amount apart from the paternal estate the money would have followed her directions, but not having done so must, according to the decisions as I understand them, follow the estate. The leading case on this point is the case of *Isri Dut Koer v. Hunsbatti Koerain* (1) Their Lordships of the Judicial Committee observed in that case that the widow's savings from the income of her limited estate are not her stridhan and if she has made no attempt to dispose of them in her lifetime there is no dispute but that they follow the estate from which they arose. The learned Subordinate Judge thought that the present case is governed by the case of *Saodamani Dasi v. Administrator General of Bengal* (2) There their Lordships of the Privy Council found that the accumulated income from her husband's estate given to the widow was kept separate and their Lordships held that that being so it was to take a different course of succession from that of the estate of the husband.

It is next necessary to mention the cases which were referred to by the learned advocate for the respondents. The first case to which our attention is drawn is the case of *Saminatha Pillai v. Manikkasami Pillai* (3). There a Hindu widow obtained a decree for mesne profits, but she herself assigned the decree for mesne profits and subsequently died; the question was whether the assignees were entitled to execute the decree or her heirs. In such a case it could not be disputed that she had dealt with the property in her lifetime and so with reference to the case of *Isri Dut Koer v. Hunsbatti Koerain* (1) the assignee was entitled to execute the decree. That case, however, has no bearing on the present question. The case next cited is *Subra Manian Chetti v. Arunachalam Chetti* (4). There also the question was quite different. The Hindu widow was never in possession of her husband's estate. She used to get moneys under a decree for

(1) [1884] 10 Cal. 324=10 I. A. 150=4 Sar. 459 (P.C.).

(2) [1893] 20 Cal. 433=20 I. A. 12=6 Sar. 272 (P.C.).

(3) [1899] 22 Mad. 356.

(4) [1905] 28 Mad. 1 (F.B.).

maintenance and out of this she had acquired certain other properties. It has never been held that when a widow gets money for her maintenance out of the estate of her husband that money if not spent by the widow herself follows the estate. It is not the income of the property that came into her possession, but she was allowed a certain sum out of the income for her own maintenance and there cannot be any question that it was her stridhan as it was held in that case. The next case cited is the case of *Sitaram v. Dulam Kuar* (5). That case, however, has only a superficial resemblance to the present case. In that case one of two sisters out of the income of her father's estate lent money to the sons of the other sister for the purpose of paying the revenue with regard to some other property; then she obtained a decree against her debtors, and the question was whether the right to execute the decree after her death was in her surviving sister or in the legal representatives of the decree-holder, that is the heirs of her stridhan. The learned judges referred to the case of *Isri Dut Koer v Hansbutti Koerain* (1) above cited and held that the decree-holder intended in that case that the money which was lent to her sister's sons should not go to her sister after her death, that is, she wanted to treat the property separately. The last case cited was the case of *L. W. J. Rivett-Carnac v. Jivibai* (6). That case it seems to me has no bearing on the present question because it was held that there was nothing to show that the money was the saving or accretion of the estate of the widow's husband so as to give it to the heirs of the husband's estate.

On all these grounds in my opinion the present case is governed by the decision of the Privy Council in *Isri Dut Koer v. Hansbutti Koerain* (1) cited above. The judgment and order of the Subordinate Judge will therefore be set aside and those of the Munsiff restored with costs in all Courts.

The hearing fee is assessed at five gold mohurs.

Bose, J.—I agree.

A.L./R.K.

Appeal allowed.

(5) [1919] 41 All. 350=50 I. C. 372=17 A.L.J. 337.

(6) [1886] 10 Bom. 478.

A. I. R. 1928 Calcutta 761

B. B. GHOSE AND CAMMIADÉ, JJ.

Secretary of State for India—Opposite Party—Appellant.

v.

Breakwell & Co.—Claimants—Respondents.

Appeal No 43 of 1926, Decided on 13th December 1927, from original decree of President, Calcutta Improvement Tribunals, D/- 17th December 1925.

Land Acquisition Act, S. 23 (5)—*Person changing the place of business not in consequence of the acquisition of the land—He is not entitled to compensation.*

A person is not entitled to receive any compensation under S 23 for changing the place of business when the change is not in consequence of the acquisition of the land.

[P 763 C 1]

Certain premises were vacated not on the ground of its being acquired, but because the lease had expired and lessees were anxious to avoid the expense of carrying on the litigation with regard to ejection when they knew that they could not stay on the land beyond a few months only.

Held: that the company were not entitled to any compensation.

[P 763 C 1, 2]

Surendra Nath Guha and Nasim Ali—for Appellant.

S. C. Bose and Lalit Mohan Sanyal—for Respondents.

B. B. Ghose, J.—This is an appeal from a decision of the President of the Tribunal under the Calcutta Improvement Act, 1911. The facts are these: The Collector under the Land Acquisition Act made a declaration dated 27th May 1921 published in the Calcutta Gazette of 1st June 1921 for the acquisition of certain lands. The owner of the premises with regard to which the declaration was made was one Banamali Mullick. The respondent company were the lessees under him. It appears that the respondents were in occupation as lessees under a lease which expired in 1911, and there was a renewal for another ten years and the renewed lease expired on 31st December 1920. Before the expiry of that lease the landlord gave notice to the respondent company that he was not prepared to grant any fresh lease to the respondents. Some offer was made on behalf of the respondents for granting a fresh lease to them, but the landlord was unwilling. The respondents, however, remained on the land and did not vacate it on the expiry of the lease on 31st December 1920.

The landlord brought a suit for ejectment and mesne profits on 20th April 1921. That was, it should be borne in mind, before the publication of the declaration. The suit, however, was not taken up for hearing for some time. On 2nd March 1922 the Collector issued notices for filing claims and one such notice was served upon the respondent company as persons interested. On 20th March 1922 the respondents preferred their claim to the Collector and they claimed altogether Rs. 55,000 or such sum as might be deemed to be a proper compensation for their loss and damages for removal as stated in the annexure to their petition. On 30th January 1923 the respondent company through their solicitors wrote a letter to their landlord that they were going to vacate the premises on 31st January 1923 and inviting the landlord to take possession on that day between 5 and 5-30 p.m. and as a matter of fact they vacated the premises on 31st January 1923. The Land Acquisition Collector acquired out of the entire premises, which is said by the witness for the respondent company to be about 2 bighas in area, 9 cottas, 9 chattaks and 30 sq. ft. only, and for this paid compensation to the landlord one lakh of rupees. He did not apportion any compensation to the respondent company. Thereupon the respondents asked for a reference to be made to the Tribunal, and the Tribunal on that reference passed an order allowing compensation to the respondents company of Rs. 10,000, the order purporting to have been made under S. 23 (1), Cl. 5, Land Acquisition Act 1894. From that decision the Secretary of State has preferred this appeal after obtaining the necessary certificate from the President of the Tribunal.

The first and the principal point in this case is whether the respondent company are entitled to the compensation awarded to them. The learned Government Pleader argues that the claimants were not compelled to change their place of business on account of the acquisition of the land and therefore they are not entitled to claim any compensation under the provisions of the section referred to above. His point is that the company were in occupation of the premises in question without any title whatsoever. The only claim which they made in reply to the demand of the landlord to vacate the premises after the expiry of their lease

was that they were entitled to remain in possession under the provisions of the Calcutta Rent Act. The Calcutta Rent Act, as the learned President has observed in his judgment, was to expire in May 1923; and at the time when the company vacated the premises in question in January 1923 they knew that under no circumstance would they be entitled to the occupation of the premises beyond the expiry of the Calcutta Rent Act. The Act, however, was extended by an amendment which was introduced in the Legislative Council on 14th March 1923 and which passed into law on 4th April 1923, by which the Rent Act was extended to the end of March 1924. At the time when the company vacated the premises there was no reason to suppose that the Rent Act would be extended till March 1924. It is contended by the learned Government Pleader that as a matter of fact the premises were vacated by the company in order to avoid the trouble of litigation with the landlord knowing that at least even if they succeeded in resisting eviction they could only do so up to May 1923. It is further urged on behalf of the appellant that the removal of the place of business on account of the acquisition could not have taken place before possession was taken by the Collector or at any rate before the making of the award on 18th September 1923. It is argued that under S. 48 (1), Land Acquisition Act, the Government was at liberty to withdraw from the acquisition at any time if possession had not been taken. Similarly under S. 78, Calcutta Improvement Act the acquisition might be abandoned in certain circumstances stated in detail in that section. As a matter of fact acquisition was made of about nine cottas only of the land as I have stated above. It appears from the evidence of one Mr. Hay, a partner of the company, that the area in their occupation was approximately two bighas. The new premises to which they removed at 44, Free School Street, were barely one bigha and a half in area. So the acquisition of the small area could not have been a sufficient ground for their removal from their old premises to the new one.

These facts being taken into consideration it can hardly be said that the removal was on account of the acquisition of land giving rise to a right to compensation for change of the place of business.

under the Land Acquisition Act. The learned President has considered the question whether the removal should be on the taking of possession by the Collector or at any previous time. He states that the question is not free from difficulty. But he thought that it would be unreasonable to suppose that the legislature intended that, a person who was residing or carrying on business on land which is acquired would lose all right to compensation for the expenses of his removal unless he waits and stays on the land till the last moment when the Collector comes to take possession. There may be something in what he says. On the other hand it would be unreasonable to suppose that a party can ask for compensation for removal simply upon a declaration having been made if the property is not acquired in the end ; or only such a small portion of the land is acquired which would not necessitate the removal of the place of business. In the present case, however, there does not appear to be any reasonable doubt that the premises were vacated not on the ground of its being acquired, but because the company's lease had expired and they were anxious to avoid the expense of carrying on the litigation with regard to ejectment when the company knew that they could not stay on the land beyond a few months only. This is clear from the fact that they did not give notice to the Collector that they were going to vacate the land, but notice was given to the landlord by the letter which I have mentioned before.

It may be mentioned here that the landlord in his plaint in the suit for ejectment stated clearly in para. 10 that he was trying to get the Improvement Trust to release that portion of the premises which was not actually required for the execution of the improvement scheme on receiving a betterment fee from him. The company had full notice of the fact before they vacated the premises that only a small portion of the premises was likely to be acquired and the rest released under the provisions of S. 78, Calcutta Improvement Act, and knowing all that they vacated the premises in January. The removal therefore was not on account of the acquisition. Under these circumstances it must be held that the company was not entitled to receive any compensation under S. 23, Land Ac-

quisition Act for changing their place of business, as this change was not in consequence of the acquisition of the land. In that view it is not necessary to consider whether the respondents are entitled to the amount given or less.

The appeal must therefore be decreed and the order of the Tribunal reversed with costs in both Courts.

Cammiade, J.—I agree.

N.K.

Appeal decreed.

A. I. R. 1928 Calcutta 763

SUHWARWADY AND GARLICK, JJ.

Bansidhar Dobey — Plaintiff—Appellant.

v.

Budangal Das — Defendant — Respondent.

Appeal No 1373 of 1926, Decided on 3rd August 1928, from appellate decree of Sub-Judge, Zillah Jalpaiguri, D/- 17th November 1925

Landlord and Tenant—Prohibition to sub-let at a rate higher than that fixed by settlement—Contract to pay a higher rent cannot be enforced — Bengal Tenancy Act, S. 192—Contract Act, S. 23.

Where in temporarily settled estates Government has prohibited sub-letting lands at a rate higher than that fixed by temporary settlement, contract to sub-let at a higher rent cannot be enforced : 32 Cal. 463 and 37 Cal. 449, Dist. [P 765 C 2]

Jatish Chandra Guha—for Appellant.

Narsh Chandra Sen Gupta and Urukramdas Chakrabarty—for Respondent.

Judgment.—This appeal arises out of a rent suit in respect of some land in the Western Duars in the district of Jalpaiguri. The plaintiff is a jotedar and the defendant is a chukanidar under him. In 1918 the chukani was purchased by the plaintiff in execution of a decree. In Chaitra 1325 (1919) the plaintiff let out the chukani to one Lepta Uraon who executed a kabuliati agreeing to pay Rs. 115 as rent. In 1920 the defendant purchased the land from Lepta Uraon. The plaintiff has brought this suit for rent at the rate of Rs. 115 a year. The defendant has pleaded that the plaintiff is not entitled to recover the rent at which he settled the land but at the rate of Rs. 104 odd which is the rent recorded in the settlement record. Both the Courts have accepted the defen-

defendant's plea and decreed the suit at the rate admitted by him. There was also a plea of payment. The plaintiff appeals and it is argued on his behalf that the defendant is bound by the engagement entered into by Lepta Uraon (his vendor) and he cannot plead that he is not liable for the rent fixed in Lepta's kabuliati. For the defence it is argued that under the law as it obtains in that part of the country the plaintiff is not entitled to recover more than 50 per cent. of the rent which he himself pays to the Government.

In order to appreciate the value of the respective contentions of the parties it is necessary to trace the history of the Western Duars and of the law in force there. The territory known as the Western Duars was ceded by the Bhutan Government to the British Government in 1866. By Act 16, 1869 (the Bhutan Duars Act) the jurisdiction of the ordinary civil Courts taking cognizance of suits in respect of immovable property, revenue and rent in the territory was excluded and certain rules were framed by the Government which formed the schedule to the Act, which had the force of law there. It was, however, found that the Act of 1869 was defective in many respects and so it was repealed by Act 7, 1895. In 1875 the Scheduled Districts Act (14 of 1874) was declared to be in force in the Western Duars, and Act 23, 1863 (the Act to provide for the claims to waste land) was also extended to the territory. See the Gazette of India of the 24th September 1875. By the repeal of the Act of 1869 the Civil Procedure Code was held to be in force in the Duars : *Brojo Kanto Das v. Tufin Das* (1). But no substantive law was declared to be in force there except what would be extended under the Scheduled District Act. In 1895 the Lieutenant-Governor of Bengal with the previous sanction of the Governor-General extended Act 10, 1859 and Act 5, 1867 (B. C.) to the Western Duars under the Scheduled Districts Act. By a notification dated 5th November 1898 the Lieutenant-Governor of Bengal similarly extended under the Scheduled Districts Act the Bengal Tenancy Act to the Western Duars with some restrictions of which the following clause is relevant for our purpose.

Where there is anything in the said Bengal Tenancy Act which is inconsistent with any rights or obligations of a jotedar, chukanidar, dar chukanidar, Adhiar or other tenant of agricultural land as defined in settlement proceedings hereto-for approved by Government or with the terms of a lease hereto-for granted by Government to jotedar, chukanidar, adhiar or other tenant of agricultural land such rights, obligations or terms shall be enforceable notwithstanding anything contained in the said Act.

When the Duars became included in the late province of Eastern Bengal and Assam that Government by a notification dated 7th November 1908 extended under the Scheduled Districts Act the Bengal Tenancy Amendment Act, 1903 and the Eastern Bengal and Assam Tenancy Amendment Act of 1908 to the Duars with some restrictions one of which was the same as contained in the notification of the Bengal Government of 5th November 1898.

After the acquisition of the territory by the British Government there have been periodical settlements by the Government laying down rules to be in force during the settlements. The first settlement was in 1871, but no notice was taken in it of the interest of chukanidars. The second settlement was in 1880 by which the rents payable by chukanidars were fixed for the term of the settlement and the Settlement Officer was authorized to enhance the rents of chukanidars up to 50 per cent. of the revenue. The third settlement, commonly known as Sunder's settlement, was made in 1889 for a period of 15 years under which the rents of the chukanidars were fixed for the term of the settlement on the principle that they should ordinarily pay 50 per cent. above the jotedari rates. The rules laid down by this settlement with occasional modifications have been adopted in subsequent settlements. The Western Duars is governed by the Waste Lands Act and the Bengal Waste Lands Manual 1919 gives the rules under which leases of waste lands in the Western Duars are made. It prescribes the form of leases (which is Form D at p. 32 of the Manual) to be adopted in case of renewal of leases in the Western Duars. The conditions attached to the lease have from time to time been modified and the lease which was granted by the Government to the plaintiff in 1922 contains a clause being Cl. 8 that he shall not be entitled to enhance the rent of the

(1) [1900] 4 C. W. N. 287.

ohukanidar more than 50 per cent. of what he himself pays to the Government. The history of the various settlements in the Western Duars and the rules obtaining there will be found in Ch. 8 of the Eastern Bengal and Assam District Gazetteers by Gruning. It is noticeable that Cl. 2, part 1, Ch. 1 of the rules given in the Bengal Waste Lands Manual says that the rules are executive orders not ordinarily framed under any particular law; and one of the rules says that in order to avoid subinfeudation the under-tenants of the jotedars are prohibited to create subordinate tenures and that the civil Courts shall not take cognizance of cases between such parties. The Government thus assumes the right to make laws for the territory.

This being the state of the law in that part of the country, we have to see if the plaintiff is entitled to demand rent under the ordinary law of contract higher than 50 per cent. of his own rent. There can be no doubt that in view of the various enactments which have been passed and the rules framed relating to the Western Duars the Government in that temporarily settled estate has the power to frame rules which have the force of law. The right of the Government to make laws for temporarily settled estates has been reserved by the Bengal Tenancy Act by Ss. 191 and 192. The last clause S 192 empowers the revenue officer to fix a fair and equitable rent notwithstanding anything contained in the contract between the parties. In such districts which are inhabited by aboriginals the Government has reserved to itself the right to make rules or laws by its executive orders as part of its administrative policy. But it is argued on behalf of the plaintiff that in spite of the restriction in the plaintiff's lease with regard to the amount at which he is entitled to sublet his holding, the defendant is bound by his contract rather the contract made by his vendor;—and in support of this contention reliance has been placed upon the cases of *Gour Chandra Saha v Mani Mohan Sen* (2), and *Zahandar Baksh Mallik v Ram Lal Hazra* (3). The above cases came from the districts of Nadia and Hooghly

respectively which are permanently settled districts. In these cases the Government let out its Khasmahal and in the kabuliyat which tenants executed in favour of the Government they stipulated that they would not charge from their sub-tenants rents higher than what they paid and 50 per cent. more. The sub-tenants agreed to pay higher rents than what the Government tenants were entitled to claim. The learned Judges held that the contract between the parties was enforceable notwithstanding the clause in the lease which could only be enforced by the Government and not by a sub-tenant. These cases have no application to the present case as they relate to Government Khas mahal in which the position of the Government is that of a private zamindar; whereas in the temporarily settled estates the Government has the right to make rules governing the settlements and its settlement-holders. In a case like the present there is no question of a third party enforcing a contract between two other parties or that the lessee is bound by the terms of his lease, under which he holds the land under his landlord. The Government has settled this land under rules prohibiting subletting at a rate higher than that fixed by the temporary settlement. The question therefore is whether the plaintiff has the right to claim rent more than what he has agreed to receive from a sub-tenant by the terms of the settlement. The rules as they stand do not confer any such right to the plaintiff. The decision of the lower appellate Court is in our opinion correct and this appeal is dismissed with costs.

A.L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 765

MUKHERJI AND BOSE, JJ.

Hardut Ray Chamaria and Co. and others—Plaintiffs—Appellants.

v.

Ujir Shaikh and others—Defendants—Respondents.

Appeals Nos. 1000 and 1002 to 1004 of 1926, Decided on 9th July 1928, from appellate decrees of 1st Sub-Judge, Zillah 24 Perganas, D/- 25th November 1925.

(2) [1905] 32 Cal. 463.

(3) [1910] 37 Cal. 449 = 11 C. L. J. 364 = 5 I. C. 565 = 14 C. W. N. 470.

(a) *Adverse Possession—Actual possession put forward—Evidence of possession not satisfactory—Maxim that possession follows title is not applicable.*

Where evidence of possession on either side is not satisfactory or not quite satisfactory, the party who has succeeded in proving his title is entitled to rely upon the presumption that possession follows title. This presumption does not apply in a case where actual and not mere constructive possession is pleaded: *John Clark v. G. H. D. Elphinstone*, (1881) 6 A. C. 164, *Ref.* [P 766 C 2, P 767 C 1]

(b) *Limitation Act, Art. 142.—Possession through tenants—Actual realizing of rents must be proved.*

Before a defendant can be called upon to show that he was in possession, it is for the plaintiff to prove his possession within 12 years before the suit. [P 767 C 2]

Where a person alleges his possession over a certain land through tenants, he must prove realization of rents from them. [P 767 C 1]

Sarat Chandra Basak and Santimoy Mozumdar—for Appellant.

Nasim Ali and Dwipendra Mohan Ghose—for Respondents.

Mukherji, J.—These four appeals arise out of as many suits that were instituted by the plaintiffs for declaration of title and recovery of possession after demolition of certain huts which stand on the land. The Courts below have found in favour of the plaintiffs on the question of title but being of opinion that the plaintiffs have failed to have their possession within 12 years before suit have dismissed the said suits.

The arguments that have been advanced before us on behalf of the plaintiffs who are the appellants in these appeals are directed against the finding of the Subordinate Judge to the effect that the plaintiffs have failed to prove their possession within 12 years and against the reasoning upon which that finding is based. Reading the judgment of the Subordinate Judge it would appear that he, after discussion of a very large number of decisions upon Art. 142 and Art. 144, *Lim. Act*, came to the conclusion that in the present suits it was Art. 142, that was applicable and that the plaintiffs were to prove their possession of the particular plots with which the suits were concerned within 12 years before the institution thereof. He then proceeds to take into consideration the evidence in the case and records two observations which I think it better to quote in his own words. He says thus :

It was argued that the defence evidence of

possession for more than 12 years is quite unsatisfactory, but the weakness of defendant's evidence cannot go to make the plaintiff's evidence strong. It is true that the evidence regarding possession for more than 12 years is not very satisfactory.

He says also :

Even in spite of the unsatisfactory nature of defendant's evidence I must say that it is far better, than that of plaintiff's evidence and on comparison the defendant's evidence becomes acceptable.

As regards these two observations upon which the learned Subordinate Judge based his final conclusion to the effect that the plaintiffs had failed to prove their possession within 12 years before suit, what is said in substance on behalf of the appellants is that the Subordinate Judge omitted to keep in view two important principles that should be borne in mind in determining the question of possession in a case of this nature. These two principles are first, that where evidence of possession on either side is not satisfactory or not quite satisfactory the party who has succeeded in proving his title is entitled to rely upon the presumption that he was in possession and second, that in finding possession in favour of a trespasser the possession that is to be found in his favour is to be limited to the particular portion of the land in respect of which he has succeeded in proving his possession.

As regards the first of these propositions reliance is placed upon the decision in the case of *John Clark v. G. H. D. Elphinstone*, *L. R. House of Lords* (1), in which it has been laid down that, with regard to land lying within defined boundaries the rule to apply on the question of possession is to assume that the acts of possession done upon one part of the land should be taken as showing possession of the person doing such acts in respect of the whole land. There can possibly be no dispute whatsoever as regards the correctness of this proposition. But in a case in which the plaintiff alleged that the lands are capable of being possessed by the exercise of acts of possession and where, as here, it is also alleged that the possession that was exercised was by receiving rents from the tenants who were actually in occupation of the land, to such a case this presumption will hardly apply until and unless the plaintiff has succeeded in showing that he has been in possession

(1) [1881] 6 A.C. 164=50 L. J. P. C. 22.

by realization of rent from tenants who are actually in occupation of at least a part of the land. This is not a case in which it was alleged on behalf of the plaintiffs that the land was waste or incapable of being possessed or that it was khas patit land of the plaintiffs. The definite case that was set up was that there were tenants on the land from whom rents used to be realized, and both the Courts below have upon the evidence refused to accept that case as established. They have referred to the fact that the collection papers etc., have not been produced and have decreed that the evidence brought forward for the purpose of proving that the plaintiffs' tenants were in occupation of the land was not satisfactory. It would not, in our opinion, be right to proceed upon any presumption of the character mentioned above in a case where actual and not mere constructive possession was the case that was put forward on behalf of the plaintiffs. It has been argued in this connexion that the presumption that should be relied upon is that possession follows title. That undoubtedly is a maxim that has got sometimes to be applied. It should, however, be remembered that the maxim does not mean that because a person has title to some property therefore necessarily he is in possession of it. What it actually meant is that if at one time a man with title was in possession of property the law allows the presumption that possession continued. In this particular case as far as can be made out from the finding of the Courts below, it does not appear that the plaintiffs have succeeded in establishing that at any point of time they were in possession. Indeed, there was no statement in the plaint as to when the plaintiffs were dispossessed and no attempt was made in the evidence to show that at any particular time the plaintiffs were dispossessed. We are accordingly of opinion that the appellants are not entitled to rely upon the presumption of the description mentioned above and that the first of these contentions must necessarily fail.

As regards the question whether the possession of the trespasser should be taken as being possession of a particular plot of land in respect of which he has succeeded in proving that possession there can hardly be any dispute. But before the defendant can be called upon to show

that he was in possession the plaintiff in a case under Art. 142, Lim. Act, will have to prove his possession within 12 years before suit. Upon the findings of the Courts below the plaintiffs have failed in this respect.

Turning now to the facts that have been found in the present case in disproof of the plaintiff's possession within 12 years before suit it is necessary to refer to the arguments that have been advanced before us on behalf of the appellants. It has been said that between Abdul Razak who is said to be the landlord under whom the defendants claim to hold these lands and the plaintiffs there was a previous litigation being Title Suit 71 of 1921 in which Abdul Razak was unsuccessful in recovery of possession from the plaintiffs in respect of a part of the plot of 3 bighas of land to which the bits of land involved in the present suits appertain. It is also said that some rent suit or rent suits instituted by Abdul Razak against some of the tenants occupying some lands out of the plot were either dismissed or withdrawn. It has been further brought to our notice that a portion of the land was some time in the year 1916 made over by one of the plaintiffs to the Municipality, and our attention has also been drawn to the fact that in the partition that took place between the plaintiffs themselves this plot of land was reserved as ejmali and was not partitioned, the object being that it would thereafter be used for the purpose of excavating a tank for the use of the public. These facts even if they have all been established though it must be said with regard to some of them that they have not been established in the opinion of the Courts below, specially as regards the land that had been made over to the Municipality being part of this land, all these facts would not be decisive of actual possession in respect of any part of the lands which form the subject matter of these suits. This a matter which the plaintiffs had to prove and which in the opinion of the Courts below they have failed to prove. The finding of both the Courts below as to why the land was not partitioned but was kept ejmali at the time of the partition is that none of the individual cosharers liked to get the land in respect of which the cosharers were really out of possession. That again is a finding of fact

with which we cannot interfere in second appeal. There are other matters referred to in the judgment of the learned Munsif against the plaintiffs' case as to possession, e.g., evidence of the supervisor of the Garden Reach Municipality, the inference to be drawn from the non-examination of the Partition Commissioner, etc., and although they have not been repeated in the judgment of the Subordinate Judge we may take it that the Subordinate Judge intended to affirm those findings as his was a judgment of affirmance. We are of opinion that on the whole the finding on the question of plaintiff's possession at which the Courts below have arrived need not be disturbed in those appeals.

The appeals accordingly are dismissed with costs.

Bose, J.—I agree.

A.L./R.K. *Appeals dismissed.*

A. I. R. 1928 Calcutta 768

CAMMIADE AND S. K. GHOSE, JJ.

Rahimuddi—Defendant—Appellant.

v.

Chadam and others—Plaintiff and Proforma Defendants—Respondents.

Appeal No 7 of 1926, Decided on 25th May 1928, from appellate decree of 2nd Sub-Judge, Faridpur. D/- 18th July 1925.

(a) *Landlord and Tenant—Sale by decree-holder in execution of a rent decree—It must be shown that he was a landlord on the date of application for execution—Superior interest in occupancy holding sold—Subsequent sale in execution of a decree for rent transfers only right of tenant and not tenancy—Bengal Tenancy Act, Ch. 11.*

In order to attract the provisions of Ch. 14, Ben. Ten. Act, it is necessary that the decree-holder should hold the position of a landlord not merely at the time of the decree but also at the time of an application for execution: *A. I. R. 1914 P. C. 111, Foll.: 25 C. L. J. 626, Dist.* [P 769 C 1]

Where a landlord has sold his superior interest of an occupancy holding, a subsequent sale of that holding in an execution of a decree for rent of that holding merely conveys right, title and interest of the tenant and not the tenancy. [P 769 C 1]

Mrityunjay Chattopadhyay and Nalini Kumar Mukerji—for Appellant.

Joges Chandra Roy and Prakas Chanda Pakrasi—for Respondents.

Judgment—This is an appeal, by defendant 1 in a suit which was for a

declaration of the plaintiff's title as an occupancy-riyat to certain land and for recovery of possession. The superior interest of the occupancy holding is held at present by defendant 1 who acquired it from his wife some time in the month of May 1923. Defendant 2, the wife of defendant 1, purchased that interest from the previous holder, Hari Mohan, by a conveyance dated 23rd October 1922. One Kutu Molla was the riyat in occupation of the land at the time of the purchase of the superior interest by defendant 2. Kutu Molla having defaulted in the payment of rent Hari Mohan had instituted against him a suit for arrears of rent and had obtained a decree. This decree was put into execution by Hari Mohan after the date of the sale of the superior interest to defendant 2 and in execution of the decree Hari Mohan had caused the tenancy to be brought to sale on the 25th April 1923. The plaintiff was the purchaser at that sale. When defendant 2 purchased Hari Mohan's interest her husband, defendant 1, dispossessed Kutu Molla and took khas possession of the land. The plaintiff, after his purchase, finding that he could not obtain possession brought the suit out of which this appeal arises. Both the Courts below have decreed the suit, and hence this appeal.

The question which arose was whether or not the sale at which the plaintiff purchased the land was one governed by the provisions of Ch. 14, Ben. Ten. Act. The learned lower appellate Court following the decision in the case of *Manindra Nath Ghose v. Asutosh Ghose* (1) held that, as Hari Mohan had been the landlord at the date of the decree, the fact that he was no longer the landlord at the date of the execution of that decree did not affect the application of the provisions of Ch. 14. This finding of the lower appellate Court has been assailed here. The law on the subject of the right of decree-holders to sell tenancies with all the privileges attached to sales under the provisions of Ch. 14, Ben. Ten. Act, is laid down in the ruling of the Judicial Committee in the case of *Forbes v. Maharaj Bahadur Singh* (2). Their Lordships have

(1) [1917] 25 C. L. J. 626=41 I. C. 525=21 C. W. N. 1132.

(2) *A. I. R. 1914 P. C. 111=41 Cal. 926=41 I. A. 91 (P.Q.).*

laid down there that in order to attract the provisions of that chapter it is necessary that the decree-holder should hold the position of a landlord not merely at the time of the decree but also at the time of the application for execution. This decision is binding upon us and it is not open to us to hold any other view with regard to the law on the subject. We must take it that the decision in the case of *Manindra Nath Ghose v. Ashutosh Ghose* (1) was on the particular facts of that particular case. The effect, therefore, according to our finding, of the sale by Hari Monan of Kuti Molla's interest was to transfer not the tenancy as a tenancy but merely the right, title and interest which Kuti Molla had had. Such being the case, it would have been necessary for the plaintiff in order to succeed to establish that the right that Kuti Molla had held was transferable. No attempt having been made to prove this transferable right the plaintiff is not entitled to succeed.

The result is that the appeal is allowed, the decrees of the Courts below are set aside and the plaintiff's suit dismissed with costs in all Courts.

A.L./R.K.

Appeal allowed.

A. I. R. 1928 Calcutta 769

C. C. GHOSE AND JACK, JJ.

Ambar Ali—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 390 of 1928, Decided on 3rd August 1928.

Criminal P. C., S. 297—Charge should be accurate and within the limits of the criminal trial.

It is essential that in the general observations which a Judge makes in the course of his charge to the jury he should be accurate and within the limits of what has always been allowed from time to time in criminal trials. The verdict of the jury should not be interfered with except where the charge taken as a whole cannot be supported [P 770 C 2, P 771 C 1].

The passage in the charge to the jury ran as follows: "As there is a presumption of innocence in favour of the accused, so there is a presumption of truthfulness in favour of the witnesses. The presumption is rebutted if it is shown that the witness has told an untruth. But that would not justify you in rejecting his evidence in toto. You will have to carefully scrutinize his evidence and should accept it only to the extent to which it is supported by

the evidence of other trustworthy witnesses and circumstances and probabilities of the case."

Held: that the language of the learned Judge may lead to misconstruction and he should not have put together the presumption of innocence in favour of an accused and the presumption in favour of the veracity of testimony adduced in a Court of justice. The two presumptions are in their nature different and should not be classed together in the manner in which it has been done by the learned Judge in this instance. [P 770 C 1]

Sures Chunder Talukdar and Surajit Chunder Lahiri—for Appellant.

Khundkar—for the Crown.

C. C. Ghose, J.—This case has been argued at considerable length by the learned advocate, Mr. Talukdar, but after giving our best consideration to the arguments which have been advanced on behalf of the appellant we are of opinion that this appeal must be dismissed and for the following reasons:

The case for the prosecution, shortly stated, was as follows: On the afternoon of 3rd October 1927, the deceased Kala Mia found two heads of cattle belonging to the accused Ambar Ali straying into his field just to the north of the bari of the accused and damaging his paddy crop. He took them into custody with the object of impounding them and refused to let them off at the request of the accused Ambar Ali. After some altercation the accused is said to have struck him on the head with a lathi. Almost simultaneously Ambar's nephew Abdul Aziz who is not an accused in this case gave a blow on his head with a *dao*, with the result that he fell down unconscious on the field. He was removed to an *ail* by some of the men who came to the spot on hearing the row and was ultimately taken to Feni in a bullock cart. He died shortly before sunrise when the cart reached Feni. His dead body was taken to the thana at Feni and the deceased's brother Mohamed Faiz made a statement before the Sub-Inspector of Feni as to the cause of death. The statement in question was sent to the Sub-Inspector, Chhagalnaya, for investigation, as the place of occurrence was stated to be within the jurisdiction of the last-mentioned thana. The post mortem examination was held by the Sub-Assistant Surgeon of Feni and it was found that the cause of the death was a blow on the head by means of a blunt weapon such as a lathi. Investigation followed

thereafter with the result that the accused Ambar Ali and two other men, Muja Mia and Nural Huq, were sent up for trial.

The accused Ambar Ali has been convicted by the jury under Part I, S. 304, I. P. C. The learned Judge was of opinion that the conviction should properly have been under the second part of S. 304; and taking that view he has sentenced the accused Ambar Ali to suffer rigorous imprisonment for a period of five years and to pay a fine of Rs. 200 or in default, to suffer rigorous imprisonment for one year more. He has also directed that out of the fine, if realized, a sum of Rs. 150 should be paid to the heirs of the deceased Kala Mia as compensation.

The learned Judge's charge to the jury has been assailed before us in one particular. The passage in the charge to which exception has been taken runs as follows;

As there is a presumption of innocence in favour of the accused, so there is a presumption of truthfulness in favour of the witnesses. The presumption is rebutted if it is shown that the witness has told an untruth. But that would not justify you in rejecting his evidence in toto. You will have to carefully scrutinize his evidence and should accept it only to the extent to which it is supported by the evidence of other trustworthy witnesses and circumstances and probabilities of the case.

The learned advocate starts off with the broad proposition that it is entirely incorrect to say that there is a presumption of truthfulness in favour of witnesses; in other words, he contends that there is no presumption whatsoever in favour of the veracity of testimony adduced in Court. So far as this contention is concerned, we have been at some pains to find out whether the contention has any substance or not. It appears that from very early times it has always been laid down in England that testimony given in a Court of justice is presumed to be true until the contrary appears. Reference may be made in this connexion to S. 352 of the well-known work of Best on Evidence. The passage in Best is reproduced by Woodroffe, J., in his edition of the Indian Evidence Act (Edn 8) at p. 795 with approval. It also appears that the view now sought to be put forward by the learned advocate was the subject of consideration in this Court in Criminal Appeal No. 607 of 1926, decided by Cuming, J., and Graham, J., on 21st February 1927. The learned

Judges in that case accepted the view enunciated in Best on Evidence; and they were of opinion that there was no authority which took a view contrary to what was laid down in Best on Evidence. Of course, the learned advocate is right in saying that the way in which the learned Judge in this case has put it is open to exception. The language of the learned Judge may lead to misconstruction and in our opinion he should not have put together the presumption of innocence in favour of an accused and the presumption in favour of the veracity of testimony adduced in a Court of justice. The two presumptions are in their nature different and should not be classed together in the manner in which it has been done by the learned Judge in this instance.

The learned advocate further contends that the learned Judge was in error in saying that the presumption, if any, in favour of the veracity of testimony adduced in a Court of justice can only be rebutted if it is shown that the witness in question has told an untruth and argues that the presumption can be rebutted in various other ways, e. g., by showing that the witness was a person who was not disinterested, that the witness' demeanour in Court was such as was not calculated to inspire confidence; that he was keeping back something which it was in his power to impart. One of the arts of the cross-examiner in a trial is to show that little credit can be attached to the testimony of a witness, and the cross-examiner, if he is skilful and accomplished, does that not only, if I may quote a common expression, by means of a direct attack but by means of eliciting from the witness' mouth answers calculated to show that the witness is not a person who has spoken the truth.

But the real question is whether the jury were prejudiced or misled by what the learned Judge said in this case in the course of his charge to the jury. We have examined the charge with care and we are bound to say that we can discover no traces whatsoever in this record of the jury having been misled in any way by what the learned Judge stated in the course of his charge to the jury. It is no doubt essential that in the general observations which a Judge makes in the course of his charge to the jury he should

be accurate and within the limits of what has always been allowed from time to time in criminal trials. The learned Judge's charge to the jury can no doubt be criticized, but the verdict of the jury ought not to be interfered with except where the charge taken as a whole cannot be supported. In this view of the matter we think this appeal must fail.

Mr. Talukdar has, however, addressed to us an argument in mitigation of the sentence passed on the accused in this case. The sentence that the learned Judge passed in this case shows that he has taken into his full consideration everything that could legitimately be urged on behalf of the accused; and as that sentence does not err on the side of severity, we think we ought not to interfere in any way with the learned Judge's order in this case.

The result is that this appeal must stand dismissed.

Jack, J.—I agree.

A.L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 771

C. C. GHOSE AND JACK, JJ.

Momin Talukdar—Accused—Appellant.

v

Emperor—Opposite Party.

Criminal Appeal No 314 of 1928, Decided on 8th August 1928

(a) *Criminal P. C., S. 4*—Assistant Sub-Inspector on tour is not "officer-in-charge of the police station" unless strictly within terms of *S. 4—Criminal P. C., S. 154*.

Assistant Sub-Inspector on duty in mofussil during investigation is not officer-in-charge of the police station for purposes of *S. 154*, when the first information report is made to him unless he comes within the strict terms of *S. 4*.

[P 772 C 1]

(b) *Criminal P. C., S. 297*—Not treating the proper first information report as such, justifies retrial where accused is likely to have been prejudiced.

Not treating the proper first information report as such and treating some other as proper is sufficient to order retrial where accused was likely to have been prejudiced by the procedure.

[P 772 C 2]

H. M. Bose and Nripendra Chandra Das—for Appellant.

Khundkar—for the Crown.

Judgment.—In this case the facts involved shortly stated are as follows: On the night of 20th September last there was some altercation between the deceased

Anu and the accused Momin over the latter beating the deceased's brother Hamid in the course of the day. On the following morning when Anu was near his cowshed the altercation was renewed and it was alleged that Momin stabbed Anu on the side with a knife. People gathered at the scene of occurrence and Anu's brother Mayur hastened for the dafadar of the village. The dafadar took him to the Assistant Sub-Inspector Prafulla Mohan who was in the neighbourhood of Bashdi Bazar investigating into another case. Mayur, it is said, made a statement to Prafulla which Prafulla recorded. The Assistant Sub-Inspector came to the place with Mayur but found that Anu was already dead. It appears that before the Assistant Sub-Inspector arrived at the scene of occurrence another brother of the deceased had started for the thana to lodge a formal complaint of death. The information that was given to the Assistant Sub-Inspector Prafulla in the neighbourhood of the Bashdi Bazar has been tendered in evidence in this case and has been marked Ex. (1). The information lodged at the thana by the brother of the deceased had already been tendered in evidence and had been marked Ex. (A). Now it appears that the learned Judge in the course of his charge to the jury advised the jury that the statement of the brother of the deceased at the thana could not be regarded as the first information report or accepted in evidence because the information of the occurrence itself had already been given to the Assistant Sub-Inspector Prafulla in the neighbourhood of Bashdi Bazar and that the last mentioned information was to be treated as the first information.

Now the learned counsel who appears for the appellant has argued that the Judge was in error in telling the jury that Ex. (A) could not be treated as the first information report and accepted in evidence because of the fact that Ex. I was to be treated as the first information report. The learned counsel argued that if one looks at the terms of *S. 154, Criminal P. C.*, it is abundantly clear that the information such as it was which was recorded in the mofussil by the Assistant Sub-Inspector Prafulla could not be treated as the first information report because he was not the officer-in-charge of the police station in fact or

within the meaning of the expression as defined in S. 4, Criminal P. C. Therefore, it is argued that the information if any, which was recorded by Prafulla could not be treated at all as the first information report and there was no reason whatsoever in rejecting Ex. A as being the first information report duly lodged at the thana by the brother of the deceased.

Various other points were taken. But it is only necessary to notice one and that is that there is no reference whatsoever in the learned Judge's charge to the jury to the material portions of the evidence of Omar Talukdar, specially the cross-examination of Omar, P. W. 5. We think the learned counsel's first point is a sound one and must be given effect to. It is common ground that the Assistant Sub-Inspector was not the officer-in-charge of the police station at the time when he recorded the information which had been given to him and which information is marked as Ex. I in the case. It is also clear that he cannot be regarded as the officer-in-charge of the police station because there is no evidence to show that the officer-in-charge of the police station at the time with which we are concerned was unable to perform his duties as such. In other words Prafulla does not come within the meaning of the expression "officer-in-charge of the police station" as defined in S. 4, Criminal P. C. He had, therefore, no authority whatsoever to record the information which was given to him as the first information in the case. In the circumstances, there is no other alternative but to hold that the learned Judge was in error when he advised the jury to put aside Ex. A, it being a document later in point of time. But it was in fact the first information report lodged at the thana in accordance with the provisions of S. 154 of the Code. This was a serious misdirection and although we are not unmindful of the argument which was addressed to us by the learned Deputy Legal Remembrancer that no prejudice was caused to the accused by the way in which the jury was advised with reference to the competitive contents of the two documents, we are unable to hold that the error into which the Judge fell was of such an insignificant character that it should not induce us to interfere with the verdict of the jury. On the

contrary we are of opinion that the error is a serious one and it is impossible to say that the jury was not misled. If one looks into the contents of the two documents, Ex. A and Ex. I one finds that in Ex. A there are mentioned the names of three witnesses and that in Exhibit I there are mentioned in addition to the name of Leakat who is mentioned in Ex. A the names of other witnesses specially of those who are described as the eyewitnesses of the occurrence. It is possible that the jury did come to the conclusion that the oral evidence in the case has received a certain amount of corroboration by reason of the fact of the mention of the names of the two persons who are described as the eyewitnesses in Ex. I itself. One does not know but it is possible that such a view might have been taken by the jury, and if such a view was really taken then it was a matter calculated to prejudice the interests of the accused. We think in all the circumstances of the case that it is safer that we should interfere with the verdict of the jury and direct a retrial.

The other circumstance to which reference has been made, namely, the non-mention of the material portions of the evidence of P. W. 5, specially what is elicited in his cross-examination is also a circumstance which should be taken into consideration. But if it stood by itself we should have hesitated to interfere with the verdict of the jury. But we think that on the first ground the appellant is entitled to ask us to interfere with the verdict.

We accordingly set aside the verdict of the jury and direct retrial by the Sessions Judge of Mymensingh.

A.L./R K.

Retrial directed.

A. I. R. 1928 Calcutta 772

RANKIN, C. J., AND MITTER, J.

S. N. Banerjee—Defdt—Appellant.

v.

Huseyn Shahied Suhrawardy—Respdt.

Appeal No. 43 of 1927, Decided on 14th July 1927, from order of Buckland, J., D/- 25th February 1927.

(a) Civil P. C., O. 9—R. 13—Scope.

Court has discretion independently of O. 9, R. 13. [P 775 C 2]

(b) *Civil P. C., O. 9, R. 13—Original Side—Negligence proved—Case can be restored.*

Where there is even an element of negligence, the Court on the original side may restore the suit upon proper terms.

As a rule the case is not to be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court. But on the original side at all events, the terms of R. 13 do not prevent the Court where there is an element of negligence from restoring the suit upon proper terms. [P 771 C 9]

S. N. Banerjee (Sr.), B. C. Ghose and D. N. Sen—for Appellant.

J. N. Mazumdar—for Respondent

Rankin, C. J—This is an appeal from a judgment of Buckland, J. whereby he refused to restore a suit which was decreed *ex parte*. It appears that a newspaper of which defendant 1 was the editor and the present appellant defendant 2 was the printer published an article on 27th July 1926 referring to the plaintiff. The plaintiff says that the article is defamatory and, on 8th November 1926, he brought a suit for damages against the editor and the printer. On 6th December, summons was served upon the printer. It appears to have been established that the summons was not served upon the editor. The printer says that he handed over the summons to be attended to by the manager of the newspaper but that owing to the fact that the summons was not served on the editor or owing to some independent negligence, the manager took no steps, though he had promised to do so, to have the suit defended on the part of the printer. It is necessary that it should be understood what happened upon this default. Under the rules of the original side, a person served with a summons is required to enter an appearance in the office of the Court. That is an act which does not require his personal attendance and it does not involve his appearing before the Court himself with or without his witnesses. If he does not enter appearance within the time limited, the case will go into what is called the undefended list; and, when the case is on the undefended list, it is not possible for the defendant, without obtaining leave, to enter appearance. He has a limited right to cross-examine witnesses adduced on behalf of the plaintiff if he appears at the time when the undefended case is down for hearing; but his position is that of a man who for not

entering appearance in time is precluded from defending the suit, whether he appears at the hearing or does not appear at the hearing. A similar form of procedure is applicable to a cause where a person has entered appearance but has made default in the filing of his written statement and again in the case of a person who has failed to obtain leave to defend in a suit on a negotiable instrument under O 37, Civil P. C. In the present case, no appearance was entered. The suit came on the undefended list on 3rd January 1927 and the minute shows what took place before the Court on that occasion. Learned counsel Mr J. B. Sen, when the plaintiff had given his evidence in part appeared and represented to the Court that the writ had not been served on defendant 1, the editor, and he asked that the case might stand over to enable defendant 1 to enter appearance. I should have explained that this case came on the undefended list on the footing that both these defendants had been served and both had made default in entering appearance. It was being heard, therefore, against both as an undefended suit. Mr. Sen stated in reply to the Court that he had not yet been instructed on behalf of defendant 1. Whether this means that Mr. Sen by that time was instructed on behalf of the present appellant is not quite clear.

The Court refused Mr. Sen's application for time holding that he had no *locus standi*. That, of course, was quite correct. A person who is not allowed to enter appearance cannot employ an attorney or counsel to appear on his behalf except possibly for a limited purpose specially provided for. Under these circumstances, a decree for Rs. 7500 for damages was passed against both the defendants. Then the editor applied to have the decree set aside as against him and he succeeded in his application—ostensibly on the ground that the writ of summons was not served on him. The printer applied on 18th January 1927 to have the decree set aside so far as he was concerned and the learned Judge has refused that application holding that, as he was served on 6th December, the negligence of the manager—his failure to provide for the defence of the suit—was not a "sufficient cause" within the meaning of O. 9, R. 13, Civil P. C. He has held

further that this case is not one within the concluding proviso to that rule. On that, the printer brings this appeal.

It would appear from the judgment of Buckland, J. that the plaintiff said that he did not oppose the application of the editor to have the suit restored as against him because that he wanted him to have an opportunity of putting in a plea of justification. The position, therefore, is that the plaintiff, according to him, is anxious to fight out this question with the editor but desires that the judgment against the printer should stand in any event. I have some difficulty in seeing that this course is either reasonable or heroic and in my opinion, it is necessary for us to consider whether this Court is bound either to affirm that there is "sufficient cause" within the meaning of O. 9, R. 13, Civil P. C. or to refuse to set aside the decree.

In my judgment, O. 9, R. 13, Civil P. C., is directed in terms to a different practice from that which obtains on the original side of the High Court and was followed in this case. It refers to the case which is the usual case in a mofussil Court where a summons has gone to a defendant informing him that on a given date the case will come on before the Court for hearing or for settlement of issues. The ordinary practice under O. 5 and the forms in the schedule to the Code sufficiently elucidate that. In the mofussil therefore the question arises in the form whether or not the defendant was prevented by "sufficient cause" from appearing when the suit was called on for hearing. In the High Court, the question is whether or not the defendant has entered an appearance in the office. If he has not entered an appearance within a certain time, then his right to enter appearance comes to an end upon the suit being sent to the undefended list in the absence of leave from a Judge. It does seem to me that there are many cases in the High Court where the mere fact that the plaintiff himself or the defendant himself was unable personally to attend on the day of the hearing would be no excuse at all because there are many cases in which the party is not a necessary witness and in which he was really intending to present his case by the assistance of a attorney and counsel. I am unable to

hold that the exact words of R. 13, O. 9, are to be applied on the footing that they are directly applicable under the rules of the original side and that they are exhaustive. It has been the general practice on the original side to follow the analogy of R. 13, O. 9, on general principles of justice. As a rule the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court. But on the original side at all events, the terms of R. 13, do not prevent the Court where there is an element of negligence from restoring the suit upon proper terms. My own view is that the main purpose of R. 13, O. 9, is to give a right to a party who could show sufficient cause to get a restoration on certain terms independently of having to make a plea to the mercy of the Court. The words are "the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit"; I am not prepared to hold that the Court is deprived by this rule of its discretion in a case like the present. If the matter is a question of discretion to be exercised on terms, I have a clear opinion that this would be a proper case in which to set aside the decree as against the printer.

It is quite clear that there is an absurdity if this judgment should go against the printer and the editor should be held not liable in respect of the same publication. Moreover, in the case of the printer of a newspaper, it does not seem to be reasonable that, in a question of this kind, he should go to the manager and request the manager to undertake the whole of the defence. It is true that when he does so, he is in some sense responsible as having entrusted the manager on his behalf to look after the case. But it may be a great hardship to a printer in a case of this kind who honestly relies upon the manager doing this duty as, indeed, he has promised to do, to find a judgment of Rs. 7,500 against him on the ground that this does not amount to "sufficient cause" and that the Court is powerless to rescind the decree. Nothing that I have said is to be regarded in any way as pronouncing an opinion to the effect that in cases coming from the mofussil from Courts to which R. 13, O. 9, Civil P. C., in its terms applies the

13th rule is not to be regarded as—exhaustive. Nor do I propose to define "sufficient cause". These questions may be left open for the purposes of the present case. Nor am I saying that what the learned Judge has said about S. 151, Civil P. C., is not well founded. It may be that, as a rule, S. 151 is wrongly invoked in cases which are covered by special legislation. I confine myself to the application of the principle of this rule to the very different practice that prevails on the original side of this High Court. I am not satisfied that the traditional view that the Court has a discretion independently of O. 9, R 13, is wrong, and, in my judgment, this is a case in which the appeal should be allowed. At the same time the reason of default is a reason which must be attributed to the appellant and, in my judgment, he ought to pay the costs both before Buckland, J., and before this Court.

Mitter, J.—I agree.

N.K.

Appeal allowed.

A. I. R. 1928 Calcutta 775

C. C. GHOSE AND JACK, JJ.

Hasaruddin Mohommad—Accused — Appellant.

v.

Emperor—Opposite Party.

Capital Sentence Case No. 15 of 1928 and Criminal Appeal No. 519 of 1928, Decided on 9th August 1928.

(a) *Penal Code, S. 302—Usual practice is not to accept the plea of guilty and the Court may and should take evidence as if the accused is not guilty—Criminal trial.*

The trial of an accused person does not necessarily end if he pleads guilty but evidence may and should be taken in cases of murder as if the plea had been one of not guilty and case decided upon the whole of the evidence including the accused's plea. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death: 8 Bom. L. R. 240; 19 All. 119; and 19 Bom. L. R. 356; Ref. [P 776 C 1]

(b) *Criminal P. C., S. 271—Court has discretion to enter upon evidence or not where accused pleads guilty.*

Section 271, though it directs that the plea shall be recorded, does not direct that the accused shall be convicted thereon, but only that he may be so convicted. It is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence. [P 776 C 1]

C. C. Ghose, J.—The accused in this case was committed to take his trial in the Sessions Court under two charges, one under S. 302, I. P. C., for having committed murder by causing the death of his wife, Ohati Bibi, and secondly, for having attempted to commit suicide by cutting his throat and thereby committing an offence under S. 309, I. P. C. In the committing Magistrate's Court there were no less than ten witnesses for the prosecution. It appears that when the charges were read and explained to the accused he pleaded guilty in the committing Magistrate's Court. The occurrence in question took place on 6th September 1927; the commitment was made on 2nd April 1928 and the trial in the Sessions Court took place on 18th June 1928. It appears that in the Sessions Court the charge under S. 309, I. P. C., was not pressed, but on the charge under S. 302, I. P. C., being read and explained to the accused, the latter pleaded guilty. The accused was thereupon convicted under S. 302 and sentenced to death, without the jury having been empanelled and evidence in support of the prosecution being placed before the jury. The learned Judge, Mr. D. Vaughan Stevens, in his judgment observes as follows:

The accused Basaruddin Mohammad stands charged under S. 302; I. P. C. with causing the death of his wife, Ohati, by cutting her throat.

He pleaded guilty in the lower Court and pleads guilty here. The charge was thoroughly explained to him and I am satisfied that he clearly understands it.

It is clear from the evidence of the doctor recorded in the lower Court that the accused intended to kill the woman. There was no eyewitness, but I see from the evidence given in the lower Court that he pointed to himself as the murderer when the witnesses appeared.

No motive is given in the evidence in which indeed it is said that the accused became mad and killed his wife. Accused's brother says accused had become mad before the occurrence, but this is not entirely borne out by the F. I. R. which says that for some time the accused had been threatening his wife saying that she had taken another man because the accused had become mad. Immediately after the occurrence the accused attempted to cut his own throat. There is nothing to show that the accused is not normal at the present time.

I cannot conclude from those materials that this accused was not at the time able to understand the nature of his act, or that it was wrong or contrary to law. In fact he seems to have realized it clearly. In those circumstances I can see no reason why the plea of guilty should not be accepted and I have no option but to pass the extreme sentence.

We desire to observe that we cannot too strongly impress upon the learned Sessions Judge that in cases under S. 302, I.P.C., it is undesirable to accept a plea of guilty and to bring the trial to an end thereon. The trial of an accused person does not necessarily end if he pleads guilty but evidence may and should be taken in cases of murder as if the plea had been one of not guilty and the case decided upon the whole of the evidence including the accused's plea. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death: see in this connexion *Emperor v. Chinia Bhika* (1), *Queen v. Bhadu* (2), *Laxmya Shiddppa v. Emperor* (3). S. 271, Criminal P. C., though it directs that the plea shall be recorded does not direct that the accused shall be convicted thereon, but only that he may be so convicted, that is to say, it is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence. As was observed in the last mentioned case:

the question is, assuming that the appellant is guilty of the murder in question, whether the sentence of death should or should not be enforced. Now that is a question which could only be answered when the circumstances of the crime are known to us and the circumstances of this crime are not known to us.

In this case the First Report contains an allegation by the brother of the accused to the effect that the accused while in a state of insanity killed his wife and cut his own throat. There was therefore all the more reason why evidence should have been gone into and the case placed before a jury. We must therefore set aside the conviction and sentence and direct that the case must go back in order that there may be a proper trial of the accused in accordance with the provisions laid down in the Code of Criminal Procedure. Let the record be returned at once.

Jack, J.—I agree.

A.L./R.K.

Retrial ordered.

A. I. R. 1928 Calcutta 776

RANKIN, C.J. AND MUKHERJI, J.

Radha Charan Rai Chaudhury and another—Defendants—Appellants.

v.

Kailash Chandra Pramanik and another—Plaintiffs—Respondents.

Appeal No. 1866 of 1926, Decided on 8th August 1928, from appellate decree of 1st Sub-Judge, Dacca, D/- 17th May 1926.

(a) *Civil P. C., S. 102*—Suit for recovery of excess amount paid to decree-holder under fraud and cheating—Second appeal is entertainable—*Provincial Small Cause Courts Act, Art. 35 (ii)*.

Where a suit was filed by the judgment-debtor for recovery of excess of the decretal amount paid to the decree-holder under fraud and cheating:

Held: that the suit is not of a small cause nature and a second appeal is entertainable.

[P 777 C 1]

(b) *Civil P. C., S. 47*—Excess of decree paid to decree-holder under fraud and cheating—Application under S. 47 is the proper remedy and no separate suit lies.

The proper remedy for refund of excess amount paid to the decree-holder is by way of making application under S. 47 and not by a separate suit. S. 47 cannot be evaded merely by interlarding the application with epithets, such as fraud cheating etc: 44 Bom. 97 and 38 All. 339, *Foll.*

[P 777 C 1]

Jatis Chandra Guha—for Appellants.

Mohendra Kumar Ghose—for Respondents.

Rankin, C. J.—In this case, it appears that a certain sum of money was due under a mortgage decree for sale. The final decree had been passed and that decree, it now appears contrary to what the trial Court thought, did provide in the usual way for subsequent interest. Now, the sale was going to be held in February. In the previous December, it appears that the mortgagor went to his creditor and asked what amount was due. He was given a certain sum as due and he paid that sum. He then went some days afterwards to a pleader and asked the pleader to find out what exactly was due and he came to the conclusion that he had overpaid by a sum of Rs. 195 or thereabout. The calculation made by the pleader seems not to have allowed any subsequent interest. It was probably based upon the amount stated in the sale proclamation. However that may be, the mortgagor brings his suit before the Munsif; that is, in another

(1) [1906] 8 Bom. L. R. 240.

(2) [1897] 19 All. 119=(1896) A. W. N. 192.

(3) [1917] 19 Bom. L. R. 356=40 I. C. 699=18 Cr. L. J. 699.

Court than the Court in which the mortgage suit was being tried. He alleges amongst other things that the defendant had taken the excess sum from him by fraud and the word "cheating" is actually to be found in the plaint. If he had not done that, then he would have had just as good a cause of action and the present appeal would not have been maintainable. But, in view of the terms of Art. 35, Cl. (ii), Provincial Small Cause Courts Act, it appears to me that the case made in the plaint obliges us to entertain this appeal. I think that all the more because both the lower Courts, so far as I can see, have found that the defendant took this sum fraudulently. The language of the Munsif in this respect is this:

The defendants have failed to show that they were entitled to any sum in excess of Rs. 1,419-4-0 as in the sale proclamation. I accordingly find that a sum of Rs. 195-12-0 was fraudulently realized by the defendants in excess and so they did not mention the amount received in the receipt Ex. 1.

In the same way, the lower appellate Court states without giving any reason "the defendants obtained the excess money under false representation." But from the beginning to the end there appears to be no representation except that that was the amount due under the decree. In these circumstances, both the lower Courts having found fraud and fraud having been charged in the plaint, I am not prepared to say that this case does not come within the exception and I am, therefore, of opinion that we may entertain this appeal.

The next point is whether this suit brought in another Court was bad by reason of S. 47, Civil P. C. That section says that all questions relating to satisfaction, execution or discharge of a decree are to be dealt with by the executing Court. In my opinion, this is a question of that character; and, in two cases, *Abdul Karim v. Islamunnisa Bibi* (1) and *Ganpat Rao v. Anand Rao* (2), it seems to me that it has been so held. These were both cases where it was said that land or money had been taken in excess. In my judgment, S. 47 is not evaded merely by interlarding the application with epithets such as fraud, cheating &c. This was essentially a case

where the plaintiff, if he had been properly advised, would have applied under S. 47, Civil P. C. to the Subordinate Judge's Court and asked for the refund of the money simply on the ground that he had over-paid that money, or that it was money paid in excess. It was entirely unnecessary on his part to make charges of cheating, fraud or anything of the kind.

That being so, it seems to me that this suit was altogether incompetent. The appeal must, therefore, be allowed and the suit dismissed with costs in all the Courts.

Mukherji, J.—I agree.

A.L./R.K.

Appeal allowed.

* * A. I. R. 1928 Calcutta 777 Full Bench

RANKIN, C. J. AND C. C. GHOSE,
SUHRAWARDY, B. B. GHOSE
AND MUKHERJI, JJ.

Tarini Charan Bhattacharjee and others—Plaintiffs—Appellants.

v,

Kedar Nath Halder—Defendant—Respondent.

Full Bench Ref. No. 1 of 1928, in Appeal No. 723 of 1926, Decided on 12th September 1928, made by Addl. Dist. Judge, Khulna, D/- 17th December 1925.

(a) *Bengal Tenancy Act*, S. 153—'Amount claimed' includes not only statutory interest at 12½% and statutory damages but even 75% interest if agreed.

The amount claimed in the suit can be read so as to include interest at a high contractual rate such as 75 per cent. A claim for statutory interest at 12½ per cent. under S. 67, Bengal Tenancy Act, or a claim for statutory damages not exceeding 25 per cent. on the amount decreed as provided for by S. 63 of the Act, are ordinary incidents of a rent suit and must be taken into consideration in ascertaining for the purposes of S. 153 whether the amount claimed in the suit does not exceed Rs. 100. [P 778 C 2]

* (b) *Civil P. C.*, S. 11—*Matter directly and substantially in issue, where not an abstract question of law but a mixed question of fact and law, is res judicata.*

Matter directly and substantially in issue in the former suit, namely whether one of the terms upon which a party held his ryoti is that he is liable to pay 75 per cent. per annum interest on arrears of rent, is *res judicata*, whether in deciding it, error was on a point of fact or on a point of law. Though, in order to decide whether the terms of the party's tenancy include a valid and binding term to the effect that he should pay interest on arrears of rent

(1) [1916] 38 All. 339=34 I. C. 231=14 A. L. J. 401.

(2) [1920] 44 Bom. 97=55 I. C. 967=22 Bom. L. R. 238.

at 75 per cent. per annum in accordance with the kabuliati, the former Court had to consider questions of law as well as questions of fact, the matter is not an abstract question of law. [P 780 C 1, 2]

(c) *Civil P. C., S. 11—Alteration of law by subsequent decisions—Different interpretation of law by judicial decision does not affect the principle of res judicata but legislature might affect it: 32 Cal. 749, Overruled.*

Even where law has been since determined to be otherwise by judicial decision, the rights of parties decided upon prior law remain unaffected. The legislature by statute may alter the rights of parties and when it does so, it makes such provision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties since they profess, at all events, to ascertain the law. If the binding character of a decision upon a concrete question as to the terms of particular holding is to fluctuate with every alteration in the current of authority, the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof: 32 Cal. 749, Overruled: 10 Cal. 1087, Foll. [P 780 C 2; P 781 C 1]

* * (d) *Civil P. C., S. 11—Question of law—Res judicata does not depend on correctness of decision—Section does not deal with points or points of law—Decision is binding and not the reasoning.*

The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as res judicata. For this purpose, it is not true that a point of law is always open to a party. S. 11, Civil P. C., says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. Questions of law are of all kinds and cannot be dealt with as though they were the same. Questions of procedure, questions affecting jurisdiction, question of limitation, may all be questions of law. In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision, can be attacked on a particular point. What is made conclusive between the parties is the decision of the Court and the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend, and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided. [P 781 C 2, P 782 C 1]

Hemendra Chandra Sen and Panchan Ghoshal—for Appellants.

Kanjulal and Subodh Chandra Dutta—for Respondent.

Rankin, C. J.—The present reference to the Full Bench has been made by a Division Bench in a second appeal arising out of a rent suit. Two questions of law have been formulated for our opinion, but under R. 2, Ch. 7 of the appellate side rules, the whole case is submitted to us for final decision.

The first point taken before us was not taken at the hearing before the Division Bench, but as it goes to jurisdiction it must be entertained and decided.

The contention is that no second appeal lies in this case by reason of the provisions of S. 153, Ben Ten. Act. The claim in the suit was (1) for arrears of rent of four years 1327—1330 B. S. at Rs. 16 per annum, i. e., Rs. 64; (2) cess for four years at 8 annas per annum, i. e., Rs. 2; (3) interest on rent in arrear at 75 per cent. per annum, i. e., Rs. 108-2-0, making a total claim of Rs. 174-2-0. The tenant nevertheless contends that the case comes within Cl. (a), S. 153, in that "the amount claimed in the suit does not exceed Rs. 100." The terms of the section are well known:

An appeal shall not lie from any decree or order passed whether in the first instance or in appeal in any suit instituted by a landlord for the recovery of rent where (a) the decree or order is passed by a District Judge, Additional District Judge or Subordinate Judge and the amount claimed in the suit does not exceed Rs. 100 unless the decree or order has decided . . . a question of the amount of rent annually payable by a tenant.

The contention is that the section contemplates a suit "for the recovery of rent" and that "the amount claimed in the suit" cannot be read so as to include interest at a high contractual rate such as 75 per cent. It is conceded that a claim for statutory interest at 12½ per cent. under S. 67, Ben. Ten. Act., or a claim for statutory damages not exceeding 25 per cent. on the amount decreed as provided for by S. 68 of the Act, are ordinary incidents of a rent suit and must be taken into consideration in ascertaining for the purposes of S. 153 whether the amount claimed in the suit does not exceed Rs. 100. But it is contended that a claim to interest at 75 per cent. made upon the basis of an agreement evidenced by a kabuliati is not within the contemplation of the section. Reliance is placed upon decisions which hold that the statutory restriction upon appeals cannot be evaded by adding a

separate cause of action to the claim for rent.

In my opinion this objection fails. We are here concerned not with the words "a question of the amount of rent annually payable by a tenant" which occur in the clause of exception, but with the words "the amount claimed in the suit" which occur in Cl. (a). Such cases as *Kripasindhu v. Jogendra* (1) and *Koylash Chandra De v. Tarak Nath Mondal* (2) are, therefore, not in point. In *Jamadar Singh v. Jagat Kishore* (3), the plaintiff in addition to the ordinary claim for rent had added as claim for damages for breach of a contract to furnish certain documents. It was held that this claim for damages was not a claim of such a character that it could be added to the claim for rent in order to ascertain the amount claimed in the suit for the purposes of S. 153. The Court, however, was of opinion that "sums ancillary to rent, such as interest on rent in arrears or statutory damages" might require to be taken into consideration before it could be said of a suit for rent that the amount claimed in the suit does not exceed Rs. 100. In my opinion this is the only reasonable and correct view.

In the present case both rent and interest have been fixed by contract. The claim for interest, if it is to be made at all, must be made in the same suit as the claim for rent. If two separate suits had been brought, one for rent and one for interest, the tenant would not only have had a legitimate grievance but could, in my opinion, have taken advantage of the defence afforded by O. 2, R. 2, Civil P. C. The preliminary objection, therefore, fails.

The question at issue before the Division Bench had reference to the claim for interest on arrears of rent at 75 per cent. per annum. This claim was made upon the basis of a kabuliati executed in 1880 by the then tenant, one Sitala Dasi in favour of the predecessor of the plaintiff. In 1898 the plaintiff's predecessor caused this ryoti holding to be sold in execution of a decree for rent and it was purchased at auction by the defendant's father. The plaintiff purchased the superior interest in 1920 and the present suit was

brought in 1924 for rent due in respect of the years 1920—23.

In 1915 the plaintiff's predecessor brought a suit against the present defendant for rent and for interest thereon at the rate of 75 per cent. per annum on the basis of the kabuliati of 1880. That suit was contested, inter alia upon the ground that the kabuliati was not valid or binding upon the defendant. In support of this defence it was maintained that Sitala was an ignorant person and not in her right mind, that the contract as to interest was hard and unconscionable and in the nature of a penalty and that the defendant being an auction-purchaser was not bound by its terms, the plaintiff not having caused those terms to be stated in the sale proclamation. The judgment of the Munsif who tried the case discloses all these defences and that they were all overruled. He held that there was no evidence that Sitala Dasi was not in her right mind; he held that there was no obligation upon the landlord to specify in the sale proclamation the rate of interest stipulated for in the event of rent falling into arrear; he held further that as the kabuliati was executed before the passing of the Bengal Tenancy Act the parties were bound by the contract and accordingly that the plaintiff was entitled to get the interest claimed.

No appeal was taken from this decision and it is not contested that the Munsif who tried the suit in 1915 was competent to try the present suit of 1924 within the meaning of S. 11, Civil P. C.

Now, the tenant's only contention in the present case is that the plaintiff is not entitled to get interest at the kabuliati rate. The trial Court rejected this contention on the ground that this very question was concluded by the previous decision. The Additional District Judge reversed this finding and proceeded on the principle that 75 per cent. per annum was an exorbitant and unusual rate of interest and that the obligation to pay it would not pass with the tenancy unless it were publicly notified in the sale proclamation. For this view he regarded the case of *Anandamoyi Deby v. Saudamini Debya* (4), as an authority. He has brushed aside the contention that the matter is res judicata and has allowed only simple interest at 12½ per cent.

(1) [1907] 5 C. L. J. 78 n. •

(2) [1897] 25 Cal. 571 n.

(3) [1916] 23 C. L. J. 557=34 I. C. 697.

(4) A. I. R. 1923 Cal. 559.

The plaintiff contends in second appeal that the decision in the suit of 1915 as to the rate of interest is conclusive in the present suit.

In my opinion the plaintiff is clearly right. The matter which is "directly and substantially in issue" in this case is the very same that was directly and substantially in issue in the former suit, namely, whether one of the terms upon which this defendant holds his ryoti is that he is liable to pay 75 per cent per annum interest on arrears of rent. In the previous suit the plaintiff's predecessor alleged and the defendant denied that this term was binding upon the defendant. The defendant, in support of his denial, raises the very same contentions which he raises now and certain others. It was held that the term was valid and binding upon him as one of the terms of his tenancy.

In these circumstances, it matters nothing whether the decision was right or wrong and it matters nothing whether the error, if any, was an error on a point of fact or on a point of law. The matter directly and substantially in issue was a sensible and concrete question as to the rights of the parties and the conditions and terms of the defendant's tenancy. To decide it correctly it was necessary to find the facts and to apply the law. If the Munsif did not succeed in ascertaining the exact facts or in applying the law correctly, the remedy of the defendant, if he had a remedy, was to challenge the Munsif's decision in a superior Court. But S. 11, Civil P. C. and the principle which it embodies would be brought to nothing if it were held that it was open to him to litigate again the question of the validity of the terms as to interest, or his obligation to comply with it.

The arguments which have been addressed to us on behalf of the defendant are really three:

In the first place it is said that the Munsif's decision in the previous case was erroneous upon a pure question of law and cannot therefore conclude the matter. The idea seems to be that the matter directly and substantially in issue in the previous suit was a pure question of law and that the doctrine of *res judicata* would not apply, at all events if it could be made out that the cause of action in the present suit was different

from the cause of action in the previous suit. I see nothing but misconception in this line of argument. In order to decide whether the terms of the defendant's tenancy include a valid and binding term to the effect that he should pay interest on arrears of rent at 75 per cent per annum in accordance with the *kabuliat* of 1880, the Munsif had to consider questions of law as well as questions of fact. But the matter which was directly and substantially in issue, and which was heard and finally decided, was not an abstract question of law. The Munsif decided that the landlord had a right to 75 per cent. per annum and that the tenant was bound to pay it as a term of his holding.

The second contention of the defendant was supported by a reference to the decision in *Alimunissa v. Shama Charan* (5). The contention is that since the decision in 1915 the law upon the question whether special and unusual terms of tenancy are binding upon an auction-purchaser without any mention in the sale proclamation has been altered by subsequent decisions of the Court, and that as the law has changed in the meantime, the previous decision no longer governs the rights of the parties. The case cited does certainly proceed upon the principle contended for. Maclean, C. J., reasoned thus:

"Cases must be decided upon the law as it stands when judgment is pronounced and not upon what it was at the date of a previous suit the law having been altered in the meantime. It has been conceded that if the law had been altered meanwhile by Statute, the objection (of *res judicata*) could not prevail. It is difficult to see why it should prevail because the law has been since determined to be otherwise by judicial decision.

In that case it may be noticed, a Full Bench decision had overruled a decision regarded as good law at the time of the previous suit.

Now in the present case I am by no means satisfied that there has been any change in the current of decisions comparable with the change which was considered in the case cited. But I am clearly of opinion that the reasoning which Maclean, C. J., and Holmwood, J., adopted in the case mentioned is erroneous. The legislature by statute, may alter the rights of parties and when it does so, it makes such pro-

(5) [1905] 32 Cal. 749=1 C. L. J. 176=9 C. W. N. 466.

vision as it thinks proper to prevent injustice. Courts of law are in no way authorized to alter the rights of parties. They profess, at all events, to ascertain the law, and if the binding character of a decision upon a concrete question as to the terms of a particular holding is to fluctuate with every alteration in the current of authority the Courts will become an instrument for the unsettlement of rights rather than for the ascertainment thereof. The principle relied upon is abhorrent to S. 11, Civil P. C. and to the general intention of the doctrine of *res judicata*. If authority be wanted for its rejection a very plain authority can be found in the case of *Gowri Koer v. Audh Kuar* (6).

The third point argued for the defendant is that while the previous decision may be conclusive as to the binding character upon the defendant of the stipulation in the *kabuliat* for interest at 75 per cent. per annum, it is open to the defendant to contend in this appeal that the stipulation, though binding, is a stipulation for a penalty and that it is accordingly open to the Court under S. 74, Contract Act, or the principle embodied therein, to refuse to give judgment for more than a reasonable compensation to the plaintiff for the defendant's failure to pay his rent when due.

It is not impossible that the stipulation in this *kabuliat* in the absence of evidence showing that 75 per cent per annum is a reasonable or usual rate of interest upon arrears of rent, might be regarded as a stipulation by way of penalty. It has been translated as follows:

In default of kist I shall pay interest at the rate of one anna per rupee per month with the arrears of rent.

I find, however, that this very question was raised in the previous suit and it is reasonably clear to me that the Munsif by his judgment overrules this contention. His view was that the parties were bound by the contract and that the plaintiff was entitled to get the interest claimed. I do not think therefore that this contention can succeed.

For these reasons I am of opinion, that the second appeal to this Court should be allowed, that the decision of the Additional District Judge should be set

aside and the decision of the Munsif restored with costs in all the Courts.

It remains now to deal with the two questions formulated by the Division Bench.

These are:

(1) Whether an erroneous decision on a pure question of law operates as *res judicata* in a subsequent suit where the same question is raised.

(2) Whether the case of *Anandameyi Dasi v. Saudamini Debi* (4) has been correctly decided.

The second of these questions is a matter of considerable importance but as in my view it does not arise in the present case, I do not think that we ought to express our opinion upon it.

As regards the first question, I am not of opinion that any categorical answer can be given to the question as framed and I do not think that it would be wise for a Full Bench to attempt an exhaustive exposition of all the considerations which are relevant in determining whether a previous decision does or does not operate as *res judicata*. I think, however, that it may be useful, if it is not exactly necessary, to make the following observations:

(1) The question whether decision is correct or erroneous has no bearing upon the question whether it operates or does not operate as *res judicata*. The doctrine is that in certain circumstances the Court shall not try a suit or issue but shall deal with the matter on the footing that it is a matter no longer open to contest by reason of a previous decision. In these circumstances it must necessarily be wrong for a Court to try the suit or issue, come to its own conclusion thereon, consider whether the previous decision is right and give effect to it or not according as it conceives the previous decision to be right or wrong. To say, as a result of such disorderly procedure, that the previous decision was wrong and that it was wrong on a point of law, or on a pure point of law, and that therefore it may be disregarded, is an indefensible form of reasoning. For this purpose, it is not true that a point of law is always open to a party.

(2) In India, at all events, a party who takes a plea of *res judicata* has to show that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and also that it has been heard and finally

decided. This phrase "matter directly and substantially in issue" has to be given a sensible and businesslike meaning, particularly in view of Ex. 4, S. 11, Civil P. C., which contains the expression "grounds of defence or attack." S. 11 of the Code says nothing about causes of action, a phrase which always requires careful handling. Nor does the section say anything about points or points of law, or pure points of law. As a rule parties do not join issue upon academic or abstract questions but upon matters of importance to themselves. The section requires that the doctrine be restricted to matters in issue and of these to matters which are directly as well as substantially in issue.

(3) Questions of law are of all kinds and cannot be dealt with as though they were all the same. Questions of procedure, questions affecting jurisdiction, questions of limitation, may all be questions of law. In such questions the rights of parties are not the only matter for consideration. The Court and the public have an interest. When plea of res judicata is raised with reference to such matters, it is at least a question whether special considerations do not apply.

(4) In any case in which it is found that the matter directly and substantially in issue has been directly and substantially in issue in the former suit and has been heard and finally decided by such Court, the principle of res judicata is not to be ignored merely on the ground that the reasoning, whether in law or otherwise of the previous decision can be attacked on a particular point. On the other hand it is plain from the terms of S. 11 of the Code that what is made conclusive between the parties is the decision of the Court and that the reasoning of the Court is not necessarily the same thing as its decision. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory by precluding the parties from reopening or recontesting that which has been finally decided.

C. C. Ghose, J.—I agree.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree.

Mukherji, J.—I agree.

v.v. *Reference answered and
Appeal allowed.*

**** A. I. R. 1928 Calcutta 782 Full Bench**

RANKIN, C. J. AND C. C. GHOSE, SUHRAWARDY, B. B. GHOSE AND MUKHERJI, JJ.

Sarat Chandra Pal—Appellant.

v.

Barlow and Co.—Respondents.

Appeal No. 34 of 1928, Decided on 12th September 1928.

**** (a) Presy. Towns Ins. Act, S. 18—Proceedings in a District Court against the same debtor—Proceedings cannot be stayed by a Judge of the High Court sitting in insolvency.**

Under S. 15 a Judge of the High Court sitting in insolvency has no power to stay proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act; *A.I.R. 1925 Bom. 543, Foll: A. I. R. 1922 Bom. 390, Ref.; Ram Shankar Rai v. Harsook Das Chhognmul, Appeal from Original Order 67 of 1925, Overruled.* [P 784 C 2]

**** (b) Presy. Towns Ins. Act, S. 18—"Other proceedings." does not include insolvency proceedings.**

Insolvency proceedings are not included under S. 18 and the expression "other proceedings," can only be referred to proceedings in the nature of suit, execution or other legal process; *49 Bom. 788, Foll: 47 Bom. 257, Ref.; Ram Sankar Rai v. Harsook Das Chhognmul; Appeal from Original O. 67 of 1925, Overruled.* [P 785 C 2]

S. C. Bose and Brojendra Nath Ghose—for Appellant.

S. N. Banerjee and R. P. Khaitan—for Respondents.

C. C. Ghose, J.—In this matter the question that has been referred to the Full Bench is as follows :

Whether, under S. 18, Presidency Towns Insolvency Act, a Judge of this Court sitting in insolvency has power to stay proceedings pending in respect of the same debtor in a District Court.

The facts involved are as follows : The appellant, Sarat Chandra Pal, who is the debtor and who carried on business in Calcutta, made an application on 29th October 1927 to the District Judge of Hooghly to be adjudicated an insolvent. That application was made under the provisions of the Provincial Insolvency Act. On the application being made, the learned District Judge of Hooghly made an order for the appointment of an interim Receiver. The District Judge further directed that notices should be sent to the debtor's creditors and fixed

5th November 1927, for the hearing of the petition. This date was afterwards altered and ultimately the hearing was fixed for 26th November 1927. The respondents, Messrs. Barlow & Company, who are the creditors of the debtor, appeared before the District Judge on 26th November 1927 and applied for and obtained time to oppose the debtor's application. On 29th November 1927, they made an application to this Court in its insolvency jurisdiction against the debtor and obtained an order of adjudication. It appears that the debtor was indebted to the extent of about Rs. 76,000 to various creditors and that the debt due to the respondents alone amounted to something like Rs. 39,000 and further that almost all the creditors were residents of Calcutta.

The insolvent was served on 9th December 1927, with an office copy of the order of adjudication made by this Court bearing date 29th November 1927. The respondents, it appears, made an application to the District Judge of Hooghly for stay of the insolvency proceedings in the Hooghly Court and of the sale by the interim Receiver which the District Judge had ordered already; but the learned District Judge refused the application, and the sale by the interim Receiver took place on 3rd December 1927. On 6th December 1927, the Registrar in Insolvency of this Court made an order upon the debtor that he should appear and produce his books of account before him on 13th December 1927. The respondents thereafter obtained a rule from the learned Judge exercising the insolvency jurisdiction of this Court calling on the insolvent to show cause why the insolvency proceedings in the District Court of Hooghly should not be stayed. This rule came on for hearing before my learned brother Costello, J., who, by his order dated 12th March 1928, directed that all further proceedings in the Court of the District Judge of Hooghly in the insolvency case pending before him, being Insolvency case No. 79 of 1927, be stayed until the further orders of this Court. Against this order the insolvent preferred an appeal to this Court being Appeal No. 34 of 1928 and it is on the hearing of the said appeal before the learned Chief Justice and Page, J., that the present reference to a Full Bench has been made.

It appears that the present respondents preferred an appeal to this Court on its appellate side against the order of the District Judge refusing to make an order for stay of the proceedings under S. 36, Provincial Insolvency Act. That appeal was disposed of by a Division Bench of this Court on 13th August 1928, this Court holding that the order of the District Judge referred to above should be set aside and that all proceedings in the Hooghly Court in the matter of the insolvency of the debtor should be stayed.

Now the question whether under S. 18, Presidency Towns Insolvency Act, a Judge of this Court sitting in insolvency has power to stay proceedings pending in respect of the same debtor in a District Court came up for consideration before my learned brother Buckland, J., in May 1925, in the matter of one Sashti Kinkar Banerji Buckland, J., stayed the proceedings in the District Court.

It may be desirable at this stage to set out the material sections in the Presidency Towns Insolvency Act.

Section 17 runs as follows :

On the making of an order of adjudication the property of the insolvent, wherever situate, shall vest in the Official Assignee and shall become divisible among his creditors, and thereafter, except as directed by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose : provided that this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

Section 18 runs as follows :

(1) The Court may, at any time after the making of an order of adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court ; (2) an order made under sub-S. (1) may be served by sending a copy thereof, under the seal of the Court, by post to the address for service of the plaintiff or other party prosecuting such suit or proceeding, and notice of such order shall be sent to the Court before which the suit or proceeding is pending (3) Any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under this Act, either stay the proceedings or allow them to continue on such terms as it may think just.

Section 22 runs as follows :

Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court whether within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon.

Buckland, J., in his judgment in the case of *Sasti Kinkar Banerji* observed as follows :

Section 18 has been specifically referred to, but I am by no means certain that the applicant need necessarily be confined to that section, for S. 90 provides that in proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in exercise of its ordinary original civil jurisdiction. Further, the Court which I am asked to deal with is as between this Court and the Court over which unquestionably this Court exercises superintendence one which is subordinate to this Court. The position therefore is not the same as that where the Court in which it is desired to stay proceedings is independent of this Court. In such a case it might possibly be open to the party desiring the stay to apply for an injunction as in the case of suits but that is not a matter I need pursue.

Buckland, J., then referred to the decision in the Bombay High Court in *re Manick Chand* (1), and observed that in his opinion this Court in insolvency had power to stay insolvency proceedings pending in another and subordinate Court. On the construction of the section itself Buckland, J., was of opinion that the words "other proceeding" should not be held ejusdem generis or analogous to a suit.

There was an appeal against the order of Buckland, J., and the same was heard by my learned brethren Greaves and Cuming, JJ., in August 1925. It appeared from the facts that the insolvent *Sasti Kinkar Banerji* was adjudicated as such by the District Judge of Birbhum on 6th August 1924, at the instance of a creditor. In March 1925, the same debtor was adjudicated an insolvent by this Court at the instance of another creditor. Greaves, J., agreed with Buckland, J., that the Birbhum Court was subject to the superintendence of this Court and that being so, the only question for consideration was whether the insolvency proceedings at Birbhum fell within the words "other proceeding" in S. 18. He held, not without hesitation, that the construction put by Buckland, J., was right. Cuming, J., agreed with Greaves, J.,

The matter raised in the present reference was further considered by the Bombay High Court in the case of *In re Naginlal Maganlal Jaichand* (2). It was held therein by Taraporewala, J., that S. 18, Presidency Towns Insolvency Act, did not empower the High Court in its insolvency jurisdiction to stay insolvency proceedings in respect of the same debtor pending in a District Court, the wording of that section being consistent only with the construction that "insolvency proceedings" are not included therein.

In my view, the judgment of the Bombay High Court in *re Naginlal* is clearly right and the judgment of Greaves, J., and Cuming, J., in the unreported case in appeal from original Order. No 67 of 1925 *Ram Sankar Roy v. Harsookdas Chhogmull* should be overruled. I am of opinion that the legislature in S. 18, Presidency Towns Ins. Act, had not in view the question of stay by this Court of insolvency proceedings pending in a District Court, inasmuch as other machinery had been provided therefor.

Before I proceed to deal with the sections in the Presidency Towns Insolvency Act, I desire to refer to two sections in the Provincial Insolvency Act. S. 29, Provincial Insolvency Act, runs as follows :

Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act either stay the proceeding or allow it to continue on such terms as such Court may impose. (Compare this with S. 3 of Sub-S. 18, Presidency Towns Insolvency Act).

The other section is S. 36, and it is as follows :

If in any case in which an order of adjudication has been made, it shall be proved to the Court by which such order was made that insolvency proceedings are pending in another Court against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court the Court may annul the adjudication or stay all proceedings thereon.

If an application for stay is refused there is provision for an appeal to the High Court under S. 76 of the Act.

Section 29, Provincial Insolvency Act, follows S. 28 of that Act which deals with the question of the effect of an order of adjudication. Under S. 29, on the making of an order of adjudication

(1) A. I. R. 1922 Bom. 390=47 Bom. 275.

(2) A. I. R. 1925 Bom. 543=49 Bom 798.

the whole of the property of the insolvent vests in the Court or in a Receiver and becomes divisible among the creditors and thereafter no creditor of the insolvent can have, during the pendency of the insolvency proceedings, any remedy against the property of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose, the Court referred to being the District Court acting under the Provincial Insolvency Act. S. 29 is ancillary to S. 28 and it is provided thereby that any Court in which a suit or other proceeding is pending should, on proof that an order of adjudication has been made under the Provincial Insolvency Act, either stay the proceeding or allow it to continue on such terms as the Court may think fit. It is clear from the words used in S. 29 that the "other proceeding" referred to therein is and must be a proceeding in the nature of a suit or a proceeding in a suit itself. Under S. 36, the District Court, when an order of adjudication has been made under the Provincial Insolvency Act, may, in cases where it is made clear that insolvency proceedings are pending in another Court against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, annul the adjudication or stay all proceedings thereon.

Section 36, Provincial Insolvency Act has its counter part in S. 22, Presidency Towns Insolvency Act, and the like powers are given to the "Courts" referred to in S. 3, Presidency Towns Insolvency Act. S. 18, Presidency Towns Insolvency Act follows S. 17 where the question of the effect of an order of adjudication under the Presidency Towns Insolvency Act is dealt with. It is provided therein that, on the making of an order of adjudication, the property of the insolvent wherever situate shall vest in the Official Assignee and shall become divisible among his creditors and that thereafter, except as directed by the Act, no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal pro-

ceeding except with the leave of the Court and on such terms as the Court may impose. Then there follows the proviso quoted above and which again is in the same terms as sub-S. (6) of S. 28, Provincial Insolvency Act. S. 17, Presidency Towns Insolvency Act is in fact very similar to S. 28, Provincial Insolvency Act. S. 18, Presidency Towns Insolvency Act, is ancillary to S. 17 and, in order to carry out that has already been indicated in S. 17, i. e., to ensure the proper administration and distribution of the insolvent's estate among the creditors, power is given by S. 18, sub-Cl. (1), to this Court in its insolvency jurisdiction to stay any suit or other proceedings pending against the insolvent before any Judge or Judges of the Court or in any other Court subject to the superintendence of the Court.

Construing therefore S. 18, Presidency Towns Insolvency Act, in the light of what has immediately gone before, I think the wording is more consistent with the interpretation that "insolvency proceedings" are not included under that section and further that the expression "other proceedings" can only refer to proceedings in the nature of suits, execution or other legal process. I base my decision on the section itself and not on any such consideration as was referred to in the course of the argument before us namely that an insolvency proceeding initiated on the debtor's application for being adjudicated an insolvent can hardly be described as a proceeding against the insolvent.

I agree with the view taken by Taraporewala, J., as regards the meaning of the expression "other proceedings" and of the words "any other Court subject to the superintendence of the Court", and I have very little to add thereto.

I would, therefore, answer the reference to the Full Bench by saying that, under S. 18 Presidency Towns Insolvency Act, a Judge of this Court sitting in insolvency has no power to stay proceedings pending in respect of the same debtor in a District Court under the Provincial Insolvency Act.

Rankin, C. J.—I have had the advantage of reading the judgment about to be delivered by C. C. Ghose J., I agree with that judgment. I am of opinion

that there is enough in the language of S. 18, Presidency Towns Insolvency Act, and in the context of that section to show that it is addressed to the question of compelling persons with claims against the insolvent to prosecute their claims in the insolvency jurisdiction where this is the proper course and that the section is not addressed to the question of competing jurisdictions in insolvency.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree. In my opinion S. 18, Presidency Towns Insolvency Act, refers only to a suit or other proceeding for enforcing a claim against the insolvent which may be adequately dealt with under the provisions of that Act, and not to proceedings under the Provincial Insolvency Act.

Mukherji, J.—I would give the same answer to the question and my reasons are practically the same as my learned brother C. C. Ghose, J., has given in his judgment.

R.K.

Reference answered.

* A. I. R. 1928 Calcutta 786

Full Bench

RANKIN, C. J. AND C. C. GHOSE,
SUHRAWARDY, B. B. GHOSE AND
MUKHERJI, JJ.

Kumar Sarat Kumar Roy—Appellant.
v.

Nabin Chandra Ram Chandra Shaha
and *Official Assignee of Calcutta*—Res-
pondents.

Appeal No. 100 of 1927, Decided on
31st August 1928, from original order,
D/- 9th August 1921.

(a) *Presidency Towns Insolvency Act*, S. 36.

The Registrar if empowered under S. 6 is a
Court for the purpose of S. 36. [P 788 C 2]

* (b) *Presidency Towns Insolvency Act*,
S. 8 (1)—Application under sub-S. (1) should
be made to the Court passing the order.

It is contrary to the notion of a re-hearing
or of a review such as is contemplated in sub-
S. (1) that the application should be made to
any tribunal except the tribunal that made the
order; but if an order is made by one Registrar,
his successor could hear a motion to review,
and if an order is made by one Judge, another
Judge exercising the insolvency jurisdiction of
the Court could hear the review. [P 789 C 2]

(c) *Presidency Towns Insolvency Act*, S. 8
(2) (a)—Application to Judge to discharge
Registrar's order is appeal—Order of Judge
treating it as review under sub-S. (1) is appeal-
able to Division Bench under sub-S. (2) with-
out leave of Judge and Division Bench should
dispose of the case on merits : 66 I. C. 715=

A. I. R. 1921 Cal. 58=48 Cal. 1089, Over-
ruled.

An application to the Judge exercising
insolvency jurisdiction to discharge an order
made by the Registrar for the attendance of a
witness under S. 36 is an appeal under Cl. (1),
sub-S. (2), S. 8 : 66 I. C. 715=A. I. R. 1921
Cal. 58=48 Cal. 1089, Overruled. [P 790 C 2]

Where Judge's view was that he was bound
to treat the case on the footing that he was not
hearing an appeal under Cl. (a), the question
whether he should give leave to appeal to the
Division Bench could not arise. Where the
Judge dealt with the matter as though he had
power under sub-S. (1), and having dealt with
the matter as a review on the merits he dis-
missed the application, the order which he
made cannot be said to be an order of the
character contemplated by Cl. (1), S. 8. If it
were anything else it would fall under Cl. (b),
sub-S. (2), S. 8 of the Act. Where the Judge
had treated this as though he had jurisdiction
to make an order on review, from such order an
appeal lies to the High Court under Cl. (b), and
Division Bench has jurisdiction to entertain an
appeal from an order of the character which
the Judge passed. It cannot be said that it is
necessary that the Division Bench should con-
fine itself to a declaration that the Judge had
no power to entertain an application for
review of an order made by the Registrar or
that it should leave the appellant to go back to
the Registrar to have the order set aside or
that it should send the case back to the Judge
to be dealt with as an appeal. It is open to it
to make the order which the Judge ought to
have made. [P 790 C 2 ; P 791 C 2 ; P 792 C 1]

(d) *Presidency Towns Insolvency Act*,
S. 90 (5)—Scope.

Where order under S. 36 was made to attend
on 2nd May 1927 but was served on 4th July
1927 and the person ordered appealed on 20th
July 1927 time ought to be extended. [P 791 C 1]

* (e) *Presidency Towns Insolvency Act*,
S. 36—Section is not to be used as extra method
of discovery in addition to those under Civil
Procedure Code.

Powers under S. 36 are not to be used as an
extra method of discovery in addition to the
ample facilities for discovery enjoyed by ordi-
nary litigants under Civil Procedure Code.
Franks, Ex parte Gilttings, (1892) 1 Q. B. 646,
and *In re Desportes*, 10 Morrell 40, *Foll.*

[P 791 C 1]

* (f) *Presidency Towns Insolvency Act*,
S. 36—Witness.

Witness is not entitled to get costs of his
attorney or counsel : 46 Cal. 795, *Foll.*

[P 791 C 2]

(g) *Calcutta High Court Appellate Side*
Rules, Ch. 7, Rr. 2 and 3.

Rule 1, and not Rr. 2 and 3, applies to ap-
peals from orders in appeal under Presidency
Towns Insolvency Act, S. 8. [P 792 C 1]

S. M. Bose and N. C. Chatterjee—for
Appellant.

S. N. Banerjee and B. K. Ghosh—for
Respondent.

Rankin, C. J.—It appears that one
Sailendra Krishna Roy was adjudicated
an insolvent in this Court on 9th August

1921. This case arose out of an application made to the Registrar in Insolvency by a firm called Nabin Chandra Ram Chandra Shaha, creditors of the insolvent for an examination of the appellant Kumar Sarat Kumar Roy under S. 36, Presidency Towns Insolvency Act, upon certain matters. It appears that the appellant is the father-in-law of the insolvent. It appears further that on 25th January 1921 the insolvent purported to enter into a mortgage in favour of the appellant over certain properties in respect of a sum of 1½ lacs. It seems that on 20th December 1922 an application for examination of the appellant was made by the Official Assignee but was afterwards withdrawn. A second application was made by the respondent creditor Nabin Chandra Ram Chandra Shaha on 14th June 1923 and the appellant was examined before the Court under S. 36, Presidency Towns Insolvency Act between November 1923 and January 1924. In the meantime the appellant had brought a suit in a District Court against the Official Assignee and others to enforce his mortgage. That mortgage suit was decreed ex parte on the 20th September 1923. In February 1924 the Official Assignee brought a suit against the appellant to set aside that ex-parte decree on the ground, as I understand, of fraudulent suppression of processes. This suit, however, was dismissed on 28th February 1927, and at the time with which we are concerned, that is when the present application was made in April 1927, that decree of dismissal was under appeal to the High Court which has not yet disposed of the appeal.

The application with which we are now concerned is an application to examine the appellant further with reference to the sum of 1½ lacs of rupees alleged to have been lent by him to the insolvent and the application asks that five documents should be produced before the Court by the appellant at his examination. The application is based upon the ground that at the prior examination the creditor had not had sufficient opportunity to examine the appellant with reference to this sum which was really the sum comprised in the mortgage to the appellant. The Registrar made an order directing the appellant to attend at a given date for examination under the section. That order was made on 2nd

May 1927, but it was not served upon the appellant till 4th July 1927.

Thereupon, on the 20th July, the appellant applied to the learned Judge exercising insolvency jurisdiction on the original side for an order that the order made by the Registrar should be vacated and that he should be relieved from appearing before the Registrar pursuant to the said order. When the application to the learned Judge was made it was framed in somewhat neutral language by reason of the fact that a decision of this Court in the case of *Rai Sukh Lal Karnani v. Official Assignee, Calcutta* (1) had been given as to the nature of the proceeding by which such an order of the Registrar can be challenged before a Judge. In that case the learned Chief Justice Sir Lancelot Sanderson held that such an application to a Judge was not an appeal but a petition to set aside the order of the Registrar in Insolvency. Richardson, J., agreeing that such an application was not an appeal within sub-S. (2), S. 8, Presidency Towns Insolvency Act, held that it was an application under Cl. 1 of that section for review of an ex-parte order.

In these circumstances the appellant moved the learned Judge but did not frame his application as a memorandum of appeal but framed it as I have stated. When the matter came before the learned Judge, it is quite clear that the case was not dealt with as being an appeal from the order of the Registrar and it is also clear that it was dealt with by the learned Judge on the basis of the view taken by Richardson, J., in a previous case, namely, that it was an application to review under sub-S. (1), S. 8. This can be seen not merely from the circumstance that the learned Judge was bound by the previous decision but from several other circumstances, one of which is that the learned Judge while acting on the decision expressed his doubt of its correctness; another is that he, while noticing that if the proceedings were an appeal he would have to deal with the question of limitation under S. 101, and sub-S. (5), S. 90 nevertheless did not deal with that question on the facts.

Moreover the learned Judge in the course of his judgment expressly stated :

I conceive that if this application is by way of review it is not sufficient to contend as

(1) A. I. R. 1921 Cal. 58=48 Cal. 1089.

though it were an appeal, that the order of the Registrar is one which should not have been made. A review and an appeal are proceedings of a different nature and the principles applicable to a review indicate that an application for a review cannot necessarily succeed upon the grounds upon which an appeal might be successful.

The learned Judge by his judgment dealt, subject to what I have already quoted, with the merits of the case. He came to the conclusion that on the merits the order of the Registrar should not be interfered with under sub-S. (1), S. 8. He appears also to have thought that if the examination should turn out to be unnecessary it would be possible for the Court to make an order by which the creditor would be mulcted in costs.

In these circumstances the appellant preferred an appeal to the Division Bench and upon that appeal the first question before the Division Bench was the question whether any right of appeal lay to the Court. I would have proceeded to deal with that question first but for the fact that the respondent's contention by his learned counsel, Mr Banerji, on this point depends to some extent on the question whether the decision in the case of *Sukh Lal Karnani v Official Assignee* (1) is right or wrong. I pass, therefore, to the question of the decision in that case. This is a matter which has been specifically referred as a question of law to this Full Bench and it has been referred in the following terms:

Whether an application to a learned Judge exercising insolvency jurisdiction on the original side for the discharge of an order made by the Registrar in Insolvency for the attendance of a witness under S. 36 of the Act is an appeal under Cl. (a), sub S. (2), S. 8, or is an application under sub-S. (1) of that section or is an application of another and what kind.

It may be observed that the order of the Division Bench referred the whole appeal to the Full Bench in addition to stating that question as a question of law.

The order made by the Registrar is made under the following statutory provisions: By S. 3 of the Act of 1909 the Court having jurisdiction in insolvency under this Act is this High Court and the phrase "the Court" when used in the statute means the Court exercising jurisdiction under this Act; in other words, the High Court of Judicature at Fort William in Bengal. Under S. 4 of the Act, all matters in respect of which

jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges; but by S. 6, the Chief Justice may direct that in any matter in respect of which jurisdiction is given to the Court by this Act, an officer of the Court appointed by him in this behalf shall have all or any of the powers in this section mentioned. Then follows a very necessary and important provision:

and any order made or act done by such officer in the exercise of the said powers shall be deemed the order or act of the Court.

The powers which the Chief Justice is enabled to delegate to an officer include powers to make any order or exercise any jurisdiction which is prescribed as proper to be made or exercised in chambers, and by the rules of this Court the power to summon a witness and examine him under S. 36 of the Act is a power which is proper to be made or exercised in chambers. The terms of S. 36 of the Act are these that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property; and the Court may require such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

The result of these various sections of this enactment and of the order made by the Chief Justice in 1915 is that the Registrar is the Court for the purpose of S. 36. In these circumstances, we have to consider what provision is made by the statute for challenging orders made by the Registrar when exercising the powers given to the Court under S. 36. That provision is to be found in S. 8 of the Act. S. 8 of the Act, contains two separate and contrasted provisions. The first provision is a provision for rehearing which has long had a place in the English statute from which most of the Act of 1919 has been borrowed.

The Court may review, rescind or vary any order made by it under its insolvency jurisdiction.

It was contended, I think, on behalf of the appellant that this provision would not apply to the Registrar because the Registrar was not the Court. I dissent from that proposition altogether. Just as the Registrar is the Court referred to in S. 36, so he is the Court referred to in sub-S. (1), S. 8. That is not because the Registrar in the ordinary way or on general principles is the Court but because S. 6 (1) of the statute has made him so as a matter of construction. I have no doubt, therefore, that that power is a power which is vested in the Registrar. I would further point out, that apart altogether from any statutory provision, in the absence of a provision to the contrary, a judicial officer who makes an ex-parte order imposes a burden on a person who is not present before him, and that when the person affected brings the matter to his notice, it is always open to him to undo the order on the ground that the original order was made on insufficient materials or that for other reason it should not have been made. I have no doubt, therefore, that one remedy of the appellant here was to go back to the Registrar under sub-S. (1), S. 8, or on the basis of the fact that the appellant was the subject of an ex-parte order, to get him to set aside that order by showing that it ought not to have been made.

Now, the provision in sub-S. (1), S. 8, is a provision of no narrow character. It is quite true that when a Court has decided a matter in the presence of all the parties it will not readily listen to the party who has lost, making an application that the matter be reopened and reheard. At the same time this consideration has no place in cases of ex-parte orders and it is well settled under the same words of the English section that the powers given to the Court from time to time to alter or modify its own orders is circumscribed by no narrow limits. The leading case is the case of *In re Tobias & Co Ex-parte Tobias* (2) where Mr. Justice Cane, a great authority on the Law of Bankruptcy, speaking of these very words [in my judgment, the verbal changes have no materiality for the present purpose] says this :

This section gives the Court a discretion of the widest and most far-reaching character,

and when properly exercised it is so beneficial in its operation and so calculated to advance the ends of justice, that I think it ought not to be restrained by construing in any niggardly spirit. One general—although not invariable—rule has been laid down for guiding the Court in the exercise of its discretion under this section, viz.,—that the Court should not grant a rehearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the Judge, when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the power to appeal is derived from the general maxim *interest reipublice ut sit finis litium*, and the maxim should not be extended beyond the limit of its utility. Where litigants have gone to trial and the Court has decided, between them, it is inexpedient that the defeated party should be allowed to reopen the litigation at any distance of time, when the position of the parties may have been materially affected by the lapse of time or the loss of material evidence. In such a case as this, however, where the refusal of the discharge operates as a punishment on the bankrupt, there can be no reason why the punishment should not be remitted at any distance of time, if it can be shown that the object of the punishment has been effected.

So that it must not be taken, so far as I am concerned, that the observation made by the learned Judge which I have already quoted is correct. It is not the case, in my judgment, that it is not sufficient to contend that the order of the Registrar is one which should not have been made. In my judgment, such an application, if made to the proper tribunal, would be an application which the Court would regard entirely on the merits remembering that it is necessary for the purpose of doing justice, particularly in cases of ex-parte orders. Now, that jurisdiction is clearly given to the same tribunal as made the order complained of. A case has been cited—the case of *Re Maugham* (3), where this has been laid down in England. In my judgment, the same meaning attaches to sub-S. (1), S. 8. It is contrary to the notion of a rehearing or of a review such as is contemplated in that sub-S. (1) that the application should be made to any tribunal except the tribunal that made the order. I do not mean to say that if an order is made by one Registrar his successor could not hear a motion to review. I do not mean to say that if an order is made by one Judge another Judge exercising the insolvency jurisdiction of the Court could not hear the review. But it must

(2) [1891] 1 Q. B. 463=60 L. J. Q. B. 244=8 Morrell 30=39 W. R. 399=64 L. T. 115.

(3) [1888] 21 Q. B. D. 21=57 L. J. Q. B. 487=5 Morrell 152=36 W. R. 846=59 L. T. 253.

be made to the same tribunal and it never was intended to introduce a confusion by having an order reviewed by a Judge if it was made by the Registrar. The particular case in which it is necessary to have recourse to a higher tribunal than the Registrar in order (to use a neutral word), that his order may be revised is the matter dealt with by sub-S (2), S. 8. That is in contrast to the first sub-section by reason of the fact that the right of appeal is given not merely to persons who are parties to the original order but to any person aggrieved thereby, and it is an important principle in insolvency that persons may be aggrieved by an order to which they are not parties; and if they are, there is a right of appeal. In this sub-section the Act of 1909 departs in some respects from its original. It introduces an express provision that the right of appeal shall lie from an order made by an officer of the Court empowered under S. 6. It says that an appeal shall lie to the Judge and that no further appeal shall lie except by leave of that Court. I ask myself what reason can there be in a case where the Registrar under the authority conferred upon him in pursuance of S. 6, has exercised the power of the Court given by S. 36 of the Act, to say that the right to approach the Judge was anything different from the right of appeal given by Cl. (a) of sub-S. (2), S. 8.

I am of opinion that by that clause it is clear that the Registrar and the Judge respectively are put in the position of an inferior and superior tribunal. It seems to me contrary to the intention of the enactment that a motion to a Judge to discharge an order of the Registrar should be deemed or taken to be in some other jurisdiction than the express jurisdiction under Cl. (2), sub-S. (a), S. 8 of the Act. For these reasons I find myself unable to agree in the opinion of the learned Sir Lancelot Sanderson, C. J., and Richardson, J., in the case of *Rai Sukh Lal Karnani v. Official Assignee of Calcutta* (1). The learned Chief Justice did not state what was the character of the application if it was not an appeal. The view taken by Richardson, J., is that it is open under sub-S. (1) to apply to the Judge to review an order of the Registrar. For the reasons I have given I am unable to accept this view. This answers the question which has been re-

ferred to the Full Bench by the Division Bench. In my opinion an application to the Judge exercising insolvency jurisdiction to discharge an order made by the Registrar for the attendance of a witness under S. 36 is an appeal under Cl. (1) of sub-S. (2) of S. 8.

I come now to deal with the question whether the Division Bench had any right to entertain an appeal from the order made by the learned Judge.

Two matters are involved in this question. It is quite clear that on the learned Judge's view he was bound to treat the case on the footing that he was not hearing an appeal under Cl. (a). On that view the question whether he should give leave to appeal to the Division Bench could not arise. The learned Judge dealt with the matter as though he had power under sub-S. 1, and having dealt with the matter as a review on the merits he dismissed the application. In my judgment the order which he made cannot be said to be an order of the character contemplated by Cl. (a), S. 8. If it were anything else it seems clear that it would fall under Cl. (b), sub-S. (2), S. 8 of the Act. He had treated this as though he had jurisdiction to make an order on review and from such order an appeal lies to this Court under Cl. (b). I am therefore of opinion that the Division Bench had jurisdiction to entertain an appeal from an order of the character which the learned Judge passed.

That being so, the next question is as to the correct way to deal with the appeal. The learned Judge, had he not been bound by the previous decision of the Division Bench, would have (and according to my view of the law should have) dealt with the application before him in this way. He should have said :

If this application is a request that I shall rehear the matter that has been dealt with by the Registrar I dismiss it with costs on the ground that I have no jurisdiction to entertain it. This matter, however, can be regarded as an appeal under Cl. (a), sub-S. (2), S. 8, from the Registrar. I will therefore enquire whether there is reasonable ground under S. 90, sub-S. (5) to extend the time for the appeal and if so I will hear the appeal upon its merits as an appeal.

Two questions, had he taken that course, would have arisen for decision. The first is whether the appellant has acted with due diligence in presenting his application to the Judge on 20th

July 1927 after being served with the order on the 4th of that month. In my judgment the correct answer to that question is that the appellant has exercised due diligence and the time under S. 101 must be extended in his favour.

The next question which the learned Judge would have had to put to himself and to decide was the question of the merits of the order made by the Registrar. In my opinion the correct answer to that question is that the order made by the Registrar is erroneous and oppressive. It is clear that the sole purpose of the examination asked for was a further enquiry into the matter of Rs. 1,50,000 loan upon the mortgage of 25th January 1921. As to that the creditor and it may be other creditors, were minded to make a case that no money had been lent, that the money which was made to appear as loan to the insolvent was really his own money and that the mortgage was a sham and fraud. That matter has been the subject of litigation since the year 1923. The mortgage suit has been decreed and the suit to set aside the decree has been dismissed and an appeal was pending from that decision in the ordinary way. Powers under S. 36 of the Act (Act 3 of 1909) are not to be used when parties are in litigation, as an extra method of discovery in addition to the ample facilities for discovery enjoyed by ordinary litigants under the Code of Civil Procedure. It has been held under a corresponding section of the English Act that while the trustee will be allowed to use the private examination section in order to make up his mind whether it is necessary to litigate or not to enable him to inform himself whether the circumstances in connexion with the debt were such as would entitle him to embark upon a litigation, once he has commenced litigation he must be content as a rule with the ordinary facilities for discovery and it is too late to urge that he should be allowed to cross-examine his opponent under the private examination section. I do not say that this principle can be regarded as a rigid rule, but it is a rule which has always to be borne in mind. I am bound to say that I have never heard of an examination in the exercise of the powers conferred under the private examination section when a mortgagee who is not bound to come into insolvency at all has brought

his suit successfully to realize his security and the Official Assignee as a defendant in that suit has been taking further steps to get the decree set aside. It appears to me that this principle has been well settled in the English cases, *Re: Franks Ex parte Gittings* (4). *In re Desportes* (5) and in many unreported cases. In this case the examination was sought at the last stage of this litigation. It was sought upon a petition which mentions nothing about the state of the litigation. In my judgment the application for an order to examine the appellant should have been refused. I think therefore that if the learned Judge had not been bound by the decision of the case in *Rai Sukh Lal Karnani v. Official Assignee* (1), he would have, and I think he ought to have on a correct view of the law, entertained this application as an appeal, extended the time for the appeal and set aside the order of the Registrar with costs. I may mention in this connexion that one of the things which apparently weighed with the learned Judge was that if the examination turned out to be unnecessary the respondent before him would be mulcted in costs. The learned Judge appears to have mistaken. I would only refer to the case of *Anshu Prokash Ghose. In re* (6) where the principles governing costs under the private examination section in the insolvency and companies jurisdictions were examined.

The next question in these circumstances is what were the powers of the Division Bench. It appears to me that as the learned Judge made an order from which a right of appeal arose to the appellant, it was in the power of the Division Bench to make the order which in its opinion the learned Judge ought to have made. It was not, in my opinion, necessary that it should confine itself to a declaration that the learned Judge had no power to entertain an application for review of an order made by the Registrar or that it should leave the present appellant to go back to the Registrar to have the order set aside or that it should send the case back to the learned Judge to be dealt with as an

(4) [1892] 1 Q.B. 646=9 Morrell 90=40 W.R. 384=66 L. T. 30.

(5) [1893] 10 Morrell. 40=5 R. 220=68 L. T. 233.

(6) [1920] 46 Cal. 795=53 I. C. 362=24 C. W. N. 68.

appeal. I think that it was open to it to make the order which the learned Judge ought to have made namely that the order of the Registrar be set aside.

Mr. Banerji has pointed out that by the Appellate Side rules of this Court there is a provision in Rules 2 and 3 of Ch. 7 which says that if the question of law arises in an appeal from appellate decree the Court shall state the points and refer the appeal for the final decision of a Full Bench and if the question arises in an appeal from an original decree the question of law alone shall be referred and the Full Bench shall return the case with an expression of its opinion upon the points of law for final adjudication by the Division Court which referred it.

Now the present case does not seem to me to be within the classes contemplated by these two rules. These rules refer to the well-known first and second appeals. This is in one sense a second appeal though it is not a limited or special appeal. In another sense it is no doubt a first appeal or an appeal from an original order though it is not in any view an appeal from the original decree. It seems to me that in these circumstances the Division Bench was quite entitled to do what it did namely to act under the general language of R. 1, Ch. 7 of the Appellate Side Rules.

Whenever one Division Court shall differ from any other Division Court upon a point of law or usage having the force of law, the case shall be referred for decision to a Full Bench.

In my opinion it is open to this Full Bench to make the order which the Division Court should have made in addition to answering the question referred by it. I would in this case in addition to giving the answer which I have indicated to the question which has been referred to the Full Bench make an order that the order by the Registrar for the examination of the appellant under S. 36, Presidency Towns Insolvency Act be set aside with costs which will include the costs before the learned Judge the costs of the Division Court and the costs of this Court.

C. C. Ghose, J.—I agree.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree.

Mukherji, J.—I agree.

*v.v. Reference answered and
Appeal allowed.*

A. I. R. 1928 Calcutta 792

SUHRAWARDY AND CAMMIADÉ, JJ.

Narayan Bera—Auction-Purchaser—Petitioner.

v.

Jharu Mandal of Baratola and others—Decree holders—Opposite Parties.

Civil Rule No. 1640 of 1927, Decided on 15th May 1928, against the order of 3rd Munsif, Contai, D/- 20th September 1927.

(a) *Civil P. C., O. 21, Rr. 100 and 101—A person purchasing non-transferable occupancy holding in decree against tenant—Landlord obtaining decree against recorded tenant and attaching holding—Purchaser is not judgment-debtor within R. 100, but one in possession on his own account.*

A non-transferable occupancy holding was purchased by a person in execution of a decree and obtained possession. It was subsequently attached by the landlord in execution of his decree against the recorded tenant for necessary rent.

Held: that the purchaser was not bound by the decree of the landlord, and he was not a judgment-debtor within the meaning of R. 100, O. 21. He was in possession of the property on his own account as required by R. 101; and so has right to proceed under R. 101, O. 21: *A. I. R. 1927 Cal. 156, Foll. 3 P. L. J. 579, Dist. 2 P. L. J. 478, Diss. from.* [P 794 C 1]

(b) *Civil P. C., S. 47—Person other than judgment-debtor in possession of property sold in execution—Executing Court cannot decide upon his title.*

Where a person other than judgment-debtor is in possession of the property sold, the executing Court has no jurisdiction to decide the question of his title, and the only remedy of the purchaser is a regular suit. [P 794 C 2]

Panchanon Ghose—for Petitioner.

Sarat Chandra Jana—for Opposite Parties.

Suhrawardy, J.—This is a revision application directed against the order of the Court below passed under O 21, R. 101, Civil P. C., restoring the opposite party in possession of the disputed property. The facts are that the opposite party Jharu Mandal claims to be the purchaser of a non-transferable occupancy holding in execution of a decree against the tenant. The landlord subsequently brought a suit for rent against the recorded tenant and obtained a decree and attached the holding. Jharu thereupon applied to deposit the amount of the decree in Court under S. 170, Ben. Ten. Act. His application finally came up for consideration before a Full Bench of this Court in *Jharu Mandal v. Khetra*

Mohun Bera (1). It was held that Jharu was neither a judgment-debtor nor a person whose interest was voidable on the sale, and therefore not entitled to make the deposit. Thereafter the petitioner obtained possession of the holding in suit through Court and thereby dispossessed the opposite party. The opposite party thereupon applied under O. 21, R. 100, to be restored to possession having been illegally dispossessed. The Court below has allowed his application and hence this rule.

It has been argued before us by the learned vakil for the petitioner that the opposite party being a transferee of a non-transferable occupancy holding is bound by the decree under which the petitioner purchased and as such he is not entitled to make an application under O. 21, R. 100. It is contended that the words "judgment-debtor" in O. 21, R. 100, include all persons of the character of the opposite party; and a great deal of argument has been advanced before us in support of the proposition that a purchaser of a non-transferable occupancy holding is a representative of the judgment-debtor under S. 47, Civil P. C., and as such he is one of the persons who come within the expression "judgment-debtor" as used in R. 100. But the real point in the case has been missed. The only question we are called upon to decide is as to whether the opposite party is a person who was in possession of the property on his own account or on account of some person other than the judgment-debtor. Under R. 97 where the holder of a decree for possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property he may make an application to the Court complaining of such resistance or obstruction. The Court is to hold an enquiry and if it finds under R. 98 that resistance was offered by the judgment-debtor or by some other person at his instigation it shall direct that the applicant be put into possession of the property. Similarly under R. 100 any person may make an application to the Court complaining of dispossession by the purchaser of immovable property in execution of a decree, but the nature of the enquiry will be, as indicated in

R. 101, namely whether the person making the application was in possession of the property before dispossession on his own account or on account of some person other than the judgment-debtor. We have therefore to see in the present case if the applicant is a person who was holding the property on his own account. This view is in accord with that taken by this Court in *Purna Chandra Kundu v. Monohini Devi* (2), whether he has any right to the property or is a mere trespasser is beside the scope of the present enquiry. It must, however, be noted in this connexion that according to the finding of the Court below the opposite party has been in possession of this property from 1907 and there has been no investigation in this case as to whether this long possession created any title in him other than that of purchaser of a non-transferable occupancy holding.

A large number of cases has been cited before us in support of the contention that the word "judgment-debtor" in R. 100 includes persons in the position of the opposite party. Before examining those cases one important fact should be noted that when the opposite party attempted to deposit money under S. 170, Ben. Ten. Act, it was held that he was not the judgment-debtor nor a person whose interest was voidable on the sale. But when he makes an application under R. 100, O. 21, Civil P. C., he is supposed to be a judgment-debtor. This apparently leads to anomaly. "Judgment-debtor" has been defined in S. 2 (10), Civil P. C., as any person against whom a decree has been passed or an order capable of execution has been made. The opposite party in the present case does not clearly come within the definition as given in S. 2 (10) of the Code. But it is contended that as a representative of the judgment-debtor under S. 47, Civil P. C., he must be considered as a judgment-debtor under R. 100. The considerations which have induced the learned Judges in some of the cases to hold that such a person may be a representative within S. 47, Civil P. C. do not arise in this case for in the first place the question does not refer to execution, satisfaction or discharge of a decree; and in the second place the auction-purchaser is a third party and not the decree-holder. But there are

(1) A. I. R. 1926 Cal. 934=54 Cal. 15.

(2) A. I. R. 1927 Cal. 156=53 Cal. 913.

two Patna cases which require special consideration. In *Panchratan Koeri v. Ram Sahai Singh* (3) it was held that the purchaser of the whole or part of an occupancy holding not transferable by custom is a representative of the judgment-debtor and entitled to object under S. 47, Civil P. C., to a sale of the holding in execution of a decree for rent. He is therefore not entitled to maintain proceedings under O. 21, R. 100. That was a case in which the decree-holder was the auction-purchaser. The learned Judges have not considered the real question that arises in such cases as to whether the purchaser there was a person who was holding the property on his own account within the meaning of R. 101. In *Bhikkin Jha v. Brij Behary Singh* (4) it was held that the words "judgment-debtor" in O. 21, R. 100 and 101, includes the representative of the judgment-debtor and all persons who are bound by a decree against the judgment-debtor and by a sale in execution of such decree, on the ground that the words "or representatives" in those rules had been omitted by oversight. I am not prepared to accept the reasoning; it seems to me to be of a speculative character. Once the Court started to supply words to the provisions of a statute on the ground that there was an omission by oversight the aim of the statute law to secure fixity of law would be frustrated and the Court would assume the function of the legislature.

Taking all the circumstances in the present case into consideration I have come to the conclusion that the opposite party in this case is a person who was in possession of the property before his dispossession by the petitioner on his own account and so was entitled to maintain an application under O. 21, R. 100, Civil P. C. In this view I would discharge this rule with costs, three gold mohurs.

Cammiade, J.—There can be no room for doubt that the words "judgment-debtor" in R. 100, O 21, Civil P. C., cannot include persons other than the actual judgment-debtor—the person against whom a decree has been passed. If the words had any other meaning the

words that precede them, namely, "where any person other than" would have no meaning. The matter is made perfectly clear by the provisions of the R. 101 which lay down that the Court may pass an order putting in possession any person making an application under S. 100 provided that that person is not the judgment-debtor and does not hold on the judgment-debtor's account. It is obvious that the executing Court can only execute a decree against the person against whom it has been passed. It has no jurisdiction to investigate the title of a third person and decide that the decree-holder has the right to recover possession against him. Even if the person in possession is a mere trespasser, it is not open to the executing Court to decide that that person has not title and to refuse to uphold the possession that he has. The law gives to the purchaser the right to bring a suit and that is the only remedy which the purchaser has if some person other than the judgment-debtor was in possession of the property. I therefore agree that this rule should be discharged.

S.N./R.K.

Rule discharged.

A. I. R. 1928 Calcutta 794

PAGE, J.

Sarat Chandra Mitra—Plaintiff.

v.

Charusila Dasi—Defendant.

Original Civil Suit No. 28 of 1922,
Decided on 24th May 1928.

(a) *Hindu Law—Will—Widow has no right to make will of moveable and immovable property inherited from her husband.*

A Hindu widow has a right to the fullest enjoyment of the immovable and moveable property that she has inherited from her husband. She is entitled to dispose of the corpus of such property inter vivos for certain restricted purposes, although she may alienate her own interest in the property for the period of the subsistence of her widow's estate. She cannot, however, dispose of the corpus of such property by her will. So long as she remains in enjoyment of the estate she may spend, or accumulate or, otherwise dispose of the income that accrues therefrom as she chooses. If at her death, or when her widow's estate is otherwise determined, it appears that she had not already disposed of the income current or accumulated which she was entitled to enjoy while she was alive, such income "will follow the estate from which it arose," and will pass to the heirs of her husband; 41 *All.* 350 and 10 *Bom.* 478, *Diss. from.*; 17 *Bom.* 690; 31 *Cal.* 214; 23 *Mad.* 453; and 8 *Mad.* 290; *Ref.*

[P 800 C 1]

(3) [1918] 3 Pat. L. J. 579=43 I. C. 969=4 Pat. L. W. 129.

(4) [1917] 2 Pat. L. J. 478=42 I. C. 526=1 Pat. L. W. 685.

(b) Will—Construction—Meaning of “money.”

Prima facie “money” means moneys in hand or receivable at call, but as “money” is a term of elastic construction, it will receive a wider or more restricted construction according to the context in which it is found and the intention of the testator to be collected from the will as a whole. (*English cases considered.*)

(c) Hindu Law—Stridhan.

Stridhan is not confined to six kinds of Manu.

S. C. Roy and J. C. Sett—for Plaintiff.

B. K. Ghose—for Defendant.

Judgment.—The decision in this case involves the solution of the problem whether a Hindu widow can dispose by will of income of property that she has inherited from her husband. Two issues fall to be determined:

(i) Did the testatrix possess testamentary capacity to dispose of the property in suit under her will?

(ii) Did she dispose of such property under the will that she executed?

The first issue raises a question of law of some nicety, and of general interest to the Hindu community; the second issue depends on the construction of the will.

I have had the advantage of an exhaustive argument upon the relevant authorities, but in India there is a divergence of opinion upon this subject, and it cannot be pretended, I think, that in the Privy Council the views which have been expressed by the Judicial Committee from time to time are all consistent or can wholly be reconciled.

Indeed, in 1826, Lord Gifford is reported to have observed in *Cossinauth Bysack v. Hurro Soondery Dossee* (1):

that in the contest for the possession of this property, between her (i. e., a Hindu widow) and the relations of her husband, she is entitled to the possession of the property, but that she is only entitled to enjoy it according to the rights of a Hindu widow, which rights it appears to me to be absolutely impossible to define.

I am disposed to be less pessimistic: but I approach the consideration of the first issue with diffidence; for, as I understand the problem, the solution is to be found not by following a process of logic or applying general principles of jurisprudence, but in a true conception of the peculiar nature of a widow's estate in Hindu law.

In *Profulla Kamini Roy v. Bhabani Nath Ray* (2) I endeavoured to state what I understood to be the general nature of the estate that a Hindu widow

(1) [1826] Clarke's Rules & Orders (App.X) 91.
(2) A. I. R. 1926 Cal. 121=52 Cal. 1018.

possesses in property inherited from her husband, and I do not propose to repeat or refer to what I said in that case, except to observe that the case of *Sreeramulu v. Kristamma* (3) has been overruled by a Full Bench of the Madras High Court in *Vaidyanatha Sastri v. Sabitri Ammal* (4). In considering issue 1 it is essential, I think, steadily to bear in mind that the estate of a Hindu widow is an anomalous estate which interrupts the normal course of succession, and that it has been created and tolerated by orthodox Hindus only because, as the Sage Birihaspati laid down

in scripture and in the code of law, as well as in popular practice a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of his pure and impure acts. Of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive?"

But, as Jimuta Vahana explains, the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it.

Again, Katyayana lays down

Let the childless widow possessing unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it. (Dayabhaga, Ch. 11, 1.56). Abiding with her venerable protector, that is, her father-in-law, or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage or sale of it at her pleasure (Dayabhaga, Ch. 11, 1.57.)

I desire to emphasize that the widow of a sonless Hindu was permitted to enjoy the usufruct of the property that she inherited from her husband solely for the maintenance of "half the body of her husband," and for the performance of such works of charity and religion as would tend to benefit her husband's soul; and not that thereby she should receive something in the nature of a gift to which she would possess an independent and unfettered title.

Now, the material facts are simple and undisputed. One Durga Prasanna Ghose, a wealthy Hindu inhabitant of Calcutta governed by the Bengal School of Hindu law, died on 4th July 1888, leaving him surviving two infant sons, Akshay Kumar Ghose and Dwijendra

(3) [1902] 26 Mad. 143=12 M. L. J. 197.

(4) [1917] 41 Mad. 75=33 M. L. J. 387=6 M. L. W. 542=42 I. C. 245=(1917) M. W. N. 653 (F.B.).

Kumar Ghose. By his will dated 25th June 1888 Durga Prasanna left all his property to his two sons absolutely.

On 26th March 1893 Dwijendra died intestate, and without issue, and upon his death his widow Srimati Priyatama Dasi became entitled to a widow's estate in the property left by her husband Dwijendra, which consisted of an undivided half share of the estate left by Durga Prasanna, the other half share belonging to Akshay. Disputes having arisen between them Akshay and Priyatama on 11th Kartik 1308 (corresponding with the 28th October 1901) executed an ekrarnama under which Priyatama granted to Akshay an ijara of certain immovable property, to an undivided half share of which she had succeeded on the death of Dwijendra, from 1st Kartik 1308 for the term of her natural life in consideration of a monthly rent of Rs. 1,250 payable within the first week of each Bengali month. In case of non-payment of the rent Akshay further agreed to pay interest thereon at 12 per cent per annum from the first day of the second week of each month until payment of the arrears was made. Akshay thus became entitled to the possession and management of the whole estate, and duly paid the said monthly sum of Rs. 1,250 to Priyatama until his death on 23rd November 1909. In due course letters of administration with the will of Akshay annexed were granted to his widow, the defendant. In the written statement it was alleged that on 6th July 1913 the defendant had adopted Debi Prasanna Ghose as a son to Akshay, but no evidence was led in support of this allegation at the trial, and no issue was raised in connexion with it. On 25th October 1919 (the 8th Kartik 1326) Priyatama Dasi died, having made a will on 7th September 1904 of which she appointed the plaintiff the sole executor and granted and devised to him "the whole of my properties and moneys of which I shall die possessed" upon certain trusts therein set out.

After the death of Akshay the defendant duly paid the rents due under the ijara to the end of Bhadra 1326 (17th September 1919). On 8th Kartik 1326, on which day Priyatama died, there were arrears of rent due and owing under the ijara for the month of Aswin which commenced on 18th September 1919, and for

eight days in Kartik, and the present suit was brought to recover these sums and interest thereon as provided in the ijara, amounting in all to Rs. 1,979-2-3.

Issue 1, therefore, that arises is whether Priyatama was competent to dispose by will of the arrears of rent due under the ijara at Priyatama's death which represented income that had accrued from property which she had inherited as the widow of Dwijendra. Now, the answer, it seems to me, depends upon whether the sum in suit formed part of the stridhan of Priyatama, and that again depends upon what this term comprehends. For, if the sum in suit was Priyatama's stridhan, it is not and cannot be pretended that she was not entitled to it in her own absolute right, or that she was not at liberty to dispose of it either by a transfer inter vivos or under her will.

On the other hand, a will speaks from the death of the testator, and, I apprehend, it is opposed to Hindu practice and repugnant to Hindu law that a woman possessing a widow's estate should dispose by will of any property that she does not hold in her own absolute right. What, then, is stridhan or woman's property according to the Hindu law prevailing in Bengal?

Surely it is not confined to the "sixfold property of a woman" described by Manu and Katyayana: Dayabhaga, Ch. 4 (1) (4) for

since various sorts of separate property of a woman have been thus propounded without any restriction of number, the number of six (as specified by Manu and others) is not definitely meant. But the texts of the sages merely intend an explanation of woman's separate property. That alone is her peculiar property, which she has power to give, sell, or use, independently of her husband's control.

Dayabhaga, Ch. 4, (1) (18); Mitakshara, Ch. 2 (11) (1) and Ch. 2 (11) (2). In the Mitakshara (Ch. 2, (11) (2)), it is stated that stridhan according "to Manu and the rest" includes also property which she may have acquired by inheritance, purchase, partition, seizure, or finding.

A consideration of the relevant texts and authorities leads to the conclusions that a widow's stridhan is not restricted to the sixfold denomination of Manu, but that the term must receive a wider construction, and means property which if undisposed of at her death will pass to her heirs and not those of her husband.

That this is so, I think, is apparent from the decision of the Privy Council in *Brij Indar v. Rane Janki Koer* (5).

Now, it is to be observed that in respect of property that has passed to a Hindu widow by inheritance the law as laid down in the text from Katyayana to which I have referred (Dayabhaga, Ch 11, l. 56) is inconsistent with that contained in the Mitakshara, Ch. 2 (11) (2). It is idle to speculate whether a widow's rights under the Benares school, according to a true view of this disputed passage in the Mitakshara, are different from those to which she is entitled in Bengal, for the subject is no longer open to discussion. As Lord Lindley has pointed out :

The law of inheritance in the case of women is left in great obscurity by the Mitakshara. The subject is dealt with in Ch. 2, S. 11 and has more than once been considered by this Board. The nature of a widow's estate was settled in two cases in *Mt. Thakur Dayhee v. Rai Bahadur Ram* (6), and *Bhugwandeem Doobey v. Myna Bae* (7), and the nature of a daughter's estate was considered in *Chottay Lal v. Chunno Lal* (8). It was there decided that under the law of the Mitakshara a daughter's estate inherited from the father is a limited and restricted estate only, and not stridhan. Upon her death the next heirs of her father succeed thereto; *Raja Chellikani v. Raja Chellikani* (9).

In *Bhugwandeem Doobey v. Myna Bae* (7) Sir James Colville observed that the text of the Mitakshara, on which, as has already been shown, the appellant must mainly rely, is paragraph 2, S. 11, of Ch. 2, which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between moveable and immovable property; yet it is settled, beyond all question, as we have already stated, that the immovable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her stridhan. The legitimate inference from this seems to be that neither moveable nor immovable property inherited from her husband forms part of a woman's peculium or stridhan.

Again, later, his Lordship adds :

The preponderance of authority is certainly in favour of the proposition that, whether the widow has or has not the power to dispose of inherited movables, they as well as the immovable property, if not disposed of, pass on her death to the next heirs of the husband.

(5) [1877] 5 I. A. 1=3 Suther 474=3 Sar. 763 (P. C.).

(6) [1867] 11 M. I. A. 139=10 W. R. P. C. 3=2 Suther 49=1 Sar. 231 (P. C.).

(7) [1867] 11 M. I. A. 487=9 W. R. 23=2 Suther 124=2 Sar. 327 (P. C.).

(8) [1878] 4 Cal. 744=6 I. A. 15=3 Sar. 880 (P. C.).

(9) [1902] 25 Mad. 676=29 I. A. 156=8 Sar. 286 (P. C.).

Now, it may be that a widow governed by a personal law other than that of the Bengal or the Benares schools has wider or different rights with respect to the disposition of property that she has inherited from her husband (*ibid*, p. 508). On the other hand, it may not be so : see *Gadadhar v. Chandrabhaga Bai* (10), *Pandharinath v. Govind Shivram* (11), *Narasimha v. Venkatadri* (12), *Buchi v. Jagapathi* (13). For the purposes of this case, however, it is unnecessary to decide the question, although it is not un-instructive to observe that the Bombay and Madras cases relating to a widow's right to property inherited from her husband do not appear to rely so much upon any peculiarity in the law in those Provinces as upon the general principles which affect and regulate the rights of widows governed by the Bengal and Benares schools : see *Rivett Carnac v. Jivibai* (14), *Gadadhar v. Chandrabhaga Bai* (10), and the Madras cases *infra*. Be that as it may, in *Mt. Thakoor v. Rai Baluk Ram* (6) Sir James Colville stated that

The result of the authorities seems to be, that although according to the law of the Western schools the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the Law of Bengal, she is by the one law, as by the other, restricted from alienating any immovable property which she has so inherited; and that on her death the immovable property, and the moveable, if she has not otherwise disposed of it, pass to the next heirs of her husband : see also Macnaughton's Hindu Law (Edn. 1829) : Vol. 1, at p. 20).

It follows, therefore, that a Hindu widow has no power to dispose by will of the corpus of either moveable or immovable property inherited from her husband : *Gadadhar v. Chandrabhaga Bai* (10), *Chamanlal v. Ganesh* (15), *Durga Nath Pramanik v. Chintamani Dassi* (16), *Narasimha v. Venkatadri* (12), *Durga Sundari Sen Gupta v. Ram Krishna Poddar* (5). And the reason is well put, if I may be allowed to say so, by N. R. Chatterjea, J., in *Durga Sundari's case* (17) ;

A Hindu widow can also dispose of her stridhan property by will to the same extent as

(10) [1892] 17 Bom. 690 (F.B.).

(11) [1907] 32 Bom. 59=9 Bom. L. R. 1305.

(12) [1884] 8 Mad. 290.

(13) [1884] 8 Mad. 304.

(14) [1886] 10 Bom. 478.

(15) [1904] 28 Bom. 453=6 Bom. L. R. 430.

(16) [1903] 31 Cal. 214=8 C. W. N. 11.

(17) Second Appeal No. 2352 of 1909.

she can dispose of it during her life-time ; in other words the power of devise is co-extensive with the power of gift. The principle, however, upon which a transfer inter vivos by a Hindu widow with the consent of the nearest reversioners passes an absolute title to the transferee cannot apply when inherited properties are sought to be bequeathed by will. During her lifetime the widow may relinquish her estate in favour of the next male heir of her husband, the succession is thereupon accelerated, and the reversioner gets an absolute estate. A will, however, can operate only on death, and the interest of a Hindu widow in properties inherited by her ceases on her death, and there is thus nothing left upon which her will can operate. At the time when the will comes into operation she has no right whatever ; and she cannot by will dispose of what does not belong to her.

Now, upon what principle of Hindu law is a widow entitled to dispose by will of the income of such property ? I know of none ; indeed, to me it appears that to permit her to do so is to act in violation alike of Hindu law and practice.

Bearing in mind that the widow's estate passed to her for support, and not as a gift from her husband, it would, I think, appear to an orthodox Hindu inconceivable that she should be permitted to dispose after her death of property which she was only entitled to enjoy during her life.

The very question to be determined was put and answered in *Kundrap Singh v. Mohon Lal Khan* (18) which was decided by the Sudder Dewanny Adawlut in 1815. In that case the widow of a childless Hindu zemindar on the day before her death left a will by which she devised to a stranger inter alia

all the property real and personal, with the profits accruing therefrom to which she had succeeded on the death of her husband, together with the profits which had accrued therefrom.

It was held that she was not at liberty to make a will affecting the landed and other property left by her husband, into the possession of which she came on his death, nor affecting the profits of it, nor affecting her own acquisitions made by means of the landed property to which she had succeeded, or by means of its profits. As, therefore, the gift or disposition by will of all three descriptions of property abovenamed (viz., landed property devolved on her from her husband, personal property, and her acquisitions made by means of the inherited estate, and its profits) is illegal, no part of that property goes to the donee.

This decision, in my opinion, is in consonance with the true conception of

a widow's estate in Hindu law. Now, the source of what, with all due deference, I regard as the fallacious doctrine to be found in some of the cases, namely that the profits current or accumulated of property which a widow has inherited from her husband passed to her in her absolute proprietary right can be traced to the difficulty which the Courts experienced in placing a limit upon the proportion of the income which the widow reasonably might expend for her maintenance and charitable purposes. Eventually in *Cossinath Bysack v. Hurro Soondery Dossee* (1) and *Hurrydass Dutt v. Uppoornath Dossee* (19), it was held that the widow was entitled to a full right of enjoyment of such property for her life, and

it is necessary to show that there is danger to the property from the mode in which the party in possession is dealing with it, in which case, and in such case only, the Court will interfere.

Accordingly, in 1868, when the question arose in *Chundrabulee Debia v. Brody* (20) as to whether a judgment-creditor of the widow or the heir of her husband was entitled to execute a decree for mesne profits that the widow had obtained before her death, Glover, J., observed that

a Hindu widow with a life-interest in her deceased husband's estate would be entitled to make the fullest use of the usufruct of that estate : and it seems doubtful, under the late rulings of the Privy Council whether she could be in any way restrained however wasteful her expenditure so long as she kept within the limits of her income and made no attempt at alienation. If on the contrary she chooses to economize she can during her lifetime give away her savings to anyone she pleases ; but if she has left savings undisposed of at the time of her death these would form part of the estate and go with that estate to the next heir of her deceased husband.

His Lordship added that it was never contemplated that she should expend the produce of her estate wastefully or do more than support herself in a decent and proper manner : and that she should leave to her own relatives or convert into her own stridhan the accumulations she might have made appears to me opposed to every principle of Hindu law as applied to widows.

In 1874 a case of considerable importance in connexion with issue 1, was decided by the Privy Council, *Gonda Kooer v. Kooer Oodey Singh* (21). In that case a widow purchased property out of the accumulated income from her widow's

(18) [1815] 2 Macnaughten's Precedents of Hindu Law 258.

(19) [1856] 6 M. I. A. 433=1 Sar. 551 (P. C.).

(20) [1868] 9 W. R. 584.

(21) [1874] 14 B. L. R. 159=3 Sar. 370 (P. C.)

estate, and left by her will "all the property which she had power to dispose of." It was held that on her death the property passed to her husband's heirs, Sir Robert Collier observing that

it is true that she made a will in her son's favour, but it contains no specific gift of the property in question and might well have been intended to apply to any property of her own which may have belonged to her as her stridhan.

In 1875 in *Mt. Bhagbutti Debi v. Bhol Nath Thakoor* (22) the parties appeared to have been governed by the Mithila law, and the Privy Council decided that the widow took a life estate in the property in question, not as a widow but under a family arrangement. Sir Robert, Collier, however, observed that if she took the estate only of a Hindu widow one consequence, no doubt would be that she would be unable to alienate the profits or that at all events whatever she purchased out of them would be an increment to her husband's estate.

I think that in that case the rule was laid down too broadly, for a widow may dispose of the income of property inherited from her husband inter vivos; but for the purpose in hand that is immaterial.

In 1883 *Isri Dut Koer v. Hansbutti Koerain* (23) was decided by the Privy Council, in which the question was whether two Hindu widows were entitled inter vivos to give to the daughter of one of them property purchased out of the income of property inherited from the husband. Sir Arthur Hobhouse observed that

the question was argued at the Bar as though it were necessary to divide all the property of a widow into two classes; one being her stridhan and the other her husband's estate over which she has the widow's right and no more. But the very question is whether having regard to the widow's freedom in enjoying her husband's property and to her established right to alienate her own interest in it she has not a kind of property the nature of which must remain undecided till her disposal of it or her death.

His Lordship further observed that : to decide this question it is necessary to examine the authorities, which are by no means in accord. But their Lordships do not treat as authorities on this question the numerous cases cited at the Bar, to show that a widow's savings from her husband's estate are not her stridhan. If she made no attempt to dispose of them in her lifetime, there is no dispute but that they follow the estate from

which they arose. The dispute arises when the widow, who might have spent the income as it accrued, has in fact saved it and afterwards attempts to alienate it.

His Lordship added that it was not : possible to lay down any sharp definition of the line which separates accretions to the husband's estate from income held in suspense in the hands of the widow, as to which she has not determined whether or no she will spend it : see also *Sridhar Chattopadhyaya v. Kalipada Chuckerbutty* (24) ; *Bhagabair Koer v. Sahudra Koer* (25)

Now, to my mind, it is not altogether clear what the Judicial Committee intended to convey by the last passage that I have cited. Their Lordship, stated that they felt the force of Ainslie, J's reasoning on this point, and the relevant passage in Ainslie J's judgment appears to be :

that, if it is within a Hindu widow's power to dispose of the surplus profits from her husband's estate remaining after due provision has been made for the duties which the widow is bound to perform, it must be equally within her power to do so, whether she does it at once as the profits reach her, or whether she allows them to accumulate I can conceive of no reason for not allowing her to accumulate the necessary funds to buy it, (i. e., property), herself, and give it away. Indeed in this latter case, the reversioner has an advantage, for if the widow happens to die without disposing of the fund, or that into which it may be converted, it will come to him Such property never passes as stridhan to the heirs of the widow, but goes, if undisposed of by the widow in her lifetime, to the heirs of the husband The fact that unappropriated profits or properties purchased, and not disposed of in the widow's lifetime, do not pass as stridhan may be explained on the theory that when a widow has at her death left money accumulated or property purchased out of surplus profits, and not appropriated to any person during her life, it was her intention to add such money or properties to the estate, and to abstain from exercising her full rights over them : *Hunsbutti Kerain v. Ishti Dutt Koer* (26).

I am of opinion that the Judicial Committee did not intend to lay down that :

income held in suspense in the hands of the widow as to which she has not determined whether or no she will spend it.

would on her death pass to the widow's heirs. Indeed, so to hold would be to render the judgment self-contradictory, for such a view is inconsistent with the decision of their Lordships that :

if she has made no attempt to dispose of them (i. e., the profits) in her lifetime, there is no dispute but that they follow the estate from which they arose.

(22) [1875] 1 Cal. 104=2 I. A. 256=24 W. R. 168=3 Sar. 528 (P.C.).

(23) [1883] 10 Cal. 324=10 I. A. 150=13 C. L. R. 418=(P.C.).

(24) [1911] 16 C. W. N. 106=11 I. C. 971=15 C. L. J. 12.

(25) [1911] 16 C. W. N. 834=13 I. C. 691.

(26) [1879] 5 Cal. 512=4 C. L. R. 411.

In my opinion, the law to be collected from the authorities is to the following effect : that a Hindu widow has a right to the fullest enjoyment of the immovable and moveable property that she has inherited from her husband, but that, except in respect of moveables which, owing to their perishable nature cannot be enjoyed without being consumed, she is only entitled to dispose of the corpus of such property inter vivos for certain restricted purposes, although she may alienate her own interest in the property for the period of the subsistence of her widow's estate. She cannot, however, dispose of the corpus of such property by her will. Further, in fulfilment of the purpose for which the widow's estate was granted to her she is entitled to enjoy the usufruct of the property while she possesses a widow's estate ; and so long as she remains in enjoyment of the estate she may spend, or accumulate, or otherwise dispose of, the income that accrues therefrom as she chooses. *Prima facie* any income that she has not spent will pass on her death to her husband's heirs. But if during her lifetime she has so dealt with the unexpended income that the reasonable inference to be drawn from her acts is that she has disposed of it in a way that is inconsistent with an intention on her part to treat it as part of her husband's estate, such a disposition will be valid and binding upon the reversionary heirs of her husband. On the other hand, if at her death, or when her widow's estate otherwise is validly determined, it appears that she had not already disposed of the income current or accumulated which she was entitled to enjoy while she was alive, such income "will follow the estate from which it arose", and will pass to the heirs of her husband.

In other words, her capacity to dispose of such income is commensurate with her capacity to enjoy it. It follows that she is impotent to dispose of such income by will, for her will speaks from the time of her death, and when she purports by her will to dispose of the income the widow no longer is able to enjoy the property which passed to her for her maintenance as the "other half of her husband," and she is then incapable of enjoying the income, whether she had received it in her lifetime, or whether, as in the present case, she never had it in her possession while she was alive.

By merely making her will it is obvious that she did not dispose of the property inter vivos or during her lifetime, for she may revoke her will before her death, and it is in this sense, I think, that Sir Arthur Hobhouse referred to the income of her widow's estate as :

a kind of property the nature of which must remain undecided till her disposal of it or her death : (ibid, p. 334)

In *Hunsbutti Kerain v. Ishri Dutt Koer* (26) Ainslie J., expressed a tentative opinion that, although accumulations of such income would not pass as stridhan, the widow might dispose of them under her will, but the learned Judge conceded that it would not be easy to reconcile such a view "with what he believed" to be the universal custom of "the country." I go further, for I would add that, in my opinion, so to hold would be to run counter also to the true conception of a widow's estate in Hindu law. I must refer now to two cases which appear to be direct authorities in opposition to the principles that I have endeavoured to explain. *Sitaram v. Dulam Kunwar* (27), and *Rivett Carnac v. Jivbar* (14). In *Sitaram v. Dulam Kunwar* (27) one of two widows jointly entitled to a widow's estate in property inherited from their husband, out of the income of the estate in her hands paid a sum of money due for Government revenue from the sons of the other widow and the sons' nephews. She afterwards obtained a decree against the persons for whose benefit the payment had been made, but died before the decree was satisfied. It was held that the heirs of the widow were entitled to execute the decree upon the ground that the right to realize this debt was "personal property (not necessarily stridhan)" of the widow who had obtained the decree. The decision in this case is in direct conflict with that in *Chundrabulea Debra v. Brody* (20), and with what I conceive to be the principles of Hindu law, and in my opinion, ought not to be followed. In *Rivett Carnac v. Jivbar* (14) the facts were not dissimilar from those in the present case, for the widow had orally agreed with one Kharva Bhana Dhunji that he should collect the rents of part of

the property of which she possessed a widow's estate, and in consideration of receiving the right of collection Kharva agreed to make to the widow certain fixed monthly payments. At the time of the widow's death there were arrears due to the widow from Kharva under the said agreement, which Kharva after the widow's death paid to the husband's heir. It was held, however, that the arrears formed part of widow's estate. In that case, as in the present case, the widow ex-concessis had not disposed of the income in her lifetime, and with all due respect for the opinion of Sargent, C. J., and Farran, J., I think that it ought to have been held that the arrears fell into the husband's estate. *Rivet Carnac v. Jivibai* (14) has been animadverted upon by Beaman, J., in *Ganpatrao v. Vaman Rao* (28), and explained by Mookerjee, J., in *Bhagabati Koer v. Sahudra Koer* (25) upon the footing that the parties may have been governed by the Mayukha and the possession of Kharva was in law the possession of the widow whose agent Kharva was. But, with due deference, it surely can make no difference whether the arrears were deemed to have been received by the widow or not, for it was not pretended that she had disposed of them in her lifetime, and unless the decision can be supported under a system of law peculiar to the Bombay Presidency (which the learned Judges did not purport to apply, and which, as at present advised, I should hesitate to affirm) in my opinion that case was not decided in accordance with the general principles of Hindu law. I am, of course, aware of the decisions of the High Court of Madras, of which I think the leading case is *Subramanian Chetti v. Arunachelam Chetti* (29), in which it has been held that the income of property inherited by a widow from her husband is her stridhan upon the ground that

whether as a matter of common-sense or of legal principle, but one view is possible, viz., that money so received is the absolute property of the woman descendible as such to her own heirs : see also *Akkanna v. Venkayya* (30), *Sri Vikrama Deo v. Vikrama Deo* (31), *Parthas-*

arathy v. Venkatadri (32) ; see however, *Ayiswaryanandaji v. Sivaji* (33).

Again, in *Akkanna v. Venkayya* (30) it was laid down that the acquirer of property presumably intends to retain dominion over it, and in the case of a Hindu widow the presumption is none the less so when the fund with which the property is acquired is one which, though derived from her husband's property, was at her absolute disposal.

Now, the principles of law applicable to a Hindu widow's power of disposition may be different in Madras from those that prevail in the case of widows governed by the Dayabhaga or the Mitakshara (although it must not be understood that I am satisfied that any such difference exists), but if and in so far as the Madras decisions purport to lay down the above propositions as matters of general Hindu law, with all deference I venture to think that they do not correctly state the law of India.

In support of the first proposition two decisions of the Judicial Committee are relied on : *Soorjeemoney Dossee v. Denobundoo Mullick* (34) and *Sowdamine Dossee v. Administrator-General of Bengal* (35). In the first case it was held that the widow was "entitled absolutely in her own right" to certain accumulations of income that had accrued after her husband's death. It is clear, however, from the decisions of later Boards that the Judicial Committee have not regarded that decision as a statement of the general law binding upon them, and have resiled from it. Indeed, it has been pointed out that there were no questions in that case as to any conflicting rights between her heirs and the reversionary heirs of her husband, and their Lordships cannot, therefore, regard this case as a conclusive, or even a direct authority upon the question : per Sir Robert Collier in *Gonda Koer v. Koer Oodey Singh* (21)

while in *Isri Dut v. Hansbutti Koerain* (23) Sir Arthur Hobhouse observed that in *Sorjeemani Dasi's* case (34) all that was done, was to recognize her right to the full usufruct and control" of the accumulations : See also per Jackson, J., in *Puddomonee Dossee v. Durwanath Biswas* (36).

(32) A. I. R. 1922 Mad. 457 = 46 Mad. 190 (F.B.).

(33) A. I. R. 1926 Mad. 84 = 49 Mad. 116.

(34) [1862] 9 M. I. A. 123 (F. C.).

(35) [1892] 20 Cal. 433 = 20 I. A. 12 = 6 Sar. 272 (P.C.).

(36) [1876] 25 W. R. 335.

(28) [1908] 10 Bom. L. R. 210.

(29) [1904] 28 Mad. 1 (F.B.).

(30) [1901] 25 Mad. 351 = 12 M. L. J. 5.

(31) [1918] 33 M. L. J. 665 = 43 I. C. 679 = (1918) M. W. N. 69.

In *Sowdaminee Dossee v. Administrator-General of Bengal* (35), as pointed out by Lord Shand, in delivering the judgment of the Board, the circumstances in which she (i. e., the widow) obtained possession of this fund were very peculiar.

The widow had received the accumulations of the income that had accrued since her husband's death under a deed of arrangement by which a family dispute was settled. During the dispute the widow claimed this fund as her absolute property, and the deed of arrangement proceeded upon that footing, the question before the Judicial Committee being whether in the circumstances the fund was to be regarded as an accretion to the corpus of the husband's estate. Lord Shand stated that she claimed this income as her absolute property, and their Lordships can see nothing in the language of the deed of agreement, or in the transaction with Sham Churn Mullick, which can support the appellant's contention that she agreed to receive this income as capital in which she should acquire only the estate of a Hindu widow.

Their Lordships, therefore, held that the fund

was received as income which, under the arrangement with Sham Churn Mullick, was her absolute property.

As I understand the decision in that case their Lordships were content to determine the issue that was before them, namely, whether the fund was to be treated as an accretion to the corpus of the husband's estate, or whether she received it as income to which under the deed of arrangement she obtained an absolute right: see *Mt. Bhagbutti Dae v. Chowdry Bholanath Thakoor* (22), and did not affect to determine any general principles relating to the power of disposition possessed by a widow under the Hindu law.

The second proposition, namely, that a Hindu widow must be presumed to intend to retain dominion over the income of property inherited from her husband follows as a corollary to the first, and in support of it reliance is placed upon the following dicta of Lord Phillimore in *Raja of Ramnad v. Sundara Pandiyasami* (37):

Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been

cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property.

Reference appears to have been made in the course of the argument of counsel for the appellant to the case of *Akhanna v. Venkayya* (30), but at the hearing before the Judicial Committee the question that called for consideration was whether, having regard to the form of the pleadings and the course of the proceedings, the plaintiff was entitled to maintain the suit for arrears of income. In my opinion their Lordships did not pretend to consider, much less to decide, whether the proposition of law for which *Akhanna v. Venkayya* (30) had been cited was correct; and it must not be taken that Lord Phillimore in that case intended to throw any doubt upon what I think now is clearly established, that the unexpended income derived from property inherited by a widow from her husband will follow the corpus, and on the death of the widow will descend to the husband's heirs, unless it is proved that during her lifetime the widow had disposed of it in such a way that the true inference from the facts is that she intended to treat it as though it were her own property. *Naba Kishore v. Upendra Kishore Mandal* (37) and cases cited supra.

As I apprehend the matter, however, the important circumstance to bear in mind in this connexion is not the nature of any presumption that may arise, but that the validity of a widow's dispositions is made to depend upon her intention to be inferred from the way in which she has treated the income. But if that be the test, (and in the present state of the authorities I am content to assume that it is) it is manifest that a widow does not receive the income as her own absolute property. For if she obtains an absolute proprietary title to the income and profits of the property as the heiress of her husband, how can her intention affect the course of succession or the validity of her dispositions? If it is her stridhan it is her own absolute property with which she can deal as she chooses, and which, if undisposed of, at her death will descend to her heirs. Her intention is utterly immaterial, for the absolute title passed to her, not because of any-

(37) A. I. R. 1918 P. C. 156=42 Mad. 581=43 I. A. 64 (P. C.).

thing that she intended or did, but because she was the heiress of her husband. It is settled law, however, that if such unexpended income has not been disposed of by the widow in her lifetime it will follow the corpus of the estate, and descend, not to her heirs, but to the heirs of her husband, and that the validity of her dispositions inter vivos depends upon whether the true inference to be drawn from her treatment of the income is that she intended that the property should not form an accretion to her husband's estate. For these reasons it is clear, to my mind, that such income is not and cannot be her stridhan, and is not property to which by inheritance she obtained an absolute proprietary title. Bearing in mind what I regard as the cardinal factor in the situation, that a widow was intended to receive a right merely to enjoy the usufruct of her husband's property during the subsistence of her widow's estate, I am clearly of opinion that when she ceased to possess the capacity to enjoy the income she lost the power to dispose of it, and, as her will must needs speak from her death, that a Hindu widow is incompetent to dispose by will of the income derived from her husband's estate, whether such income had been received by her during her lifetime or had accrued due to her at the time of her death. It becomes unnecessary, therefore, to consider issue 2 whether the arrears of rent in suit passed under the terms of Priyatama's will to the plaintiff as her executor. But as the issue has been argued fully and strenuously it is desirable, I think, that I should state the opinion that I have formed upon it.

Now under the will Priyatama left to the plaintiff as the sole executor "the whole of my properties and moneys of which I shall die possessed." By a declaration of 7th September 1904, Priyatama had expressed the intention to deal with the said abovementioned properties, (i. e., certain immovable properties which this suit does not affect) and money including the said annual rent of Rs. 15,000 payable to me under the terms of the lease absolutely and independently of my husband's family, and so as to debar anyone after my death from claiming the said properties and moneys as reverting to the estate of my husband, and that I propose to and shall by will or deed dispose of the said properties and moneys in such manner as I shall consider proper.

At the commencement of her will,

after specifically referring to the said properties and annual income and the declaration of 7th September 1904, Priyatama left "the whole of my properties and moneys of which I shall die possessed" to the executor of the will upon certain trusts.

Having regard to the provisions of the will it cannot, I think, reasonably be contended that the arrears of rent in suit formed part of the "properties" of the testatrix, but the question is, 'were the arrears "moneys" of which she died possessed? Now, "money" is a more comprehensive term than "cash," *Sarojini v. Gnanendra* (38). As long ago as 1725 it was held to mean "ready money and money due" and, having regard to the terms of the will then under consideration to include

arrears of rent, since these must be looked upon by all the rules of construction to be Mrs. Shelmer's money at the time of her death per Baron Gilbert in *re Mary Shelmer's will* (39).

The rule to be drawn from the authorities is that prima facie "money" means moneys in hand or receivable at call, but as "money" is a term of elastic connotation it will receive a wider or more restricted construction according to the context in which it is found, and the intention of the testator to be collected from the will as a whole: *Rogers v. Thomas* (40), *Langdale v. Whitfeld* (41), *Collins v. Collins* (42), *Byrom v. Brandreth* (43), *Re Cadogan* (44), *in re Townley* (45). In the present case, I have no doubt that Priyatama intended that the arrears of rent in suit should be included in the expression "moneys of which I shall die possessed," and that such arrears purported to pass under the will to the plaintiff as executor. But, as I hold that Priyatama was not competent to dispose by will of the sums in suit the claim fails, and the suit is dismissed with costs.

A.L./R.K.

Suit dismissed.

(38) [1915] 23 C. L. J. 241=33 I. C. 102.

(39) [1706] Gibert Chan. 200.

(40) [1837] 2 Keen. 8.

(41) [1858] 4 K. L. J. 426=4 Jur. (n.s.) 706=6 W. R. 862=27 L. J. Ch. 795.

(42) [1871] 12 Eq. 455.

(43) [1873] 16 Eq. 475.

(44) [1883] 25 Ch. D. 154=53 L. J. Ch. 207=32 W. R. 57=49 L. T. 666.

• (45) [1884] 53 L. J. Ch. 516=32 W. R. 549=50 L. T. 394.

A. I. R. 1928 Calcutta 804

B. B. GHOSE AND BOSE, JJ.

Khatemannessa Bibi — Plaintiff—Appellant.

v.

Upendra Chandra Mandal and others — Defendants—Respondents.

Appeal No. 407 of 1926, Decided on 5th September 1928, from original order of Sub-Judge, Zillah Burdwan, D/- 20th August 1926.

(a) *Civil P. C., S. 2(2)* — Order limiting right to recover mesne profits—Order is of a nature of a decree and is appealable.

An order limiting the right of the decree-holder to recover mesne profits for a certain period is of the nature of a final decree as defined in S. 2 and is appealable as such : 23 All. 152 (P. C.), *Foll.* [P 804 C 2]

(b) *Appeal—Competency—Appeal from preliminary order in execution* — Execution subsequently dismissed—Appeal is still maintainable—Execution will proceed as per appellate judgment—*Civil P. C., S. 97.*

After the order limiting right of mesne profits and subsequent to the appeal of the decree-holder, the Judge proceeding with the execution required the decree holder to put in the Commissioner's fees for making enquiry according to the terms of his order. The decree-holder failed to put in the money and, therefore, the execution case was dismissed.

Held : that the mere fact that the Judge dismissed the application for execution subsequently would not debar the decree-holder from maintaining his appeal. If the appeal succeeds, the whole of the judgment of the lower Court goes and the execution will be proceeded with in accordance with the judgment of Court of appeal. [P 804 C 2 ; P 805 C 1]

(c) *Decree—Setting aside—Appellate decree being executed by lower Court* — Executing Court from other materials finding that certain matters were not put before the appellate Court and so modifying the decree as the appellate Court would have passed if the matters were put before it—Executing Court's act was without jurisdiction — Proper course was review—*Civil P. C., O. 47, R. 1.*

The decree of the High Court ran thus : "It is ordered and decreed that the plaintiff do get khas possession against the tenant defendants, and it is further ordered and decreed that the plaintiff do realize mesne profits for three years prior to the institution of the suit, the amount to be determined in execution proceedings." The Judge upon other materials placed before him in execution proceedings found that the plaintiff had entered into a compromise with certain persons regarding certain lands and he came to the conclusion that as the compromise was not brought to the notice of the High Court, the High Court had made the decree as stated above.

Held : that no doubt, if the compromise had been brought to the notice of the High Court,

the decree might have been made otherwise. But the Subordinate Judge had acted absolutely without jurisdiction in modifying the decree of the High Court in the way he thought that the High Court should have made its decree. If the defendant judgment-debtors had suffered in any way by reason of anything which the plaintiff had done and which was not brought to the notice of the High Court when the case was heard, the proper way was to have the decree amended either by way of review or by some other legal proceeding. The defendants not having done that, could not ask the Subordinate Judge to amend the decree of the High Court in the manner which the Subordinate Judge thought just and to execute the decree in that way. There was not ambiguity in the decree and the clear duty of the executing Court was to execute the decree as it stood. [P 805 C 1]

Gopendra Nath Das—for Appellant.

Sitaram Banerji, Apurba Charam Mukherji and Urukram Das Chakravarti —for Respondents.

B. B. Ghose, J.—In this appeal a preliminary objection was taken on behalf of the respondents that no appeal lies as the order of the Subordinate Judge was an interlocutory one. This question is settled by the decision of the Privy Council in *Bhup Indar Bahadur Singh v. Bijar Bahadur Singh* (1), where their Lordships held that an order limiting the right of the decree-holder to recover mesne profits for a certain period is of the nature of a final decree as defined in S. 2, Civil P. C., and is appealable as such. A second preliminary objection has been taken that after the order of the Subordinate Judge and subsequent to the appeal of the decree-holder preferred to this Court the Subordinate Judge required the decree-holder to put in the commissioner's fees for making enquiry according to the terms of his order. The decree-holder failed to put in the money and, therefore, the execution case was dismissed. As the execution case has been dismissed this appeal is incompetent. This objection does not commend itself to me. The decree-holder did not accept the decision of the Subordinate Judge on the points mentioned in his judgment and he did not want to proceed with the execution on the terms directed by the Subordinate Judge. If his appeal succeeds the mere fact that the Subordinate Judge dismissed the application for execution subsequently would not debar him from maintaining his appeal. If his appeal succeeds the

(1) [1901] 23 All. 152=27 I. A. 209 (P. C.).

whole of the judgment of the Subordinate Judge goes and the execution will be proceeded with in accordance with the judgment of this Court. This preliminary objection also fails.

The Subordinate Judge decided several questions in his judgment. It seems from the issues he framed and decided that he went behind the High Court decree. The decree of the High Court, with reference to which the appellant sought for ascertainment of mesne profits runs thus :

It is ordered and decreed that the plaintiff-appellant do get khas possession against the tenant defendants, and joint possession with the dar-patnidar defendants 38 and 39 viz., Makhan Chandra Mandal and Ishan Chandra Mandal to the extent of 12 annas and 16 gandas share of the land in dispute as in the plaint mentioned ; and it is further ordered and decreed that the plaintiff-appellant do realize mesne profits for three years prior to the institution of the suit, the amount to be determined in execution proceedings.

* The Subordinate Judge upon other materials placed before him found that the plaintiff had entered into a compromise with certain persons regarding certain lands and he came to the conclusion that as the compromise was not brought to the notice of the High Court, the High Court had made the decree as I have stated above. The Subordinate Judge may be right in his conclusion. It may be that if the compromise had been brought to the notice of the High Court the decree might have been made otherwise. But the Subordinate Judge has acted absolutely without jurisdiction in modifying the decree of the High Court in the way he thought that the High Court should have made its decree. If the defendant judgment-debtors have suffered in any way by reason of anything which the plaintiff had done and which was not brought to the notice of the High Court when the case was heard, the proper way was to have the decree amended either by way of review or by some other legal proceeding. The defendants not having done that cannot ask the Subordinate Judge to amend the decree of the High Court in the manner which the Subordinate Judge thought just and to execute the decree in that way. There is no ambiguity in the decree and the clear duty of the executing Court was to execute the decree as it stands.

The Subordinate Judge has again fallen into an error in saying that there cannot

be a joint decree for mesne profits of all the lands of the plaintiff but each set of the tenant defendants who are bound by the decree is liable for the profits of only those lands of the solenama that were held by them. The decree of the High Court does not make any such discrimination, and here again the Subordinate Judge's order is absolutely without jurisdiction.

There is a third point on which the Subordinate Judge has also fallen into an error, and it is in holding that the plaintiff decree-holder could not claim mesne profits exceeding Rs 901. This matter has been settled by this Court : see *Bidyadhar Bachar v. Manindra Nath Das* (2).

The Subordinate Judge is in error with regard to the heirs of defendant 30 Sitanath Muchi. It is admitted by both parties here that his heirs were brought on the record of the suit and they are bound by the decree made by the High Court.

The Subordinate Judge's order is set aside with regard to all these points stated above. The other questions decided by him are affirmed. The Commissioner should be directed to execute the decree of the High Court according to the view set forth above. In ascertaining mesne profits payable by the defendants for any lands to the decree-holder the Commissioner will of course enquire up to what date the defendants were in possession as trespassers of which particular lands as against the plaintiff decree-holder. If the tenants had given up possession to any person whose right the plaintiff had acknowledged even before the decree of the High Court either by giving up possession to such third persons or by paying rent to them, then the defendants would not be liable for mesne profits to the plaintiff over again for those lands. This is a matter for enquiry by the Commissioner subject to his finding being revised as usual by the Court. The case therefore is sent back to the Court of the Subordinate Judge for the appointment of a Commissioner for ascertaining mesne profits due to the decree-holder.

I cannot fail to observe that the decree-holder has made a very inflated claim, and if on account of that the Commissioner's enquiry is prolonged the Court

will consider what costs the decree-holder would be liable to pay on account of this inflated claim.

The decree-holder is entitled to the costs of this appeal. The hearing-fee is assessed at five gold mohurs. Defendant 29 will not be liable for any costs.

Bose, J.—I agree

R.K.

Case remanded.

A. I. R. 1928 Calcutta 806

RANKIN, C. J. AND C. C. GHOSE, J.

Enid Ivy Collins—Appellant.

v.

Walter George Collins—Respondent.

Appeal No. 9 of 1928, Decided on 1st May 1928, against a decree of Pearson, J. in the exercise of matrimonial jurisdiction in Suit No. 19 of 1927, D/- 21st December 1927.

Divorce Act, S. 10—Decree for judicial separation—Petition for divorce is not maintainable on the same facts.

Where a decree for judicial separation has been once obtained on the grounds of cruelty and adultery, a new petition asking for dissolution of marriage upon the same facts before the same Court armed with same jurisdiction is not maintainable. It would be not only contrary to the principle but inconvenient and in some cases highly unjust to permit a party to have two suits about the same matter: *Green v. Green*, (1873) 3 P. & D 121; *Mason v. Mason*, (1883) 8 P. & D. 21; *Fullerton v. Fullerton*, (1922) 89 T. L. R. 46; *Hall v. Hall*, (1879) 48 L. J. P. 57; and *Bland v. Bland*, (1866) P. & D. 237; *Dist.* [1 808 C 1]

Ormond—for Appellant.

Rankin, C. J.—This is a wife's petition for dissolution of marriage brought on 18th July 1927. The learned Judge has dismissed the petition on the ground that on 1st June 1926 there was a previous petition by the wife against the husband whereby she sought and obtained a decree for judicial separation upon grounds of cruelty and adultery. That decree was granted to her on 17th August 1927. The present petition is founded upon the same acts of cruelty and adultery as founded the previous petition. The petitioner explains that she did not wish for a dissolution of marriage partly because she was a Roman Catholic and had scruples against divorce and partly because she desired to see whether her husband would take her back and also because she was able to get maintenance. She asked for a decree for

judicial separation on the previous occasion though she was entitled by law to a decree for dissolution of marriage. It appears that these reasons no longer actuate the lady to the same extent. It appears further that she has been unable to obtain by process of execution maintenance or alimony from her husband. Accordingly she brings another petition on the same facts without alleging any new matrimonial offence committed subsequent to the decree for judicial separation and asks now for a decree for dissolution of the marriage. The learned Judge has ruled that without new matrimonial offences a new petition cannot be entertained in these circumstances.

Mr. Ormond for the appellant has brought to our notice that in Raydon on Divorce, 2nd edition, p. 133, it is said that after a successful suit for judicial separation irrespective of whether further offences were committed either before or since, a suit for dissolution of marriage may be brought, and it appears that in Halsbury's Laws of England, Vol. 16, p. 498 a similar statement is made in an article of which the same learned author is one of the writers.

The authorities given for the petition so laid down are three, *Green v. Green* (1), *Mason v. Mason* (2) and *Fullerton v. Fullerton* (3); and reference has been made in this connexion to the case of *Hall v. Hall* (4). The learned Judge on going through these authorities has come to the conclusion that they do not support the proposition laid down, and upon going through these authorities and certain others, I am forced to the same conclusion.

The case-law upon this subject may be said to begin early. Before the Matrimonial Causes Act of 1856, the ecclesiastical Courts had no jurisdiction to grant divorce. That relief could only be obtained from the House of Lords. Accordingly one of the first questions raised on the new Act was whether a person who had brought a suit for the relief which was then possible before an ecclesiastical Court could after the passing of the new Act come to the Divorce Court and get relief under the new statute. That matter was passed upon in the case of *Evans v.*

(1) [1873] 3 P. & D. 121.

(2) [1883] 8 P. & D. 21.

(3) [1922] 89 T. L. R. 46.

(4) [1879] 48 L. J. P. 57=27 W. R. 664=40 L. T. 525.

Evans (5), and the case there was that a suit had been brought by a husband for divorce *a mansa et thoro*, in other words, for judicial separation on the ground of certain acts of adultery. That petition had been dismissed but an appeal was pending. In the meantime, after the new Act, he brought a suit for divorce and the question was whether the Court could entertain that suit. Lord Campbell and the Court over which he presided was of opinion that there was no estoppel that the former suit was for a different object but that here the suit was for a dissolution of the marriage before a tribunal armed with much larger powers and governed by different rules. The same class of case was dealt with in the case of *Ciocci v. Ciocci* (6). There a decree for divorce *a mansa et thoro* had been obtained in an ecclesiastical Court and the same party, namely, the wife brought a suit under the new Act for a judicial separation on the same ground. The Judge ordinary was of opinion that such a suit could not lie and he pointed out that a great violation of principle would be involved in putting a party twice on his trial on account of the same acts. He also pointed out that it could not be said in this case that the object of the suit was entirely different from that of the suit before the ecclesiastical Court. Those two cases are governed by the circumstance that under the Matrimonial Causes Act there was a new jurisdiction and a new remedy available to the petitioner.

Until that Act was passed adultery coupled with cruelty or desertion was not a cause of action for a decree of divorce but gave a much more limited right in ecclesiastical Courts. I now come to the case of *Green v. Green* (1), which is one of the cases upon which the petitioner relies. That was a case in which the Judge ordinary had to deal with the petition of a wife who had obtained a decree for judicial separation upon the ground of her husband's adultery. The wife afterwards instituted a suit for dissolution of marriage on the ground of adultery committed by the husband subsequently to the decree for judicial separation coupled with his cruelty to her during the cohabitation. Even in spite of the fact that the cause of action there included a new matrimonial offence subsequent to the decree

the Judge ordinary dealt with the matter as one of some difficulty. He came to the conclusion that the principle that a person cannot be vexed twice on the same facts was not applicable to such a case. He says:

The maxim that no one shall be twice vexed for the same cause is not in point, for the subject-matter of the two suits, as well as the remedies sought in them are different. The husband by his adultery subsequent to the former decree has committed a fresh matrimonial offence (for the decree of judicial separation is not to be treated as a license to commit adultery for the future) and for this offence, aggravated by the previous cruelty, the wife has had no redress.

He points out that cruelty condoned is revived by subsequent adultery. He also points out:

If she had obtained a judicial separation on the ground of cruelty she might afterwards have obtained a decree for subsequent adultery coupled with the cruelty already proved, and the fact that the respondent had previously been guilty of adultery would not have affected her position. It appears to me that the basis of that decision is the fact that there was a new matrimonial offence.

The same question came before the Court in the Court of appeal in 1883 in the case of *Mason v. Mason* (2) and Lindley, L. J., there says that the difficulty he had was removed by the authority of *Green v. Green* (1). That was a case where a husband had obtained a judicial separation. The wife continued to cohabit with the co-respondent. Then the husband petitioned for a dissolution of his marriage. In these circumstances it was thought that *Green v. Green* (1) was applicable and that the only question was the question of delay.

In 1866 the case of *Bland v. Bland* (7) came before the Judge ordinary

where a wife had obtained a decree of judicial separation on the ground of the husband's cruelty and continued to live separate from him and the husband subsequently committed adultery, upon proof of such adultery, and of the decree for judicial separation, the Court made a decree nisi for the dissolution of the marriage.

Again in *Fullerton v. Fullerton* (3) the learned President acted upon the decision in *Green v. Green* (1) a case where a woman obtained a decree for judicial separation on the ground of adultery and afterwards applied for a dissolution of marriage on the ground of desertion prior to the petition for judicial separation and of adultery subsequent to the decree.

(5) 27 L. J. R. (n.s.), Pro & M. 57.

(6) 29 L. J. (n. s.) 60.

(7) [1866] P. & D. 237=15 W. R. 9=35 L.J. Mat. 104.

In these circumstances it appears to me that there is no authority for the proposition that upon the same facts before the same Court armed with the same jurisdiction the petitioner can present a new petition asking for a dissolution of the marriage. It appears to me that it would be not only contrary to the principle but inconvenient, and in some possible cases highly unjust to permit a party to have two suits about the same matter. One can imagine a case of a husband electing not to ask for a dissolution of marriage and then afterwards keeping in terrorism his right to ask for a dissolution of marriage. One can imagine a case in India or elsewhere where a matrimonial case might be presented to the Court in the form of petition for judicial separation in order that the parties might have a preliminary hearing of the evidence and then afterwards at a later stage present evidence on the same matter over and over again. In my judgment any such ruling as is asked for in this case would be opening the flood gates to practice which might be most inconvenient and objectionable.

In my opinion this appeal must be dismissed. No order is made as to costs as the respondent does not appear.

C. C. Ghose, J.—I agree.

A.L./R.K. *Appeal dismissed.*

A. I. R. 1928 Calcutta 808

PAGE AND MALLIK, JJ.

Harendra Kumar Rai Choudhuri and others—Plaintiffs—Appellants.

v.

Secy. of State & others—Respondents

Appeals Nos 1113 and 1114 of 1926, Decided on 14th August 1928, from the Appellate Decrees of Addl. Sub-Judge, Zillah Mymensingh, D/- 17th Dec. 1925.

(a) *Bengal Public Demands Recovery Act (3 of 1913), S. 37—No public demand due—The certificate is ultra vires—Proceedings founded on it are null and void.*

It is a condition precedent to the issue of a valid certificate that the "public demand" should be due and payable by the certificate debtor, and if at the time when the certificate is signed by the certificate officer, there is no public demand due from the certificate debtor, the certificate is ultra vires, and all the proceedings founded upon it are null and void: 25 Cal. 883 (P. C.), *Rel. on.* [P 809 C 2]

(b) *Bengal Tenancy Act, S. 104 (j) and S. 111A—Entry as to rent is conclusive—Entry as to being a tenant raises only a presumption.*

Although the entry relating to the rent set-

tled is conclusive, any other entry, e. g., a person is tenant in possession through his tenants, is not irrebutable but shall be presumed to be correct until it is proved by evidence to be incorrect. [P 810 C 1]

(c) *Bengal Alluvion and Diluvion Act—Plaintiff a cosharer and patnidar—Diarah proceedings taken as to accretions—Zemindar refusing to take settlement—Payment of malikana—Plaintiff recorded as tenant through sub-tenants—Plaintiff is entitled to claim accretions as appertaining to his patni tenures, but he cannot be compelled to take settlement of the accreted lands.*

Plaintiffs were cosharers in a zemindari, and 16 annas patnidars under the zemindars. Certain lands had accreted to the zemindari, and diarah proceedings were taken by the Government for the purpose of the resumption and settlement of the accreted lands. The zemindars refused to take settlement of the accreted lands, and were granted malikana in respect thereof.

Held: that no doubt the plaintiffs under the law were entitled to claim these accreted lands as appertaining to their patni tenure, and Government could not compel them to take settlement of the accreted lands even against their will. [P 810 C 1]

(d) *Interpretation of Statutes—Affirmative Act.*

Affirmative Act giving new right does not destroy existing right unless legislature apparently intends that the two rights should not co-exist together. [P 809 C 1]

D. N. Chakerbutty and Kali Kinkar Chakerbutty—for Appellants.

Surendra Nath Guha and Syed Nasim Ali—for Respondents.

Page, J.—The plaintiffs are 7 annas and odd cosharers in a zemindari, and 16 annas putnidars under the zemindars. Certain lands have accreted to the Zemindari, and diarah proceedings were taken by the Government for the purpose of the resumption and settlement of the accreted lands, and the assessment thereof with revenue under Regulation 7 of 1822 and 1 of 1825, Act 31 of 1858, Act 9 of 1847, and Ch. 10, Ben. Ten. Act. The zemindars refused to take settlement of the accreted lands, and were granted malikana in respect thereof. The Government then took khas possession of the accretions, and in the Record-of-Rights the plaintiffs are recorded as the tenants of the separate diarah mahals Nos. 13618, 13116, which had been formed out of the accreted lands. Thereafter five certificates under the Public Demands Recovery Act (3 of 1913) were issued and notices were served upon the plaintiffs for the recovery of arrears of rent and cesses alleged to be

due from them as tenants of these diarah mahals under the Government. The plaintiffs under protest paid the amounts demanded under the certificates on 28th October, 1920, 26th March 1922 and 31st January 1924. On 21st July 1924 the plaintiffs brought the present suits for a declaration that they are not liable for the rent and cesses in respect of these two diarah mahals, and that the certificates were issued ultra vires and were null and void. The plaintiffs also sought to recover by way of refund the sums paid thereunder to the Government.

Three defences were raised by the Secretary of State for India :

(1) That the plaintiffs had failed to bring the present suit within six months of their petition denying liability under S. 9, Public Demands Recovery Act, and, therefore, under Ss. 34, 35 and 37 of the Act the suits were barred by limitation.

(2) That as the plaintiffs had failed to bring a suit within the time limited by S. 104H, Ben. Ten. Act the plaintiffs in the present suits were precluded under S. 104J and S. 111A from challenging the correctness of the entries in the Record-of-Rights to the effect that they were tenants of the diarah mahals under the Government and were liable to pay the rent, therein stated to be settled.

(3) That on the refusal of the zemindars to take settlement of the lands that had accreted to their zemindari the Government was entitled to treat the plaintiffs as tenants under Government of the new estates that had been created out of the accretions, and to recover rent and cesses in respect of the same from the plaintiffs.

The first contention on behalf of the defendant raised the question whether the only mode in which the validity of a certificate issued under the Public Demands Recovery Act, and the liability of the certificate debtor to pay the public demand thereunder can be challenged is by resorting to the machinery provided in the Act.

The general rule is

that an affirmative statute giving a new right does not of itself and of necessity destroy a previously existing right. But it has that effect if the apparent intention of the legislature is that the two rights should not exist together : per Lord Cranworth, L. C., in *O'Flaherty v. Mc. Dowell* (1)

Whether the new remedy is exclusive or cumulative in each case will depend upon the true construction of the statute under consideration.

Now it is to be observed that in S. 37 the legislature, when limiting the common law right of the subject to seek

relief in a Court of law, refers to "a certificate duly filed under this Act," and in my opinion, it is a condition precedent to the issue of a valid certificate that the "public demand" should be due and payable by the certificate debtor, and if at the time when the certificate is signed by the certificate officer there is no "public demand" due from the certificate debtor the certificate is ultra vires, and all the proceedings founded upon it are null and void. The ruling of the Judicial Committee in *Balkissen Das v. Simpson* (2) relating to the cognate provisions of the Bengal Land Revenue Sales Act (11 of 1859) is applicable to the Public Demands Recovery Act: see *Janakdhari Lal v. Gossain Lal* (3), *Nandan Missir v. Harak Narain* (4), *Protap Chandra v. Secy. of State* (5), *Dhirendra Krishna v. Mohendra* (6). In *Balkissan Das v. Simpson* (2) Lord Watson, in delivering the judgment of the Board, observed that

the Act does not sanction and by plain implication forbids the sale of any estate which is not at the time in arrear of Government revenue But the chief and substantial objection upon which the appellants' plaint is based is that at the time when their 5 annas share of the village Shahzadpur was sold there were no arrears of revenue due by them in respect of it The result is that the whole of the proceedings of the Collector with a view to the sale of the 5 annas share were beyond his jurisdiction, and are not entitled to the protection given by the Act in cases where the sale is authorized, although it may be attended with some irregularity or illegality: *ibid* p. 842, *Mutsaddi Mian v. Mahomed Idris* (7) ; *Mahomed Jan v. Gunga Bishun* (8).

The issue to be determined, therefore, is whether the arrears and cesses in suit were due from the plaintiffs at the time when the certificates were issued. The defendant's second contention is that under Ss. 104 (J) and 111A, Ben. Ten. Act, the plaintiffs are precluded from asserting in the present suits that they are not liable as tenants to pay the rent settled and cesses in respect of the two diarah mahals as they have failed to challenge the en-

(2) [1898] 25 Cal. 833=25 I. A. 151=2 C. W. N. 513=7 Sar. 363 (P. C.).

(3) [1909] 37 Cal. 107=13 C. W. N. 710=1 I. C. 871=11 C. L. J. 254.

(4) [1910] 14 C. W. N. 607=5 I. C. 337=11 C. L. J. 266.

(5) A. I. R. 1922 Cal 101=49 Cal. 1026.

(6) A. I. R. 1923 Cal. 428.

(7) A. I. R. 1915 P. C. 177.

(8) [1911] 38 Cal. 537=10 I. C. 272=33 I. A. 80 (P. C.).

(1, [1857] 6 H. L. C. 142 (187) = 4 Jur. (n.s.) 33.

tries to that effect in the Record of Rights as provided by the Act.

The answer to that contention is that under S. 104 (J), although the entry relating to the rent settled is conclusive, any other entry is not irrebutable but shall be presumed to be correct until it is proved by evidence to be incorrect. S. 103B (3), *Priyanath Basu v. Tara Chand* (9), *Uma Charan v. Laksmi Narayan* (10).

Now, the entries in the Record of Rights that the plaintiffs are tenants of the two diarah mahals and are in possession of the same through sub-tenants clearly are rebutted by the following facts found by the lower appellate Court, that: no settlement was or could under the law be offered to them as patnidars and that

the plaintiffs were not in possession of the diarah mahals, and refused to take settlement thereof.

Nevertheless, the third contention of the defendant is that, notwithstanding the refusal of the plaintiffs to become tenants under the Government, after the zemindars had declined to take settlement of the lands that had accreted to their zemindari, the Government was entitled to treat the plaintiffs as tenants under Government and to claim rents and cesses from the plaintiffs in respect of the two diarah mahals. In my opinion this contention is ill founded. No doubt, in the circumstances the plaintiffs under the law were entitled to claim these accreted lands as appertaining to their patni tenure, but to contend that the Government could compel them to take settlement of the accreted lands even against their will is to advance a proposition opposed to good sense and justice, and for which, I apprehend, there is no justification in law.

In the present case it is not pretended that the plaintiffs have taken possession of the lands in suit, or that they have entered into any agreement to take statement of the lands from Government, and, in my opinion, at the time when the certificates were issued there was no "public demand" due from the plaintiffs; the certificates were ultra vires the certificate officer, and all the proceedings founded upon the certificates were null and void.

I am of opinion that the plaintiffs are entitled to the declarations for which they pray and as the claim for a refund

of the arrears and cesses that were paid under protest is in substance one for money had and received by the Secretary of State to their use Art. 62, Sch. 1, Lim. Act (9 of 1908) is applicable, and the plaintiffs are entitled to recover the sums paid under protest, except the amount of the payment on 28th October 1920, which was not made within three years of the filing of the suit. The decrees of the lower appellate Court will be set aside, and a decree in the above sense passed in favour of the plaintiffs with costs in all the Courts.

Mallik, J.—I agree.

R.K.

Decree set aside.

* A. I. R. 1928 Calcutta 810

CUMING AND MUKHERJI, JJ

Bhola Nath Bose—Defendant—Appellant.

v.

Mt. Nagendra Bala Chaudhurani and another—Plaintiff and Pro forma Defendant—Respondents.

Appeal No. 733 of 1925, Decided on 8th February 1928, from appellate decree of First Sub-Judge, Howrah, D/- 15th December 1924.

(a) *Limitation Act, S. 1*—The Act does not apply to defences.

The Limitation Act applies to the bringing of suits and not to defences: *A. I. R. 1921 Bom. 257, Foll.* [P 811 C 2]

* (b) *Evidence Act, S. 44*—Time to set aside a decree expiring—Validity of the decree can be challenged in defence on the ground of fraud—Decree—Setting aside.

Although a defendant cannot bring a suit on the ground of limitation to set aside a decree, he can still in defence contend when the decree has been proved by the plaintiff, that it had been obtained by fraud, and it is not necessary for him to bring a suit to set it aside: *A. I. R. 1921 Bom. 257, Appr.* [P 811 C 2]

Rupendra Kumar Mitter and *Dharmadas Sett*—for Appellant.

Sarat Chandra Roy Chowdhury, Upendra Lal Roy and *Benode Lal Mukerji*—for Respondents.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for a declaration of her title and recovery of khas possession with mesne profits of two plots of land in area some nine bighas. Her case was that these two plots of land originally formed two chakran holdings. These chakran holdings were

(9) *A. I. R. 1924 Cal. 341.*

(10) *A. I. R. 1927 Cal. 214.*

resumed in the year 1905 and on resumption were settled with one Badal Roy. It may be here noted that the plaintiff herself purchased the mehal in 1908. Badal Roy was unable to get possession with the result that the plaintiff brought two suits with regard to these plots of land Nos. 645 and 646 of 1911 and obtained in these two suits two ex-parte decrees. According to her she then took possession and settled some of the land with defendant 1. Thereafter further trouble arose and in proceedings under S. 145, Criminal P. C., decisions were given which were against the plaintiff. Hence this suit.

The defence was that the plaintiff had no title, and that the defendants held the land under one Makhan Lal Mukerji also known as Janai Babu.

The trial Court framed a number of issues. All the issues were found in favour of the plaintiff and the suit was decreed. On appeal to the District Court the case was remanded for the determination of some further issues which had not been determined by the trial Court. The case then again came before the District Court with the findings of the Court of the first instance. On the issues that had been sent down to that Court for determination, the District Court dismissed the appeal. The learned Subordinate Judge held that the only evidence that the lands were chakran were two decrees and the proceedings held in execution thereunder. He found that these two decrees had been obtained by fraud and that the whole of the execution proceedings were also fraudulent, processes both in the suits and in the execution proceedings having been suppressed. But he held that three years had elapsed since the defendants knew of these decrees and hence they were barred from disputing the validity of these decrees. On this finding he dismissed the appeal. The defendants have appealed to this Court.

Mr. Mitter who appears for the appellants has put forward two contentions first that the defendants can plead that the decrees were obtained by fraud and need not sue to have them set aside; and secondly, that the defendants in defence are entitled to challenge the correctness of the decrees even though a suit to set them aside is time barred.

Now S. 44, Evidence Act, provides that

Any party to a suit or other proceeding may show that any judgment, order or decree which

is relevant under Ss. 40, 41 or 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

The present decrees are relevant under S. 40 and hence come under S. 44. They were put in as pieces of evidence. The defendants have shown that they were obtained by fraud and hence the Court cannot rely upon them. S. 44, Evidence Act, will be found discussed at great length by Banerji, J., with his usual clearness and lucidity in the case of *Rajib Panda v. Lakhan Sendh Mahapatra* (1) and it would not be possible for me to add anything to the learned Judge's remark. No doubt the defendants cannot now bring a suit to set aside those decrees, but they still can in defence contend that they were obtained by fraud and it is not necessary for them to bring a suit to set them aside. The Limitation Act applies to the bringing of suits and not to defences: see *Mahadev Narayan v. Sadashiv Keshav* (2) with special reference to p. 52 (of 45 Bom.) There is, therefore, in this case no evidence that the lands in question were chakran lands, it being found by the lower appellate Court that these decrees were obtained by fraud and hence their evidentiary value is nil. The plaintiff is, therefore, not entitled to eject the defendants on the ground put forward in the plaint, namely, that they held chakran lands.

The plaintiff-respondent contends that she is entitled at any rate to a declaration of her title to the lands in dispute. She would seem to contend that so far as her title is concerned that title has been admitted by the defendants. It is somewhat difficult to discover whether the defendants did at any time during the suit admit the title of the plaintiff to the lands in dispute. Certainly in their written statement they would seem to have put forward the case that the lands in suit did not belong to the plaintiff but belonged to the Janai Babus. In his statement, however, of the defendants' case when it was first on appeal before the District Court, the learned Judge there summed up the defendants' case:

The defendant contended that the decrees in Suits Nos. 645 and 646 of 1911 were fraudulently obtained; that no summonses were served in those suits but that they were fraudulently suppressed and that the proceedings in execution also were suppressed; on the merits they urged.

(1) [1900] 27 Cal. 11=3 C.W.N. 660.

(2) A.I.R. 1921 Bom. 257=45 Bom. 45.

that they were not service tenants but were ordinary tenants paying money rents and that they have acquired the right of occupancy so their possession was not liable to be vacated.

This may or may not be the impression of the learned Judge who heard the appeal, arrived at as to what was the defendants' case as made before him. When, however, the case came back again after remand the defendants appear to have once more contended that the plaintiff had no title. In the statement of the cases of the parties in the last Court of appeal the defendant's case was stated as follows :

On the defendant's appeal it was contended first that the Courts below have held that the plaintiff has not been able to prove her title or possession. It may be that the defendant after the issues sent down on remand had been decided in their favour went back to the former position that the plaintiff had no title. In another portion of the learned Judge's judgment he seems to have held that the lands lie within the patui mehal purchased by the plaintiff, but that does not show that these formed the alleged chakran holdings. In conclusion he states that these decrees and proceedings stand good and that plaintiff has proved her title and possession within the period of limitation on the strength of these which it is too late now to question.

Therefore, he apparently held that the plaintiff's title had been proved by means of these decrees which we have now found, are valueless as evidence having been obtained by fraud. It does not seem to us that the question of title has really been satisfactorily dealt with by the lower appellate Court. We think it will be more satisfactory if this question of title be gone into by the lower appellate Court. We, therefore, send back the case to the lower appellate Court to determine the question on the evidence now on the record as to whether the plaintiff has or has not proved her title to the lands in suit. Neither party will be allowed to adduce any further evidence.

With regard to costs, the appellants will be entitled to their costs before this Court, but the costs of the lower Courts will abide the determination by the lower appellate Court. If the plaintiff succeeds on the question of establishment of her title the parties will each be entitled to one-half of the costs, but if the plaintiff fails in proving her title and her suit is dismissed entirely the defendants will be entitled to all the costs incurred by them in the lower Courts.

Mukherji, J.—I agree.

R.K.

Case sent back.

A. I. R. 1928 Calcutta 812

MUKHERJI AND ROY, JJ.

Jananendra Mohan Bhadhury and another—Plaintiffs—Appellants.

v.

Profullananda Goswami and others — Defendants—Respondents.

Appeal No. 342 of 1925, Decided on 14th April 1927, from appellate order of 2nd Sub-Judge, Zillah Hooghly, D/- 28th May 1925.

(a) *Civil P. C. O. 9, R. 13 — Appeal against ex-parte decree—R. 13 not availed of—Propriety of the order refusing an adjournment can be raised in the appeal.*

In a case in which an ex-parte decree has been passed and the aggrieved party has not availed of the remedy by way of an application under O. 9, R. 13, he is not precluded from raising the question of propriety of the refusal to adjourn his case, in the appeal which he prefers from the ex-parte decree itself: 30 *Mad. 54, Foll.*: 39 *All. 143, Dist. and Diss. from: A. I. R. 1924 Rang. 137, Diss. from.* [P 814 C 1]

(b) *Civil P. C., S. 151—Powers of remand are not restricted to Civil P. C., O. 41, R. 23.*

The powers of the appellate Court as regards remand are not restricted to the cases specified in O. 41, R. 23. The Court is entitled to make an order of remand under the provisions of S. 151: 44 *Cal. 929* and *A. I. R. 1922 Bom. 267, Rel. on.* [P 814 C 1]

Bijan Kumar Mukherjee, Kali Sankar Sarkar and Sarasija Kanta Palit — for Appellants.

Haradhan Chatterjee and Biraj Mohan Majumdar for Dy. Registrar — for Respondents.

Mukherji, J.—This appeal is directed against an order passed by the Second Subordinate Judge of Hooghly on 5th and 28th May 1925. By this order the learned Subordinate Judge allowed an appeal that had been preferred to his Court by a defendant in a suit which had been decreed ex parte and after setting aside the judgment and decree of the trial Court remanded the suit for further trial upon certain terms and conditions. The plaintiffs have now preferred this appeal. It appears that after several adjournments granted to the defendant on applications made by him for that purpose and upon the condition that he would pay the costs of those dates the case was eventually fixed for 26th February 1924. On that day the plaintiffs were ready but the defendant again put in an application asking for an adjournment on the ground that he had been attacked with pox and that, therefore, he was unable to appear

in Court on that day. An order for adjournment was made on condition that the defendant would pay adjournment costs, Rs. 15; but on the said costs not being paid the case was taken up, certain witnesses for the plaintiffs were examined and the learned Munsif decreed the suit ex parte on the evidence that was before him. From this decree an appeal was preferred on behalf of the defendant and in this appeal the learned Subordinate Judge, being of opinion that on 26th February 1924 the defendant was prevented by sufficient cause from appearing in Court inasmuch as he had been attacked with pox and in that view holding that the adjournment asked for on behalf of the defendant should have been granted, passed the order to which I have referred. The plaintiffs, as I have already stated, have thereupon preferred the present appeal to this Court.

In support of this appeal two grounds have been urged on behalf of the appellants. The first ground is to the effect that on an appeal preferred from the ex-parte decree that was passed in this case the Subordinate Judge was not entitled to go into the question as to whether the defendant was prevented by sufficient cause from appearing in Court on the day the case was taken up. His argument in substance is that this is a matter which properly comes within the purview of proceedings taken under O. 9, R. 13, Civil P. C., and inasmuch as the defendant did not resort to that remedy it was not open to him to urge at the hearing of the appeal that he had preferred, that he was prevented by some sufficient cause from appearing when the suit was called on for hearing and that, therefore, the learned Subordinate Judge was wrong in passing the order that he did in the present case. In support of this contention reliance has been placed on behalf of the appellants upon a passage which is to be found in the case of *Jonardan Doley v. Ram Dhone Singh* (1). That passage occurs in the order of reference made by Banerjee and Rampini, JJ., referring certain questions for consideration to a Full Bench of this Court and the passage runs in these words:

Upon the record, as it stands, the ex-parte decree may be wholly unassailable, but, if the defendant has an opportunity (which he was prevented from having owing to some sufficient cause) of placing on the record evidence which

he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal which must ordinarily proceed upon the record as it stands. The proper remedy must be the one provided by S. 108, Civil P. C.

In my opinion, the passage relied upon by the learned vakil on behalf of the appellants is obiter. Apart from authorities it seems to me to be perfectly clear that when a suit has been decided ex parte the remedy by way of appeal from the ex-parte decree as well as the remedy by way of application under O. 9, R. 13 are both open to the persons against whom the decision was passed. It is true that if he avails of the remedy by way of application under O. 9, R. 13 he is in a position of greater advantage than he would be if he preferred an appeal from the ex-parte decree itself. This would be by reason of the fact that he would be able to establish by adducing evidence that he was unable to appear owing to circumstances over which he had no control, whereas if he prefers an appeal from the ex-parte decree itself the Court would have to proceed upon the record as it stands and to determine upon the materials that are on the record whether the application for adjournment was rightly granted or not. The question as to whether the order refusing the application for adjournment was rightly passed or not is, in my opinion, somewhat different from the question as to whether the absenting party was prevented by sufficient cause from not appearing in the course of the proceedings. The two no doubt are inter-related but the considerations are not quite the same. Reliance has in the next place been placed upon the decision of the Allahabad High Court in the case of *Hummi v. Azizuddin* (2). The decision taken as a whole no doubt does support the contention which the appellants have put forward but the facts of that case are entirely different from those of the present case, one distinguishing feature being that in that case an application under O. 9, R. 13, to set aside the ex-parte decree and to have a rehearing was as a matter of fact dismissed and it was after that the question again arose at the hearing of the appeal. A decision of the Burma High Court has also been referred to, namely, the case of

(1) [1896] 23 Cal. 738 (F.B.).

(2) [1917] 39 All. 143=36 I. C. 277=14 A. L. J. 1226.

Raj Chandra Dhar v. K. D. O. C. Ray (3). Now, with the utmost respect for the learned Judges who decided the case in *Hummi v. Azizuddin* (2) and the case in *Raj Chandra Dhar v. K. D. O. C. Ray* (3), I must say that if they intended to lay down as a broad proposition that in a case in which an ex-parte decree has been passed and the aggrieved party has not availed of the remedy by way of an application under O. 9, R. 13, he is precluded from raising the question of propriety of the refusal to adjourn his case in the appeal which he prefers from the ex-parte decree itself, I am unable to agree in the view which the learned Judges had taken in the case. There is a decision of the Madras High Court in the case of *Sadhu Krishna Ayyar v. Kuppan Ayyangar* (4), where the contrary view has been taken. There is, therefore, in my opinion, no substance in the first contention that has been urged on behalf of the appellants.

The appellants' second contention is that inasmuch as evidence had been taken and a decision on the merits had been passed it was not open to the learned Subordinate Judge to make an order of remand in the form that he did. It is said that the remand has been made in the form prescribed under O. 41, R. 23, Civil P. C., and that the said rule has no application to the circumstances of the case before us. This undoubtedly is so, but as has been pointed out in the case of *Ghuznavi v. Allahabad Bank Ltd.* (5) and *Jethalal Girdhar v. Varajlal Bhaishankar* (6), the Court is entitled to make an order of remand of this description under the provisions of S. 151, Civil P. C. It is now too late to contend that the powers of an appellate Court as regards remand are restricted to the cases specified in O. 41, R. 23, Civil P. C. It has been argued that inasmuch as the aggrieved party could have availed of the remedy under O. 9, R. 13, it was not open to the Court to make an order under S. 151 because the inherent power of the Court has got to be exercised subject to the provisions of the Code and only in such case with regard to which no provision has been made by the Code itself. Now S. 151 says:

(3) A. I. R. 1924 Rang. 137=2 Rang. 108.

(4) [1907] 30 Mad. 54=16 M. L. J. 479.

(5) [1917] 44 Cal. 929=26 C. L. J. 49=41 I. C. 598=21 C. W. N. 877.

(6) A. I. R. 1922 Bom. 267=46 Bom. 184.

Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

If the defendant was entitled to raise the question of the propriety of the adjournment in the appeal that he preferred from the ex-parte decree and if that Court came to be of opinion that the adjournment should have been granted, then in my opinion, the only sort of order that could properly be passed by that Court would be an order setting aside the decree passed by the trial Court and remanding the case for retrial. This is the order which the lower appellate Court has passed. The Code does not appear to have made any express provision for a case of this nature. I am of opinion that no grounds have been made out why we should interfere with it.

In this view of the matter the order passed by the learned Subordinate Judge seems to be right and this appeal should be dismissed. Having regard, however, to the dilatoriness on the part of the respondents in the conduct of the proceedings in the Court below I am of opinion that no order should be made for the costs of this appeal in their favour.

Roy, J.—I agree.

R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 814.

CAMMIADE AND S. K. GHOSE, JJ.

Rahimannessa Bibi—Petitioner.

v.

Sk. Halim—Opposite Party.

Civil Revn. Petn. No. 490 of 1928, Decided on 2nd July 1928, from order of Dist. Judge, 24-Pargannas, D/- 15th March 1928.

Civil P. C., S. 132—Right of parda ladies is absolute—Civil P. C., O. 26, R. 1.

Section 132 recognizes the right of ladies who are behind the parda according to the custom of the country to require that their evidence, if necessary, should be taken on commission. This is a right which the Court has no power to deny. [P 815 C 1]

Narendra Nath Chatterjee—for Petitioner.

Bhupendra Nath Das—for Opposite Party.

Judgment.—This Rule was obtained against the opposite party to show cause why the order of the District Judge of 24 Pargannas refusing to allow the peti-

tioner who is a pardanashin lady to be examined on commission should not be set aside. S. 132, Civil P. C., recognizes the right of ladies who are behind parda according to the custom of the country to require that their evidence, if necessary, should be taken on commission. This is a right which the Court has no power to deny.

The order of the learned District Judge is set aside and it is ordered that evidence of the petitioner be taken on commission. The Rule is made absolute and the petitioner will have her costs in this Rule, the hearing-fee in this Rule being assessed at one gold mohur.

V.V. *Rule made absolute.*

A. I. R. 1928 Calcutta 815

C C. GHOSE AND JACK, JJ.

Emperor

v.

Ahammad (Ahmed) Sheikh and others

—Accused.

Criminal Ref. No. 117 of 1928, Decided on 19th July 1928, made by Sess. Judge, Khulna.

(a) *Civil P. C., O. 21, R. 43—Removal of property is illegal—Calcutta High Court General Rules and Circular Orders (Civil), Ch. 1. P. 31, R. 93.*

Removal by attaching officer of property attached is illegal. [P 817 C 1]

(b) *Calcutta High Court's General Rules and Circular Orders, Ch. 1, P. 31, R. 93.*

Rule 93, P. 31, Ch. 1, of the Calcutta High Court's General Rules and Circular Orders, as amended, has the force of law. [P 817 C 1]

Khitish Chandra Chakravarty and Panchanan Ghosal—for the Crown.

Probodh Chandra Chatterji and Satyendra Chandra Sen—for Complainant.

Report by Sessions Judge.—Under S. 338, Criminal P. C., I transmit the record of the case noted below * to be laid before the High Court with the following report :

On the 5th December 1927 a peon of the civil Court (P. W. 1) went to execute a warrant of attachment of moveable property, Ex. 1, issued by the Munsif, 2nd Court, Khulna, against one Ahmed Sheik, judgment-debtor, who intimates his inability to pay the decretal amount, On this the peon attached four bullocks,

*Criminal Motion 32/28 *Ahmad Sheikh v. Emperor*, Ss. 183 and 147, I. P. C.

two carts, a bedstead and a chair on the identification of P. W. 2, gomsata of the decree-holder. The peon and his party then removed the attached property to the river ghat some 7—8 rasis from the house of the judgment-debtor. Then Ahmed Sheik, Adiladdi Sheik, Kushai Sheik, Gani Sheik, the present petitioners, and some other persons came to the Ghat, one of them pushed Nani Gopal, P. W. 2 and they then took away all the property which had been attached. The peon in due course made a complaint to the Munsif, the proceedings were instituted in the criminal Court, as a result of which the four petitioners named above have been convicted under Ss. 183 and 147, I. P. C. and sentenced to pay a fine of Rs. 50 each or in default to suffer 1½ months rigorous imprisonment each.

At the time of the trial a number of defences were set up on behalf of the accused. In the first place the fact of attachment was denied in toto, and it was stated that P. W. 2 and some other men came to the house of the judgment-debtor before dawn, and were opposed and went away without effecting any attachment, it was also contended that the attachment made by the peon was not a legal attachment and that the peon had no legal justification for removing the attached property from the bari of the judgment-debtor, and hence no offences were committed in taking away the property from his custody. The lower Court has disbelieved the story of the accused regarding attempt at the stealthy removal before dawn, and has also held that the attachment effected by the peon was legal. I agree with the findings on these matters. I have no doubt from the evidence adduced that the facts as stated by the witnesses for the prosecution are true and that the property was removed to the river ghat after attachment and taken away from there forcibly by the accused party, including the present petitioners. As regards the fact of actual seizure in pursuance of the attachment, the evidence of the P. Ws. shows clearly that the peon actually touched some of the property attached, and distinctly pointed out the rest of the property stating that he was attaching it under the warrant. The evidence also proves satisfactorily that all the property was removed to the

river ghat, and these facts are sufficient to prove attachment by actual seizure within the meaning of O. 21, R. 43, Civil P. C. I do not think, however, that the removal of the property from the bari of the judgment-debtor was a legal removal and it is for this reason that I consider it necessary to refer this case to the High Court and to recommend that the convictions under Ss. 183 and 147, I. P. C., should be set aside.

The lower Court has held that the removal of the attached property was not in accordance with the Rules issued by the Hon'ble High Court for the attachment of the moveable property. These rules are to be found under R. 93, p. 31, Ch. 1 of the High Court's General Rules and Circular orders (Civil). The first rule framed under main R. 93 is that :

the attaching officer shall give the debtor, or, in his absence any present adult member of his family, the option of having the attached property kept on his premises or in some other place in the village, on condition that a suitable place for its safe custody be provided by him.

In the present case no evidence has been offered on behalf of the prosecution to show that any such option was given to the judgment-debtor who admittedly was present, and indeed the evidence indicates that such option was not given. In such circumstances it must, I think, be held that the removal of the property from the bari was illegal. It has been argued on behalf of the opposite party at the hearing of this motion that the rules framed under main R. 93 cannot be treated as having the force of law, and that the particular rule in question is inconsistent with the provisions of O. 21, R. 43. The provisions of the latter order and rule are that the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and it does seem that there is some inconsistency between this and the rule quoted above. I think, however, that the rules framed under R. 93 of the High Court Rules and Circular orders must be treated as framed by the High Court under the provisions of Ss 122 and 128, Civil P. C., and as superseding the directions of O. 21, R. 43. It appears that the rules framed under R. 93 were originally framed by the Local Government under the old Code of the Civil Procedure and the ruling reported

in re Reference under Stamp Act (1) indicates that those rules must be treated as still in force until new rules are framed under the new Code of Civil Procedure of 1908. Rule 93 has recently been amended by C. O. No. 7 of 1926 which directed that for the words "the rules framed by the Local Government" the words "the following rules" should be substituted. This amendment seems to me to indicate that "the following rules" under R. 93 have been adopted by the High Court and that they must be treated as having the force of law. It has been pointed out on behalf of the opposite party that in the instruction given in the beginning of vol. 1 of the High Court's General Rules and Circular orders (Civil) it is said that all rules having the force of law are now issued as "Rules" i. e., every separate rule or set of rules is issued under the title "Rule No.", while general instructions for the guidance of judicial officers are ordinarily issued as "circular orders" under the title "Circular Order No." It is further pointed out that the R. 93 and the amendment thereunder have been issued as circular orders, and consequently that they cannot be treated as having the force of law. There seems to be some force in this contention, but as the rules under R. 93 were originally framed by the Local Government and published in the Calcutta Gazette, I think that they must be held to have had the force of law, and that the rules as they at present exist cannot be considered to have any less force. If this view is correct then it seems to me that the removal of the property by the civil Court peon, without leaving any option to the judgment-debtor to provide safe custody for the property must be considered as illegal, and consequently that the subsequent taking back of the property by the present petitioners cannot be held to constitute any offence under Ss. 183 and 147, I. P. C., and S. 99, I. P. C., would not operate as a bar to the exercise of the right of private defence of the property.

I cannot say that on the merits the present petitioners have much claim to consideration, in view of the high-handed way in which they acted and of the main defence set up, which I believe

(1) [1914] 37 Mad. 17=20 I. C. 775=24 M. L. J. 637.

to be false. As the question involved seems, however, one of some importance, I consider it necessary to refer the matter to the Hon'ble High Court and to recommend that if my view is correct that the rules framed under R. 93 must be regarded as having the force of law, the convictions and sentences of the accused in this case should be set aside.

Judgment.—We have caused enquiries to be made and it appears that R. 93 on p 31, Ch 1 of the High Court's General Rules and Circular Orders (Civil), as now amended, was made by the High Court and sanctioned by the Government of India under S 107 of the Government of India Act. It would, therefore, follow that this rule has now the force of law. In that view of the matter, we think that the reasons given by the learned Sessions Judge of Khulna in his letter of reference are sound and we therefore accept the Reference, set aside the conviction and the sentences referred to therein and direct that the fines, if paid, be refunded.

S.N./R.K.

Conviction set aside.

* A. I. R. 1928 Calcutta 817

Full Bench

RANKIN, C. J. AND C. C. GHOSE AND
MUKHERJI, JJ.

A Vakil, In the matter of—

In First Appeal No. 264 of 1924, Decided on 9th January 1928.

* *Legal Practitioners Act* (1879), S. 13 (b)
—*Fraudulent acts of clerk—Pleader is not necessarily guilty of professional misconduct.*

It cannot be too constantly or too emphatically stated that if a vakil leaves his money business to be conducted by his clerk, he is responsible for what the clerk does for purposes of civil liability. At the same time, if a vakil is deceived by his clerk or if his clerk does acts in fraud of him, then of course, it would not be right to hold that the vakil himself is guilty of professional misconduct. [P 818 C 2]

Sircar, Mritunjoy Chatterji and Roma Prosad Mookerjee—for the Vakil.

Prafulla Chandra Ghose—for Appellant in First Appeal No. 264 of 1924.

Rankin, C. J.—In this case a complaint was made to the Court informally by a letter dated 25th August 1927, from a lady who was appellant in a certain first appeal. It appears that the first appeal was ultimately dismissed because there was a sum of Rs. 200 for paper book costs in connexion, more particu-

larly, with the B list which had not been paid after time had been given upon various occasions. A very substantial amount of over Rs. 1,200 was paid into Court, but owing to the failure after many opportunities to pay in a further sum of about Rs 200 the appeal was ultimately dismissed for default by a Division Bench. That having taken place, the complaint to which I have referred was addressed to this Court on 25th August 1927, and the main purposes of the complaint were two. One was to say that the appeal had been dismissed without any notice to or demand from the appellant and although sufficient funds were placed with the vakil to meet his fees and other incidental expenses It may be noticed there that there is no question of the lady's stating that money had been paid to be deposited which had, in fact, not been deposited. The second element of complaint was that a sum of Rs 624 had been withdrawn from the Court and no portion of the money had been returned to the appellant.

Now, that complaint having been lodged just before the long vacation a further complaint this time submitted by a vakil B. B. Prafulla Chandra Ghose dated 14th December 1927, was sent to this Court by a letter. That letter refers to previous communications asking for an inquiry and goes on to ask that the Registrar should let the learned vakil know "the result of your enquiry into the matter." It further goes on to make a series of further charges and a series of further statements apparently by way of supplement to what had been made to the Court some months ago.

It is quite obvious that whatever observation or criticism these representations may be justly subject to, it was not possible for this Court to pass the matter over without taking proper steps both in the interest of the Court itself and in the interest of the learned vakil. It is of course quite unreasonable and absurd that a letter which is sent to know the result of an enquiry should go on to make a whole lot of new charges and in that respect this letter of December is thoroughly unreasonable and improper. It contains moreover a certain amount of indication that charges are made with too great lightness, because in one instance a charge is made that Rs. 170 was not paid to a certain learned

pleader of this Court without any steps being taken to make certain there is any foundation for the charge.

It is extremely difficult to deal with complaints of this character without, on the one hand, omitting to enquire into matters which require to be investigated and without, on the other hand, being unfair to the learned vakil concerned. However, the Full Court thought it right to issue a rule calling upon the learned vakil to give his explanation on certain definite matters set forth in the rule, those matters being taken from the record of the case and the representations of the party complaining.

The learned vakil has very conveniently submitted his explanation first of all, in a written form and, secondly, by learned counsel Mr Sircar. It appears from his explanation first that there is no material before us at present which leads us to think that there is any *prima facie* case against this vakil of having received money for the purposes of depositing it in Court and having failed to deposit the same. Indeed, that charge is contrary to the case made by the lady herself when she applied to the Court to restore the appeal; and although that fact may not be conclusive against her, the position is, in my judgment, that we are not now presented with a substantial or reasonable case of that character which requires any further investigation. If the complainant still wishes to press any charge of that sort, she will do it at arm's length between party and party according as she is advised. There is nothing to require the Court to take of its own motion any further steps with respect to that.

The second matter is this : it refers to a sum of Rs. 624 which was withdrawn from the Court. Now, it appears that the cheque by which that money was repaid was a cheque made out to the learned vakil but that his name was written not by himself by way of endorsement on the cheque; and we now find that that was done by the clerk of the vakil who appears to have kept the money making a profession or pretence that he was keeping it in deposit with himself in order that it might be returned when the lady and her am-mukhtears were prepared to give a joint receipt. We are now told by the learned vakil that on discovery of this clerk's conduct he

was immediately dismissed and we are further told that when he was dismissed his master was unable to obtain from him the account book which it was his duty to keep and which would show the transactions had by him on behalf of his master. That certainly is a statement of which, if true would put the learned vakil in a very awkward position when he comes to give a detailed explanation to the Court. We have no reason to think that that statement made in that way is untrue. I can only wish for myself that that matter had been fully and carefully stated in the original letter of explanation which was sent by the learned vakil on 21st September.

It cannot be too constantly or too emphatically stated that if a learned vakil leaves his money business to be conducted by his clerk he is responsible for what the clerk does for purposes of civil liability. At the same time if a learned vakil is deceived by his clerk or if his clerk does acts in fraud of him then of course it would not be right to hold that the learned vakil himself is guilty of professional misconduct. In the present case it would appear that the explanation which has been tendered to this Court is full. It would not appear that it is open to this Court or necessary for this Court to institute any further enquiry as to the matters dealt with in this explanation. In my judgment, therefore, these proceedings have brought the Court to this position that, while the appellant may in this matter, if she likes, take steps civil or criminal against the clerk or even should she be so advised against the learned vakil, this Court in its disciplinary jurisdiction has received an explanation which no longer makes it any part of the duty of this Court of its own motion to prosecute this matter further as a matter of professional misconduct. The explanation has been received and so far as this Court of its own motion is concerned, that is an end of the matter. It is not necessary that we should issue a further rule on the vakil. On the other hand, nothing has been said by us which can prevent the appellant from taking further steps if she is so advised.

G. C. Ghose, J.—I agree.

Mukherji, J.—I agree.

M.R./R.K.

Order accordingly.

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**** A. I. R. 1928 Calcutta 819
Full Bench**

RANKIN, C. J., AND C. C. GHOSE,
SUHRAWARDY, B. B. GHOSE AND
PAGE, JJ.

*Ram Charan Goldar and others—
Plaintiffs—Appellants.*

v.

*Hamid Ali and others—Respondents—
Opposite Parties*

Civil Rule No. 546-S of 1928, D/- 6th July 1928, in Appeal No. 809 of 1925 from appellate decree of Additional District Judge, Tipperah.

*** Letters Patent (Calcutta), Cl 15 (Amended in 1927)—Condition of certificate is attached to a judgment of single Judge only—Right of appeal on difference of a Bench being deleted, no appeal lies from refusal to grant a certificate in such a case.*

A second appeal came up for hearing before two Judges of the High Court on 9th February 1928. The Judges differed in their opinion and the case was disposed of under S. 98 (2) instead of being referred to in pursuance of the proviso to S. 98, Civil P. C. The amendment to Cl. 15, Letters Patent, came into force on 14th January 1928. Application for certificate under the amended clause was refused. An appeal having been preferred against this order,

Held: that certificate is a condition attached by the amending Letters Patent only to the case of a judgment of a single Judge and the right of appeal given in the case of a difference of opinion where the Judges are equally divided is dealt with in the amended Letters Patent by being deleted altogether. No appeal therefore lay from the refusal to grant such a certificate. [P 820 C 1]

Sarat Chandra Basak and Probodh Chandra Kar—for Petitioners.

Naresh Chandra Sen Gupta and Nagendra Nath Chowdhuri—for Opposite Parties.

Rankin, C. J.—In this case, the plaintiffs who are the applicants before us brought their suit on 25th November 1919. A second appeal was referred to this Court in 1922 and, by the decree in that appeal, the case was remanded to the lower appellate Court which came to its decision on 3rd December 1924. From that decision, a second appeal was filed again to this Court on 6th March 1925. This was heard on 9th February 1928 by my learned brethren Cuming and Mukerji, J., who differed in opinion. Cuming, J., took the view that the appeal should be dismissed; Mukerji, J., took the view that the appeal should be allowed. Very unfortunately, instead of acting under the proviso to S. 98, Civil P. C., whereby the matter on which they

differed could have been referred to one or more Judges of the Court, the procedure followed by that Bench was that the decree of the lower Court was declared to be confirmed under the opening words of sub-S. (2), S. 98.

After the second appeal had been brought to this Court in 1925, but before the hearing, the amending Letters Patent, which came into force on 14th January 1928, were passed. In these circumstances, the plaintiffs who had failed in their appeal presented to this Court a Letters Patent Appeal from the decision of the Division Bench and that appeal has been ordered to be accepted and registered, subject to any objection that may be taken by the respondents at the hearing of the appeal as regards its competency. In addition to presenting the Letters Patent appeal, however, the plaintiffs presented another appeal. It appears that, on 24th February 1928, they applied to Cuming, J., purporting to act under the amended Letters Patent for a certificate that the case was a fit one to be taken on appeal and the learned Judge refused that certificate on the same day. Thereupon, the plaintiffs presented an appeal from that order of refusal and, on that appeal being presented, a rule (546-S of 1928) was issued calling upon the respondents to show cause why that appeal should not be admitted. That is the only rule before us as regards this case.

Now, when the matter is examined, it is found to stand in this way: By the Letters Patent as they stood before the recent amendment, a provision was made by Cl 15 for an appeal, first of all, from the judgment in certain cases

of one Judge of the said High Court or of one Judge of any Division Court pursuant to S. 13, High Courts Act:

and, in the second place, from the judgment in certain cases

of two or more Judges of the said High Court or of such Division Court whenever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the said High Court at the time being.

By the amending Letters Patent, Cl 15 is dealt with in this way: For that clause, an amended clause is substituted and, when the amended clause is examined, it appears that, as regards the first matter, namely, the judgment of a single Judge, it is provided first, that no

appeal shall lie from a judgment in the exercise of the jurisdiction to hear appeals from appellate decrees but to that there is an exception, viz, that an appeal shall lie in such a case where the Judge who passed the judgment declares that the case is a fit one for appeal.

As regards the second of the two matters which I have mentioned as being dealt with by Cl. 15 as it originally stood, namely, an appeal from the judgment of a Division Bench of two or more Judges where the Judges are equally divided in opinion, the amendment made by the amending Letters Patent is to omit that provision altogether. Upon that state of facts in the circumstances of the present case, it appears that various questions arise. But one question which does not arise in any circumstances is the question of there being any necessity to have a certificate as a condition of bringing a Letters Patent appeal. That certificate is a condition attached by the amending Letters Patent only to the case of a judgment of a single Judge and the right of appeal given in the case of a difference of opinion where the Judges are equally divided is dealt with in the amended Letters Patent by being deleted altogether. In that view, it is clear that, whether or not Cuning, J., refused the certificate on the ground that he had no jurisdiction to give one or on any other ground, his decision was, in fact, right because there was no jurisdiction to give such a certificate and no such certificate could have operated anything. In this view, it appears to me that the present appeal from the refusal to give such a certificate must come to nothing and that the present rule calling upon the respondents to show cause why this appeal should not be admitted must be discharged. There is no question in such a case of granting a certificate; still less of any appeal from the refusal to grant such a certificate.

It remains to make quite clear that, when the appeal which has been registered against the decree dismissing the second appeal comes on for hearing, the question whether the effect of the amending Letters Patent is to take away the right of appeal which formerly would have existed will be disposed of by the Court. As regards that question, it is a special question and is not an easy question. It is entirely a separate question

from the question which has been argued in the other rule (545-S of 1928) in which we have reserved judgment. In my opinion, it is more correct to allow that question to be determined in due course at the decision of the appeal. In fact, we have no right to dispose of that second appeal here and now without consent of parties and, in any case, learned advocate for the plaintiffs prefers that the question of his clients' right of appeal should be determined under the existing order when their appeal comes on for hearing and not now.

The only other question that remains is the question of costs of this rule. It is perhaps unfortunate for the parties that we have required this matter to be argued twice. But it is a new question and, in my judgment, it is not a case in which we ought to make either party pay costs. There will be no order as to costs. The rule will be discharged.

C. C. Ghose, J.—I agree.

Suhrawardy, J.—I agree.

B. B. Ghose, J.—I agree.

Page, J.—I agree.

R.K.

Rule discharged.

* * A. I. R. 1928 Calcutta 820 Full Bench

RANKIN, C. J., AND C. C. GHOSE AND
B. B. GHOSE, JJ.

In the matter of S, a Vakil.

Civil Rule No. 915 of 1928, Decided on
15th August 1928.

* * *Letters Patent (Calcutta), Cl. 10—Pleader accepting client's vakalatnama and papers but not filing the appeal—No specific agreement exempting him from liability in case of non-payment of fees—Pleader also not subsequently trying to file an application to get extension of time—Pleader's action amounts to not ordinary negligence but to grave professional misconduct—Legal Practitioner's Act, S. 13.*

P came to Calcutta being desirous of presenting a second appeal. The vakil was at that time absent from Calcutta and P approached his clerk. Before P left Calcutta, the vakil who had returned had himself prepared the memorandum of appeal and P had signed and handed over a vakalatnama. P made certain payment before he left Calcutta in respect of the appeal, but he had not paid the whole of the sum. No specific agreement exempting the vakil from liability in case of non payment was entered into. The vakil subsequently left for the mufasil, relying upon instructions given by him to his clerk to file the appeal when the balance of the sum due had been paid by P. The vakil took no further trouble in the matter. On his return to Calcutta he made enquiries of his

clerk and was informed by his clerk that the appeal had been filed although as a matter of fact it was not filed. Shortly afterwards he left Calcutta again having given his clerk instructions to arrange for some one to argue the appeal if it came up for hearing. The vakil knew nothing of the clerk's deception until he returned on the second occasion to Calcutta. At this time, the negligence, trickery and lies of his clerk were made fully known to him. The vakil agreed to move an application under S. 5, Lim. Act, and a draft memorandum of appeal and a draft affidavit of the clerk were prepared. But they were not actually filed. All other papers in the case were subsequently returned to P.

Held : that the vakil had accepted P's vakalatnama and had promised to file the appeal. It was not an ordinary case of negligence. It was in itself grave professional misconduct and a complete disregard of the client's interest.

[P 824 C 1]

A. N. Chaudhury and J. M. Chaudhury
—for Opposite Party.

Rankin, C. J.—Prasanna Kumar Sen, in May of this year, presented in person a petition to this Court complaining of the conduct of *S*, a vakil of this Court. By an order dated 28th May 1928, a rule was issued calling upon the vakil to submit to this Court an explanation of his conduct in respect of the matters complained of. At the hearing of this rule it was on 17th July 1928 ordered by the Court that a rule should issue calling on the vakil to show cause why he should not be suspended from practice or otherwise dealt with for professional misconduct : (1) in failing to file the second appeal, *Prasanna Kumar Sen v. Hiralal Roy Choudhury* and (2) in failing thereafter to make proper explanation to the Court of the circumstances with reference to such failure in order that time might be extended for the filing of the said second appeal. This rule was issued under the powers conferred by Cl. 10, Letters Patent 1865, which empowers the Court to remove or suspend from practice on reasonable cause any advocate, vakil or attorney.

In November 1927, the petitioner came to Calcutta being desirous of presenting two second appeals. The vakil was at that time absent from Calcutta and the petitioner approached his clerk, one Nando Lal Sarkar. The vakil having returned to Calcutta soon afterwards, the petitioner saw him upon the matter of the two proposed appeals. As regards one appeal, the vakil got Dr. Nares Chan-

dra Sen Gupta to look into the papers and to draw up the memorandum of appeal. This appeal was duly filed and later on was duly admitted, Dr. Sen Gupta having argued it successfully under O 41, R 11. The other appeal is the matter with which this rule is more particularly concerned. The proposed respondents were Hiralal Roy Chaudhury and others. Before the petitioner left Calcutta on or about 19th December 1927, the vakil himself had prepared the memorandum of appeal and the petitioner had signed and handed over a vakalatnama.

Nothing in this case turns upon any question of payments made by the petitioner to the vakil. It is quite clear that the vakil was not acting out of charity and fully intended to be paid for his services. The petitioner made certain payments before he left Calcutta in respect of both appeals. He says that for the first appeal he paid in all Rs 33 and for the second appeal Rs 30, but he had not paid the whole of these sums by the time he left Calcutta. After the petitioner had left for his home he wrote a letter on 16th January 1928 to the vakil's clerk complaining that he had not been given any information about the numbers of the two appeals or copies of the grounds or accounts. He assured the clerk that he would do his best to get the necessary money and expressed a wish that the dates of hearing in the two appeals might be close together. On 8th February the clerk wrote informing the petitioner that the number of his appeal was 2513. This refers to the first of these two appeals which had in fact been filed on 19th November. On 15th March this appeal was admitted under O. 41 and the vakil's clerk wrote to the petitioner asking him to send money for service of notices upon the respondents and Dr. Sen Gupta's fee. The petitioner on 21st March wrote to the vakil saying that he was unable to pay Dr. Sen Gupta's fee and complaining that the clerk had not sent him any accounts of expenses and had not given him the number of the second of these two appeals, namely, the one against Hiralal Chaudhury. He enquired what was the number and what was to be the date of hearing of this appeal. By that time the latest date for filing this appeal had long gone by, namely the 15th February 1928. The reply to this is a letter from the clerk to the peti-

tioner whereby the petitioner is told that this last-mentioned appeal was second appeal No 2860 and that it had been dismissed summarily. The clerk refused to send copies of documents unless money was forthcoming and pressed for Rs 28 for service of notices in the other appeal which had been admitted. The petitioner on 18th April wrote to the clerk complaining that he had been given no information as to whether there was any remedy by review or otherwise against the dismissal of the appeal against Hiralal Chaudhury and no information as to the pleader who appeared in the case or the reason for which the appeal was not admitted. Complaint was also made that no accounts had been given to the petitioner for the sums of money which he had paid. On 20th April the clerk wrote in reply to the petitioner that the vakil had been present, that there was no chance of a review and that the rejection of the appeal could not be helped. It was also stated that it had been argued by the son-in-law of the Judge who heard it. Demand was at the same time made for Rs 8 for the other appeal and also for the vakil's fees. There is another letter on the following day (21st April) from the clerk to the petitioner. This letter makes out that the vakil has been very much displeased at the petitioner's complaints and apparent lack of confidence. It says that the appeal which was dismissed was argued before a certain Judge of this Court and that the petitioner was represented by a relative of that Judge. It calls upon the petitioner to make further payments.

In these circumstances the petitioner not unnaturally became highly dissatisfied and suspicious and came to Calcutta. He there learnt that no appeal had ever been filed in the case against Hiralal Chaudhury and he went to another vakil to see what could be done in the circumstances. The clerk wrote to his master requesting him to come to Calcutta at once and before the end of the month S. returned.

The case for the respondent vakil is that he has very little practice in the High Court, but that he has extensive landed properties in the Rajshahi and Pabna Districts over which he had been having considerable trouble involving his presence and personal supervision; that on account of this he was obliged to be

in the mufassil for substantial periods, going there before the payment of the January kist and staying on till the payment of the March kist of Government revenue. It is admitted that he took from the petitioner the papers and the vakalatnama for the proposed appeal in the case against Hiralal Chaudhury. He says that he left Calcutta on 18th November 1927 and that before leaving Calcutta he had himself drawn up the grounds of appeal and had received Rs 20 for costs in that connexion; that when he left Calcutta he left instructions with his clerk to file the two appeals on getting the requisite costs from the petitioner. Leaving the matter thus, the vakil, according to his own case, left for the mufassil, relying apparently upon instructions given by him to his clerk to file the appeals when the balance of the sum due had been paid by the petitioner. From that point onwards it does not appear that the vakil took any further trouble in the matter and he did not return to Calcutta until the first week in March. He states that he then made enquiries of his clerk and was informed by his clerk that both the appeals had been filed; that shortly afterwards he left Calcutta again having given his clerk instructions to arrange for some one to argue the second of the two appeals if it came up for hearing under O. 41, R. 11 during his absence; that he returned to Calcutta about the end of April and was told by the clerk that the second of the two appeals had not been filed, and that the clerk had been falsely representing to him and to the petitioner that it had been filed and dismissed.

The petitioner says that the vakil himself had written him a letter dated 20th April, but I find that this is not proved. I further accept the statement of the vakil that his clerk had in March informed him that the appeal had been filed and that he knew nothing of the clerk's deception until he returned to Calcutta at the end of April 1928. At this time, however, it is clear that the negligence, trickery and lies of his clerk were made fully known to him. The petitioner complains that the vakil at first agreed to apply for extension of the period of limitation and to make an affidavit for that purpose, but that he afterwards refused to file any such petition. The petitioner says he could get

no other vakil of the High Court to do this for him, that he was asked to take back his papers and Rs. 30 but refused to do this and that in these circumstances he was obliged to apply to the Court in person.

The vakil's case, on the other hand, is that he consulted Dr. Sen Gupta and that Dr. Sen Gupta drew up a draft affidavit to be sworn by the clerk for the purpose of obtaining an extension of time. That draft affidavit is in evidence, having been produced by the vakil. In para 3 it states that the appeal in the case against Hiralal Chaudhury was not immediately filed as the money paid by the appellant was not sufficient to cover all the expenses; that when the vakil left Calcutta he left instructions with the clerk to arrange for all his work, including the filing of the appeal in time; that the clerk's wife fell seriously ill at the time, so that the clerk had to leave Calcutta suddenly and in great mental distress, without making any arrangements for all the cases, and had to stay away from Calcutta; and that in the midst of the worry and trouble the fact that the petitioner's case had to be filed escaped the clerk's memory. The draft affidavit goes on to say that the clerk discovered his mistake on receiving a letter from the petitioner, but was filled with so much fear on account of his failure of duty that he did not venture to tell the petitioner or his master what had happened. It also states that when his master was informed of the true state of affairs, the clerk was instructed by him to make over the papers to the client to take such action as he thought fit.

The respondent vakil in his affidavit says that when he learnt the true state of affairs, he informed the other vakil to whom the petitioner had gone in his absence, that he would himself move an application under S 5, Lim. Act, with an affidavit of his clerk in support of the application; that he informed the petitioner that this was all that he could now do for the petitioner under the circumstances, that the petitioner asked him to explain the affidavit in Bengali, that, after hearing it, the petitioner said that he was not agreeable to file an affidavit in these terms; and that on the next day the petitioner asked for his papers and was given back the papers

without being required to sign a receipt as he said that he was unable to write. The petitioner's case is that he has never received his papers back. The draft memorandum of appeal and the draft affidavit of the clerk were certainly not given to the petitioner because they were produced before this Court by the vakil, but on the evidence in this case I do not think it would be safe or right to hold as against the vakil that he had retained the other papers in the case.

It appears to me, however, that on the vakil's own showing he has been guilty of grave misconduct. I find it amply proved that he undertook before he left Calcutta to file both the appeals. I am not at all impressed by the suggestion that this undertaking was in any way conditional upon the payment of further money by the petitioner. The affidavit of the vakil discloses defective notions on his part as to his responsibility for his clerk's monetary transactions with his clients and a statement in para 17 of the vakil's second affidavit appears to me to be particularly wrong and disingenuous:

I say further that the client had apparently specially entrusted my clerk with the business of looking after the cases and that my clerk carried on the entire correspondence with him on his own responsibility and without my knowledge.

In my judgment the petitioner has established conclusively that before he left Calcutta, in November 1927, the vakil had accepted his vakalatnama and undertaken his case. He had promised to file the appeal in the case against Hiralal Chaudhury and had never at any time made a stipulation that unless the petitioner supplied him with a particular sum of money he would not act for the petitioner. Instead of doing his duty by the petitioner in these circumstances the vakil left Calcutta for several months, leaving everything to his clerk a person obviously of the lowest instincts and utterly unfit to be trusted in any matter of importance. I cannot find that the vakil took any steps to enquire what the clerk was doing, whether the appeal was filed, and whether the petitioner had paid more money or not. He says that in March he asked the clerk whether the appeal had been admitted, but even on his return to Calcutta he did nothing more. In the meantime apparently the clerk was con-

ducting correspondence with the petitioner after his own fashion.

This is in my judgment no ordinary case of negligence. It is in itself grave professional misconduct and a complete disregard of the client's interest. Persons who are admitted to practice in this Court cannot be allowed to share in a valuable monopoly and at the same time to neglect their duties in a manner so unconscionable.

I regret to say that my view of this vakil's conduct, when he discovered the consequence of his own unparalleled neglect of duty, is that it was neither frank as regards the Court, nor just to the petitioner. An affidavit is drafted which consists of nothing but shabby and absurd excuses made upon the footing that the petitioner was partly to blame for not making further payments and that the clerk was partly excused by domestic troubles. In his second affidavit the vakil says that the statements made in paras. 6 and 7 of the affidavit of the clerk were based upon statements made by his clerk which he believed to be true. This statement I do not accept, and I am clearly of opinion that the petitioner has proved that because he would not identify himself with this thoroughly treacherous and disingenuous document, the vakil would have nothing more to do with the petitioner. In my judgment the petitioner was entirely in the right to refuse to be any party to an application made to the Court after this manner. I cannot too strongly condemn the contention that the vakil was making any reasonable endeavour to retrieve his client's case or to accept the responsibility for the loss suffered by his client by the vakil's neglect of duty.

Mr. A. N. Chaudhury on behalf of the vakil, while admitting that his client is plainly guilty of professional negligence, has urged us to hold that the case is not one which calls for an order suspending the vakil from practice. I regret to say that I cannot take this view. It is most necessary that conduct such as is disclosed in this case should be visited with severity, and the most lenient order which it is open to us to make is that S be suspended from practice in this Court for a period of six months from to-day.

C. C. Ghose, J.—I agree.

B. B. Ghose, J.—I agree.

R.K.

Order accordingly.

A I. R. 1928 Calcutta 824

CUMING AND MUKHERJI, JJ.

Court of Wards, Durga Prosad Sen Gupta and others — Plaintiffs — Appellants.

v.

Madhab Krishna Nandy and others—Defendants—Respondents.

Appeal No 701 of 1925, Decided on 25th January 1928, from appellate decree of 1st Sub-Judge, Comilla, D/- 9th January 1925.

Civil P. C., O. 22, R. 3—Manager of Court of Wards filing appeal on behalf of several co-sharers—Death of one of them before filing appeal—Legal representatives not brought on record—Appeal is incompetent.

Where manager of Court of Wards filed an appeal on behalf of several co-sharers, one of whom was dead before the filing of the appeal and the legal representatives of the deceased were not brought on record,

Held : that the appeal was incompetent.

[P 824 C 2]

Surendra Nath Guha and Nashim Ali —for Appellants.

Bepin Chandra Basu—for Respondents.

Judgment.—This appeal arises out of a suit for rent. The plaintiffs are the appellants to this Court. It would appear that the suit was brought by a manager under the Court of Wards on behalf of a number of persons. It would further appear that the suit was actually decided by the Subordinate Judge in appeal on 9th January 1925. On 11th January 1925, that is, before the appeal was filed in this Court which was done on 23rd March 1925, one of these disqualified proprietors, Durga Prosad Sen Gupta, died. No attempt was made to bring his heirs on the record before the appeal was filed; and the appeal was filed in his name by the manager although at the time he was actually dead. An application was made on 9th November 1925, for the substitution of his heirs. This application was rejected. The position, therefore, is that one of the co-sharer landlords is not an appellant in this appeal. The suit being a suit for rent the appeal in its present form is incompetent. The appeal, therefore, stands dismissed with costs.

A.L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 825

CAMMADE AND S. K. GHOSE, JJ.

Bimala Charan Rudra—Plaintiff—Appellant.

v.

Abdul Rahaman Dalai and others—Defendants—Respondents.

Appeal No. 2432 of 1926, Decided on 27th August 1928, from appellate decree of 5th Sub-Judge, Zillah Dacca, D/- 31st August 1926.

(a) Evidence Act—Admissibility.

Evidence cannot be admitted about intention of parties when that intention is clearly expressed in deed. [P 825 C 2]

(b) Transfer of Property Act, S. 58—Mortgage-deed containing the word "bikrita" and also a clause that mortgage shall be come out-and-out sale after expiry of certain period is not out-and-out sale at the inception.

If the mortgage deed contains a clause that the mortgage would be turned into out-and-out sale, a clause which is essential for a mortgage by conditional sale under S. 58, T. P. Act, the deed is not an out and out sale to begin with, but only a mortgage by conditional sale, although the deed contains the word "bikrita," meaning "sold." [P 825 C 2]

(c) Mortgagor and Mortgagee—Adverse possession.

Mortgagee cannot set up adverse possession against the mortgagor by executing a kabuliyat in favour of the landlord. [P 826 C 1]

Gunada Charan Sen and Probodh Chandra Kar—for Appellant.

Sarat Chandra Basak and Charu Chandra Choudhury—for Respondents.

Biraj Mohan Majumdar—for Dy. Registrar.

Judgment.—This appeal is by the plaintiff in a suit for redemption of a mortgage bond by way of conditional sale. The mortgage was executed on 23rd November 1905 by one Ananda Chandra De, and the plaintiff has acquired Ananda's interest under a kobala. The first Court decreed the plaintiff's suit, ordering that the plaintiff shall recover possession on payment into Court within seven days of the decree the sum of Rs. 700 which is the amount for which the property was mortgaged. The Court of appeal below reversed the decree of the first Court. Its findings were that the transaction was not a mortgage but an out-and-out sale, and that the plaintiff had acquired no title under his kobala which was not a bona fide deed. The learned Subordinate Judge's ground for holding that the deed

which expressly states that it is a mortgage by way of conditional sale is an out-and-out sale, is that the word "bikrita" which means "sold" had been written in one part of the document and had been penned through prior to registration. From the fact that the word "bikrita" had been written in the document even though it had been penned through, the learned Subordinate Judge thought himself justified in saying that the transaction was an out-and-out sale. The learned Subordinate Judge has also treated as good evidence, with regard to the intention of the parties, various statements made by witnesses on the side of the defendants. The learned Subordinate Judge was clearly in error in admitting evidence on the question of the intention of the parties when that intention is clearly expressed in the deed. The finding by the learned Subordinate Judge that the plaintiff had acquired no title and that his deed is not bona fide is not based on anything more than his finding immediately above to the effect that he is not satisfied that the plaintiff had paid anything to Ananda. It is perfectly immaterial whether the plaintiff had paid anything to Ananda or not. It is open to Ananda to make a gift to the plaintiff if he so chose, and the plaintiff is Ananda's grandson-in-law.

It has also been urged on behalf of the respondents that there are two other grounds on which the judgment of the learned Subordinate Judge may be supported. It is contended that according to the terms of the deed executed by Ananda, the mortgage should be turned into an out-and-out sale on the expiry of six years from the date of the execution of the deed. Such a clause in the mortgage is to be expected in a mortgage by way of conditional sale. In fact if reference is made to S. 58, T. P. Act, it will be found that it is when such a clause exists in the deed or when such other clauses there mentioned, with which we are not concerned, exist that the transaction is a mortgage by way of conditional sale. It has also been urged that on the expiry of six years the mortgagee defendant executed the kabuliyat in favour of the landlord, the date of that kabuliyat being a little over 12 years prior to the institution of the suit. The contention is that the mortgagee by executing a kabuliyat dispossessed the mortgagor and

acquired title by adverse possession for more than 12 years. There is no force whatever in this contention. The mortgagee could not dispossess the mortgagor.

The appeal is, therefore, allowed, the judgment and decree of the learned Subordinate Judge are set aside and those of the Munsif are restored with costs in this Court and in the Court of appeal below.

S.N./R.K.

Appeal allowed.

A. I. R. 1928 Calcutta 826

CUMING, AND MUKERJI, JJ.

Tata Iron and Steel Co., Ltd—Defendants—Appellants.

v.

Radha Moni Dasi and others—Plaintiffs—Respondents.

Appeal No. 1447 of 1925, Decided on 16th February 1928, from appellate decree of Sub-Judge, Asansol, D/- 4th April 1925.

Bengal Patni Regulation (8 of 1819), S. 13—Girbidar is like usufructuary mortgagee—Patnidar cannot grant lease to girbidar's prejudice.

The position of the girbidars is the same as that of a usufructuary mortgagee in possession; and the patnidar is not entitled to disturb his possession by granting a lease to other persons and lease so granted is not in any way binding on the girbidars: 11 W. R. 357, *Foll*: 12 Cal 185; 15 C. W. N. 404; and 7 C. L. J. 601; *Ref.* [P 827 C 1]

Amarendra Nath Bose and Ambica Pada Chowdhury—for Appellants.

Jyotish Chandra Sarkar—for Respondents.

Cuming, J.—In the suit out of which this appeal arises the plaintiffs sought for a declaration of title to and for a perpetual injunction restraining the defendants from taking sand from the bed of the river Tumni. Their case briefly was that a certain property was sold for arrears of rent in 1886. One Fulkumari Debi who was a dar-patnidar under patni deposited the amount due and obtained possession of the patni as girbidar under S. 13 Regn. 8, 1819, on 29th September 1886. The plaintiffs' case was that by various transfers and devolutions the girbi right and interest had passed to her and that she was in possession of the patni. The main contention of the defendants was that they had taken a lease of the underground coal and other

minerals from the zemindar, Maharaja of Burdwan, and also from the patnidars in 1918; and, therefore, they had a right to the sand. They denied the plaintiff's girbi or possession and alleged that the plaintiffs were not girbidars but were merely benamdars of the patnidars who were their lessors. The trial Court found that the plaintiffs were in possession of the patni interest of 'the mouza Joalbhanga as girbidars, that they were not benamdars and that the defendants had no right to the sand as against the plaintiffs; it, therefore, decreed the suit. The defendants appealed to the District Court and that Court dismissed the appeal. The Court held that the plaintiffs were not benamdars and the defendants had no right to the sand of the river Tumni.

The learned advocate for the appellants has argued four points. First, it is argued that the Court below has erred in law as to the legal rights of the girbidars as contemplated under S. 13, Regn. 8, 1819. Secondly, it is said that on a proper and legal construction of the Indenture of 1918 the Courts below ought to have held that the appellants are entitled to the sand in dispute. Thirdly, it is said that the Courts below have erred in law in thinking that the plaintiffs are not bound by the terms of the said Indenture of 1918. Lastly, it is said that on the case made in the plaint and on the findings arrived at by the Courts below they ought to have held that the plaintiffs cannot maintain the present suit specially in the absence of the patnidars. This last ground namely the maintainability of the suit in the absence of proper party, was not pressed. The last three other grounds really in effect depend on the decision of the question as to what are the rights of a girbidar. A girbidar may be said to be creations of S. 13, Regn. 8, 1819 and the material portion of that section is to be found in clause 4 of that section where it begins with the words:

But shall be considered as a loan made to the proprietor of the tenure preserved from sale by such means and the taluk so preserved shall be the security to the person or persons making the advance who shall be considered to have a lien thereupon in the same manner as if the loan had been made upon mortgage; and he or they shall be entitled on applying for the same to obtain immediate possession of the tenure of the defaulter in order to recover the amount so advanced from any profits belonging thereto.

I may say, as far as I can see, these are more or less the rights of a usufructuary mortgagee and this view is supported by the decision of this Court in the case of *Boistub Churn Bhudro v. Tara Chand Banerji* (1), where the learned Judges remarked that the position of girbidars was substantially the same as that of a mortgagee in possession under a usufructuary mortgage. Mr. Bose has referred us to three other cases, *Lala Bharub Chandra Karpur v. Lalit Mohun Singh* (2), *Ram Jiban v. Taj-ud-din* (3) and *Jakhomull Mehera v. Saroda Prasad Dey* (4). He admits that these last three decisions throw no light on the problem with which we are now concerned. As I have stated before it seems to be quite clear that the position of the girbidars is the same as that of a usufructuary mortgagee in possession; and that the patnidar is not entitled to disturb his possession by granting a lease to other persons, and lease so granted is not in any way binding on the girbidars. These contentions are, therefore, decided against the appellants.

The last argument by Mr. Bose on behalf of the appellants is "what is the nature of sand." Mr. Bose seems to contend that sand being a mineral patnidars had no right to the sand and the girbidars also had no right to the sand. He seems to contend that the right to the sand belongs to the zemindar who has joined in granting him a lease. The zemindar apparently was one of the grantors of the lease to the defendants. The original lease by which the patni was created has not been produced and in its absence it is impossible to say what right the zemindar reserved for himself and what rights he demised to the patnidars. In the absence of this lease it is impossible to decide this point. Mr. Bose further argues that under O. 41, R. 7, Civil P. C., he should be allowed to put in some additional evidence. The additional evidence in question is a judgment of a certain suit and it is dated 13th May 1927. This is a suit apparently brought by the patnidars for a declaration that the money due for arrears of rent has been paid and for recovery of possession. No copy of this

judgment has been served on the respondents and we are not prepared at this stage to allow that evidence to be placed before us.

The result, therefore, is that this appeal fails and is dismissed with costs.

Mukherji, J.—I agree.

V.V.

Appeal dismissed.

A. I. R. 1928 Calcutta 827

C. C. GHOSE AND JACK, JJ.

Abdul Barik and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 536 of 1928, Decided on 16th August 1928, from judgment of Sess. Judge, Bakarganj.

Criminal P. C., S. 293—Jury's verdict agreeing with whatever opinion the Judge might form—Jury sent again for consideration—Returning verdict of guilty—Judge not agreeing with the verdict but accepting it—Retrial ordered.

The jury returned a verdict that they agreed with whatever opinion the Sessions Judge might form. The jury was sent back to bring in a proper verdict after consideration. The jury returned within a short time with a verdict of guilty. The Judge convicted the accused although he did not agree with the verdict.

Held: that the jury apparently abdicated their functions in favour of the Judge and did not consider the case at all. The conviction and sentence should be set aside and retrial ordered. [P 828 C 1]

Sures Chunder Taluqdar and Saroj Kumar Maiti—for Appellants.

Khundkar—for the Crown.

Judgment.—In this case the accused were tried under S. 328, and 304, I. P. C., before the learned Sessions Judge of Bakarganj and a jury. After the learned Judge had charged the jury it appears that the jury retired at 4-10 p. m. and returned at 4-25. When they returned, the verdict of the jury was given as follows:

Q. Are you unanimous? A. Yes.

Q. What is your verdict? A. We agree with whatever opinion you may form (*hujurer je rai amader*).

The jury were accordingly directed at 4-26 p. m. to go back and bring in a proper verdict after consideration of the evidence. They came back at 4-35 p. m. and on being questioned they said that they found all the three accused not guilty under S. 304

(1) 11 W. R. 357.

(2) [1883] 12 Cal. 185.

(3) [1911] 15 O. W. N. 404=9 I. C. 489.

(4) [1908] 7 C. L. J. 604.

and by a majority of 4 to 1 found all the three accused. Montajuddi, Abdul Barik and Akram Ali, guilty under S. 328, I. P. C. In this state of the record it is impossible not to feel that the jury did not properly consider the case at all. The jury, as has been pointed out in several cases, are the only persons who can pronounce a definite opinion on the guilt or otherwise of the accused who are tried before them. In this case they apparently abdicated their functions in favour of the Judge. No doubt, the Judge very properly sent them back, but it does not appear from the time occupied by the jury in their second deliberation that they properly considered the case and brought in a genuine verdict. We are confirmed in this because of what the learned Judge has said himself in his finding and sentence, namely; "I accept this verdict although I do not agree with it." There is, therefore, all the more reason why this matter should be further considered by the learned Sessions Judge and a fresh jury.

The result is that the verdict of the jury is set aside and with it the conviction and the sentence, and the matter must go back to the learned Sessions Judge for retrial before him and a fresh jury.

A.L./R.K.

Retrial ordered.

A. I. R. 1928 Calcutta 828

MITTER, J.

Surendra Nath Das—Decree-holder—Petitioner.

v.

Alauddin Mistry—Auction-purchaser—Opposite Party.

Civil Rule No. 848 of 1928, Decided on 30th July 1928, from order of Dist. Judge, 24-Pargannas, in Misc. Appeal No. 92, of 1928, D/- 10th May 1928

Civil P. C., O. 21, R. 90—Auction-purchaser is not a person whose interests are affected by the sale and cannot apply under the rule.

An auction purchaser is not a person whose interests are affected by the sale but is a person who acquires interest in the property sold by the sale and he has no locus standi to make an application under O. 21, R. 90: 3 P.L.J. 516, Rel. on; 88 M. L. J. 228, Diss. from: A. I. R. 1925 All, 459, Disapproved. [P 830 C 1]

Hira Lal Chakravarty—for Petitioner
Amtika Pada Choudhury and Bhambesh Narayan Bose—for Opposite Party.

Judgment.—The rule arises out of an application made by the auction purchaser who is the opposite party to the rule under O. 21, R. 91, Civil P. C., to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold. The case made by the opposite party is that the property purchased by him was wrongly described in the sale proclamation. The wrong description is said to have consisted in (i) overstatement of the area: (ii) mention of the existence of a pucca privy on the land which really does not exist. It is said that if the auction-purchaser had not been misled in these two particulars he would not have purchased the property in question.

The Munsiff dismissed the application being of opinion that O. 21, R. 91 of the Code has no application to the present case and that the remedy of the purchaser was by a suit.

An appeal was taken against this order to the District Judge of 24 Pargannas.

The learned District Judge held that O. 21, R. 91 did not apply to the present case and stated that this point was conceded before him on behalf of the purchaser. But the learned District Judge remanded the case to the Court of first instance for a decision of the question whether there has been a material irregularity and whether the applicant has suffered substantial injury. The learned District Judge held, following the decision of the Madras and Allahabad High Courts and dissenting from the view taken in the Patna High Court, that an application under O. 21, R. 90 could be made by an auction-purchaser as he is a person whose "interests are affected by the sale" within the meaning of the said rule.

This rule was obtained for revision of the order of the learned District Judge directing a remand and the main ground on which this rule was issued was that the Court had no jurisdiction to entertain an application under O. 21, R. 90, at the instance of the auction-purchaser and consequently the learned District Judge having held that O. 21, R. 91, did not apply was not right in remanding the case on the footing that the application of the auction-purchaser could be treated as one under O. 21, R. 90.

It has been held on the highest authority that an auction-purchaser could not apply to set aside a sale under S. 311, Civil P. C., 1882, for S. 311 was limited "to the decree-holder or any person whose immovable property has been sold" which an auction purchaser was not: see *Brij Mohan Thakur v. Uma Nath* (1).

In the present Code of 1908 the words are: "Any person whose interests are affected by the sale" may apply to set aside the sale under O. 21, R. 90. Can an auction-purchaser be regarded as such a person? I think not; for the interest here contemplated must refer to an interest not "created by the sale" but affected by the sale. It is the sale to the auction purchaser which is to affect the interests and therefore the interest must have existed before the sale which affects that interest. It is true that if I contrast the language of O. 21, R. 89 I find that R. 89 contemplates an application by persons either owning the property sold in execution or holding an interest therein by virtue of a title acquired before such sale. It is improbable as has been pointed out in *Abdul Aziz v. Tafizuddin* (2) that the divergence of language between O. 21, R. 90 and R. 89 is accidental. It is true that the words "persons whose interests are affected by the sale" are of wider import than the words of the Code of 1882, viz., "person whose immovable property has been sold." The latter expression was construed to mean "any person whose interests were affected by the sale" by a Full Bench of this Court in the case of *Asmutennessa Begum v. Asrag Ali* (3) and the legislature has adopted those words in the Code of 1908. It is necessary to look into the previous history of the legislation in order to determine whether the legislature intended to make such a violent departure from the provisions of the Code of 1882 so as to include an auction-purchaser within the expression "person whose interests are affected by the sale." With great respect to the learned Judges of the Allahabad High Court I do not think the reference to the previous decision of the Judicial Committee in *Brij Mohan*

Thakur v. Uma Nath Choudhury (1) relating to the corresponding provision under the Code of 1882 is irrelevant in the present controversy. see: *Ravinandan v. Jagannath* (4) (*Walsh J.*, p 484). The legislature must be taken to have knowledge of the decision of the Judicial Committee in *Brij Mohan Thakur v. Uma Nath Choudhury* (1). What was there to prevent them from using the word "the auction purchaser" in O. 21, R. 90 after the word "decree holder" if it was their intention to nullify the effect of the decision of their Lordships of the Privy Council in *Brij Mohan Thakur v. Umanath Choudhury* (1).

Walsh, J., in the case referred to above observed as follows: The question whether an auction-purchaser is entitled to apply, depends on the question whether he is included in the expression "a person whose interests are affected by the sale." It is necessary to observe that this expression was not contained in the corresponding provisions which was in force up to 1908, and up to that date the auction-purchaser could not apply but could bring a suit. It follows, therefore, that for the purpose of determining this question the cases decided before 1908, or decided after 1908, with reference to proceedings which had begun before 1900, bearing upon the question whether auction purchasers could apply or could properly bring a suit, are wholly irrelevant, and for my part, I decline to look at them. Unfortunately I find them still cited as though they were relevant and authoritative, in text books dealing with the law under this rule and they have been cited as authorities in one decision from which I feel compelled to differ.

These observations of the learned Judge show a disregard of the accepted canons of the construction of statutes. They are inconsistent with following accepted rules of construction laid down by their Lordships of the Judicial Committee of the Privy Council in the recent case of *Abdur Rakim v. Mahomed Barkat Ali* (5). Their Lordships say:

It is a sound rule of interpretation to take the words of a statute as they stand and to interpret them ordinarily without any reference to the previous state of the law on the subject or the English law on which it is founded: but

(1) [1893] 20 Cal. 8=19 I. A. 154=6 Sar. 245 (P.C.).

(2) [1915] 19 C. W. N. 326=23 I. C. 839.

(3) [1888] 15 Cal. 488 (F.B.).

(4) A. I. R. 1925 All. 459=47 All. 479.

(5) A. I. R. 1928 P. C. 16=55 Cal. 519=55 I. A. 96 (P.C.).

when it is contended that the legislature intended by any particular amendment to make substantial changes in the pre-existing law it is impossible to arrive at a conclusion without considering what the law was previously to the particular enactment and to see whether the words used in the statute can be taken to effect the change that is suggested as intended.

In this view it was not only not irrelevant but it was essential to consider the terms of the corresponding provision in the Code of 1882 and further how that provision was interpreted in the decision of the Judicial Committee of the Privy Council.

The learned Judges of the Madras High Court would interpret the words "interests" to mean "interests" in the property acquired at the sale: see *Gopala Krishnayya v Sanjeeva Reddy* (6). It is difficult to understand how a person's interest can be affected by the sale unless those interests in the property sold existed prior to sale.

I think that the Patna High Court has taken the correct view in holding that the word "interests" in O. 21, R. 90 must refer to interests existing prior to the sale: see *Ketra Mohan v. Dilwar* (7).

The auction purchaser is not in my opinion, a person whose interests are affected by the sale but is a person who acquired an interest in the property sold by the sale and he has no locus standi to make an application under O. 21, R. 90. The learned District Judge was not right in sending the case back to the Court of first instance for treating the application as one under O. 21, R. 90. The result is that the order of the learned District Judge is set aside and the application of the opposite party under O. 21, R. 91 is dismissed. If there has been fraud and misrepresentation which induced the opposite party to bid at the sale and pay a larger price he has his remedy by suit. The rule is made absolute, but in the circumstances of the present case there will be no order as to costs.

A.L./R.K.

Rule made absolute.

A. I. R. 1928 Calcutta 830

CUMING AND MUKERJI, JJ.

Rajjab Ali and others—Plaintiffs—Appellants.

v.

Miajan and others—Defendants—Respondents.

Appeal No. 815 of 1925, Decided on 10th February 1928, from appellate decree of Addl. Dist. Judge, Commilla, D/- 9th January 1925.

Cosharer—Partition suit—Property partitioned previously should be separated—If it cannot be determined the suit should be dismissed.

In a suit for partition, if it is found that there was previous partition, Court should determine what lands had been partitioned before and these lands should be separated from the other and the partition of the remainder be effected. If it cannot be determined what lands were partitioned before, then the suit has to be dismissed: *A. I. R. 1927 P. C. 208. Cons.*

[P 831, C 2].

Upendra Kumar Roy—for Appellants.
Jogesh Chandra Roy and Sasadhar Roy (Sr.)—for Respondents.

Cuming, J.—This appeal arises out of a suit for partition. The case of the plaintiffs was that many years ago some seven persons of whom the plaintiffs represented, three took a lease of a large area of land within certain boundaries from the Maharaja of Tipperah. The parties remained in possession of distinct portions of the land by private arrangement for the sake of convenience, but that there was no regular partition of the demised land. Now, they asked that the land should be partitioned. The case of the defendants was that the lands had all along been partitioned. Now, it appears that the actual amount of the lands purported to be demised by the patta granted by the Maharaja was some 32 kanis of land. It is apparently the case of both the parties that some 12 kanis out of the demised land was sold and that they remained in possession of the remaining 20 kanis, settlement operations had since taken place and the parties were found to be in possession of some 17½ acres of land being roughly 52 kanis. As far as I can see it is the case of both the parties and certainly of the defendants that the land demised by the patta is covered by certain daga Nos. 870, 871, 879, 882, 884, 885, 887, 1326 1336, that these lands measure as

(6) [1920] 33 M. L. J. 228=11 M. L. W. 184=55 I. C. 333=(1920) M. W. N. 152.

(7) [1918] 3 Pat. L. J. 516=46 I. C. 614=5 Pat. L. W. 151.

I have stated 17.12 acres. There was a further case with regard to the schedule *kha* land with which we are not now concerned.

The trial Court found that there had been no previous partition of the lands covered by schedule *ka* and ordered that a partition should be made of it. With regard to the schedule *kha* land he ordered that the plaintiff's claim should be dismissed.

Both the parties appealed to the District Court—the plaintiff with regard to the schedule *kha* land and the defendant with regard to the schedule *ka* land. The learned Judge dismissed the appeal of the plaintiffs regarding the schedule *kha* land and allowed the appeal of the defendants so far as the schedule *ka* land was concerned. He held that there had been a previous partition of this land and hence he dismissed the plaintiffs' suit totally.

The plaintiffs have appealed to this Court and they contend that the learned Judge has made out for the defendants a case which is different from that set up by the defendants in their pleadings. There the case of the defendants was that the schedule *ka* land was covered by the original patta, while the learned Judge seems to think that the schedule *ka* land comprises 'not only the land of the original patta but also some land which he calls the excess land and has made a new case that there was reclamation outside the boundaries of the lands covered by the patta to which the parties lay exclusive claim by adverse possession.

Looking at the judgment of the learned District Judge it seems to me that there is substance in this contention of the appellants. The learned Judge has found at p. 8 of the paper-book that

in respect of schedule *ka* lands a partition has been made and that the two parties are in possession respectively of the land falling to the allotment of each.

At p. 7 of the paper-book he has found that there was a regular partition of such of the lands demised as were then fit for cultivation. Now, the schedule *ka* land included all the land covered by the patta which had been brought under cultivation and, therefore, obviously included something more than the land which was partitioned before 1912. Therefore it is quite clear that

the whole of the lands of Schedule *ka*, were not partitioned in 1912. This, I think, is quite clear from the learned Judge's own finding that what was partitioned at that time were the lands brought under cultivation. It does not seem to be anyone's case that there was no further reclamation after the year 1912. The remaining land apparently would remain *ejmali*. Any further reclamation of this *ejmali* land would obviously be for the benefit of all the co-sharers.

Mr. Jogesh Chandra Roy who appears for the respondents contended that the appeal must fail on this finding of fact, as there had been a partition of some of the land there could not be a partition of the whole land as was sought for by the plaintiffs. The plaintiffs, he contended, could only sue for a partition of these lands which had not been partitioned before 1912. In support of this contention he refers to the decision of the Privy Council in the case of *Abdul Wahab Khan v. Tilakdhari Lal* (1). This decision, no doubt, supports the contention of the respondents that the plaintiffs cannot succeed in the suit as now framed because it has been found as a fact that some of the lands included in this suit have already been partitioned. In the case before the Privy Council their Lordships ordered that the suit should be dismissed and further added that this would be without prejudice to the right of the plaintiff to sue for partition of the lands which are admittedly still undivided. We think, therefore, the proper order in this case would be that the order of the District Judge should be set aside and the case should be sent back to the first Court to determine what lands had been partitioned before 1912, and these lands should be separated from the other and the partition of the remainder will be effected. If, of course, it cannot be determined what lands were partitioned before 1912 then the plaintiffs' suit has to be dismissed.

Costs of this appeal will form part of the costs in the suit, and costs in the suit will abide the result.

It will be open to the parties to adduce any further evidence that they may desire to adduce.

Mukerji, J.—I agree.

R. K.

Case remanded.

(1) A. I. R. 1927 P. C. 208.

A. I. R. 1928 Calcutta 832

PAGE AND MALLIK, JJ.

Aghore Nath Haldar—Plaintiff—Appellant.

v.

Dwijapada Chatterjee — Defendant—Respondent.

Appeal No. 2013 of 1925, Decided on 9th February 1928, from appellate decree of Dist. Judge, Zillah Murshidabad, D/- 27th April 1925.

(a) *Bengal Municipal Act 3 of 1884, S. 85* (a)—*Test for making a person liable to assessment for an occupation of "a holding" is the mode of user and not the length of occupation—Occupation by a servant must be ancillary to his duties.*

Occupation of a holding in order to render a person amenable to a personal tax imposed upon "persons occupying holdings" under S. 85 (a) connotes actual possession by the person liable to be assessed or by his servant or agent in furtherance of the duties which such servant or agent was engaged to perform for the assessee. Such possession must be beneficial to the assessee, it must be intended that the possession should be continuous and not merely casual or intermittent, and the assessee or joint assessee of the holding must be entitled to the exclusive use and enjoyment of the holding as of right and not on sufferance free from interference from outsiders and without the user and enjoyment being subject to a paramount right of regulation or control by the party who put them in possession or any other person: per *Denman, C. J., in In re Chelsea Waterworks, 5 B & D Ad. 156* and per *Lord Hatherley in Cory v. Bristow, (1871) 2 A. C. 272, Foll.* [P 833 C 2]

It is the mode of user and not the length of the term that determines whether or not the occupation in such that the person occupying the holding is liable to assessment. [P 834 C 1]

In order to constitute an occupation as a servant it must be an occupation ancillary to the performance of the duties which the occupier was engaged to perform. [P 833 C 2]

Where a Headmaster of a High School resided for some time in the attached hostel with the permission of the School Committee and lived as an ordinary boarder under the Superintendent subject to the usual term of boarding and lodging, but was not entitled to the use of any particular seat or bed and was also liable to have his seat changed at any time as the Superintendent might direct.

Held: that the Headmaster did not occupy a holding within the meaning of S. 85 (a) and was not liable to be assessed and that his occupation was not occupation as a servant. [P 835 C 1]

(b) *Bengal Municipal Act (3 of 1884), S. 85* (a)—*"Holding" does not mean a part of a holding.*

The term "holding" in S. 85 (a) bears the meaning attributed to it in S. (6) (3) of the Act, viz., "land held under due title or agreement

and surrounded by one set of boundaries." It does not and cannot reasonably be construed to mean or include a part of a holding: 17 C. W. N. 812, *Ref.* [P 833 C 1]

(c) *Bengal Municipal Act (3 of 1884), S. 85*—*Separate occupiers of separate parts of one holding cannot be assessed for portions in their occupation.*

There cannot be separate occupiers of separate parts of one and the same holding assessable to tax in respect of portions that they respectively occupy. [P 834 C 2]

(d) *Bengal Municipal Act (3 of 1884), S. 15*—*S. 15 is concerned with electoral franchise and not with taxation.*

Sections 85 and 15 do not relate to the same subject-matter. S. 15 is not concerned with the incidence of taxation but with qualifications for the electoral franchise. [P 834 C 2]

Peary Mohan Chatterjee—for Appellant.

Rupendra Kumar Mitter and Byomkesh Basu—for Respondent

Page, J.—The issue raised in this appeal involves the construction of the term "persons occupying holdings" in S. 85 (a), Bengal Municipal Act 3 of 1884. The appellant is the Headmaster of the English High School at Jangipur. From October 1921—23 he resided in a boarding house or hostel for students adjoining the school buildings, but the school building and the hostel for the purposes of the Bengal Municipal Act are, and are to be treated as, separate holdings. The hostel belongs to the School Committee, and its internal affairs are managed by a Superintendent. Persons who are accepted as boarders are entitled to reside in the hostel only if, and so long as they conform to the rules and regulations of the institution. The hostel exists primarily for students, but the appellant obtained permission to reside therein as a boarder upon the usual terms, and became entitled to occupy a seat or bed in one of the rooms on the upper storey and to partake of the meals supplied in the hostel for an inclusive charge of Rs. 7-8-0 per month.

The appellant, however, was not entitled to the use of any particular seat or bed, and so long as he was given a seat in any one of the rooms on the upper storey he was liable to have his seat changed from time to time as the superintendent might direct or the exigencies of the hostel might require.

In these circumstances an assessment was made upon the appellant under S. 85 (a) Bengal Municipal Act, and the

amount of the tax was realized by the issue of distress warrants. The appellant thereupon brought the present suit to recover inter alia the amount of the tax that had been levied upon him. The trial Court decreed the suit, holding that the assessment upon the appellant was illegal, but the lower appellate Court reversed the decree of the trial Court and dismissed the suit. From the decree of the lower appellate Court the appellant has preferred the present appeal.

The material sections of the Act are, S. 85 (a) The Commissioners may, from time to time . . . impose within the limits of the municipality one or other or both of the following taxes: (a) a tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality; provided that the amount assessed upon any person in respect of the occupation of any holding shall not be more than Rs. 84 per annum; or (b) a rate on the annual value of holdings situated within the municipality. S. 6 (3) "holding" means land held under one title or agreement, and surrounded by one set of boundaries; provided that where two or more adjoining holdings form part and parcel of the site or premises of a dwelling house, manufactory, warehouse or place of trade or business, such holdings shall be deemed to be one holding for the purposes of this Act other than those mentioned in Cl. (a), S. 85.

(4) "House" includes any hut, shop, warehouse or building;

(5) "immovable property" and "land" include (besides land) benefits arising out of land, houses, things attached to the earth, or permanently fastened to anything attached to the earth.

The issue to be determined is whether the appellant is a person occupying a holding within S. 85 (a), Bengal Municipal Act. Two contentions have been raised in support of the appeal.

The learned vakil on behalf of the appellant urged that the occupation of the appellant was that of a servant or agent of the School Committee, and that the hostel was being occupied by the School Committee, and not by the appellant. *Ambika Churn v. Satis Chandra* (2) *Govinda Chandra v. Kailash Chandra* (4).

(1) [1892] 2 C. W. N. 699.

(2) [1915] 15 C. L. J. 689 = 15 I.C. 909.

In my opinion this contention is ill-founded. The appellant was not residing in the hostel because he was required to do so for the better performance of his duties as the headmaster of the school. Indeed, the hostel was not intended to be a boarding house for the master; but for the students, and it was only after obtaining the permission of the Secretary of the School Committee that the appellant was allowed to reside in the hostel at all. Now

the governing principle is that in order to constitute an occupation as a servant, it must be an occupation ancillary to the performance of the duties which the occupier has engaged to perform: per *Mellor. J. in Smith v. Seghill* (3), *Fox v. Dalby* (4), *Clifton College v. Thompson* (5) *Charterhouse School v. Gaylex* (6).

The first contention, therefore, raised on behalf of the appellant fails.

It was further contended that in the circumstances the appellant by residing in the hostel did not "occupy a holding" within S. 85 (a), Bengal Municipal Act.

Now, "occupier" and "occupation" are not defined in the Act, but, in my opinion occupation of a holding in order to render a person amenable to a personal tax imposed upon "persons occupying holdings" under S. 85 (a) connotes actual possession by the person liable to be assessed, or by his servant or agent in furtherance of the duties which such servant or agent has engaged to perform for the assessee. Such possession must be beneficial to the assessee; it must be intended that the possession should be continuous and not merely casual or intermittent, and the assessee or joint assessee of the holding must be entitled to the exclusive use and enjoyment of the holding as of right and not on sufferance; free from interference from outsiders, and without the user and enjoyment being subject to a paramount right of regulation or control by the party who put them in possession or any other person. It is not essential, however, that the possession should be permanent in the sense that the assessee should be entitled to the exclusive use and enjoy-

(3) [1875] 10 Eq. 422 = 44 L. J. M. C. 114 = 21 W. R. 745 = 32 L. T. 859.

(4) [1875] 10 C. P. 285 = 23 W. R. 244 = 4 L. J. C. P. 42 = 31 L. T. 478.

(5) [1896] 1 Q. B. 432 = 65 L. J. Q. B. 231 = 6 J. P. 599 = 44 W. R. 410 = 74 L. T. 168.

(6) [1896] 1 Q. B. 437 = 65 L. J. Q. B. 233 = 60 J. P. 326 = 44 W. R. 412 = 74 L. T. 171.

ment of the holding for a definite term or a certain period, for a tenant-at-will is, until the will be determined an occupier: per *Denman, C. J., in re Chelsea Waterworks* (7).

and

it would be a confusion of ideas to say that it (that is, a liability to determination) interferes with the exclusive possession any more than a right of re-entry on the part of a landlord in certain given events, could be said to interfere in any way with the right of a tenant during the time he is holding. He is a beneficial occupier for a term, though that term is limited by certain contingencies which may possibly determine his interest at an earlier period: per *Lord Hatherley in Cory v. Bristol* (8).

In other words, it is the mode of user and not the length of the term, that determines whether or not the occupation is such that the person occupying the holding is liable to assessment. Further it is to be observed that exclusive user and enjoyment is not the same thing as exclusive occupation, for

a lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger. Such a lodger could not bring ejectment or trespass *quare clausum fregit* the maintenance of the action depending on the possession, and he is not rateable: per *Blackburn, J. in Allan v. Liverpool* (9);

and although a person may be entitled to the exclusive enjoyment of a holding that is so also

where a guest in an inn, or a lodger in a house, has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear that the possession remains in the innkeeper, lodging-house keeper, or ship-owner: per *Hill, J., in Smith v. St. Michael's Cambridge* (10), *Smith v. Lambeth* (11), *Curzon v. Westminster Corporation* (12).

Now, in determining the question whether the occupation of a holding is such that it renders the occupier liable to a personal tax imposed under S. 85 (a)

- (7) [1893] 5 B. & Ad. 156,
- (8) [1871] 2 A. C. 262=25 W. R. 383=36 L.T. 595=46 L.J.M.C. 273.
- (9) [1874] 9 Q.B. 180=22 W. R. 330=43 L.J. M. C. 69=30 L.T. 93.
- (10) [1860] 3 E. & E. 383.
- (11) [1882] 10 Q. B. D. 327=52 L. J. M. C. 1=47 J. P. 244=48 L. T. 57.
- (12) [1916] 86 L.J.K.B. 198=14 L. G. R. 1112=80 J. P. 469=115 L.T. 823.

regard must be had to the circumstances of each case, for

it is the intention of the parties which has to be looked at; it is not the words only that are to be regarded. The whole of the circumstances must be taken into consideration. It is the substance of the transaction rather than the form that determines the question whether such an exclusive occupation exists as will make the property rateable: per *Lopes, L. J., in Rochdale Canal Co. v. Brewster* (13), *Lord Bute v. Grindall* (14), *The Queen v. Lady Emily Ponsonby* (15), *R. v. St Pancras* (16), *Cory v. Bristol* (8), *Bradley v. Baylis* (17), *Holywell Union v. Halkyn Dist. Mines Co.* (18), *Liverpool Corporation v. Chorley* (19), *Jalpaiguri Municipality v. Jalpaiguri Tea Co. Ltd.* (20).

In my opinion, however, there cannot be separate occupiers of separate parts of one and the same holding assessable to the tax in respect of the portions that they respectively occupy, for the term "holding" in S. 85 (a) does not mean or include "part of a holding" Ss. 6 (3) (4) (5); although, no doubt, there may be more persons than one in joint occupation of a holding, in which case each of the joint occupiers, is, or may be, amenable to the tax according to his circumstances and property within the municipality: *Jalpaiguri Municipality v. Jalpaiguri Tea Co.*, (20) and *R. v. Paynton* (21).

Reliance was placed by the respondent on S. 15 (iii), but S. 85 and S. 15 do not relate to the same subject-matter. In enacting S. 15 the legislature was not concerned with the incidence of taxation, but with the qualifications for the electoral franchise, and in S. 15 (iii), where the words "occupies a holding or part of a holding" occur, the legislature were prescribing the qualifications of one class of electors, upon the supposition that persons who had passed one of the tests therein set out, and were occupying a holding or a part of a holding rated at not less than a certain sum, probably were possessed of sufficient perspicacity and intelligence to exercise the electoral

- (13) [1894] 2 Q. B. 852=64 L. J. Q. B. 37=59 J. P. 132=71 L. T. 243.
- (14) [1786] 2 H. Bl. 265=1 Term Rep. 343=1 R.R. 220.
- (15) [1842] 8 Q. B. 14.
- (16) [1877] 2 Q. B. D. 581.
- (17) [1881] 8 Q.B. D. 195=51 L.J. Q.B. 183=45 J. P. 847=30 W. R. 823=46 L.T. 253.
- (18) [1895] A. C. 117=64 L. J. M. C. 113=59 J. P. 566=71 L.T. 818.
- (19) [1913] A. C. 197=82 L. J. K. B. 555=29 T.L.R. 246=57 S.J. 263=11 L.G.R. 182=77 J.P. 185=103 L.T. 82.
- (20) A. I. R. 1922 Cal. 46.
- (21) [1882] 7 Q. B. 255.

franchise in a reasonable way. In S. 85 the legislature were concerned with the imposition of taxation, and the term "holding" in that section, in my opinion bears the meaning attributed to it in S. 6 (3) viz:

land held under one title or agreement and surrounded by one set of boundaries: *Shah Hamed Hossain v. Patna Municipality* (22), and does not and cannot reasonably be construed to mean or include a part of a holding. Now, applying the texts that I have endeavoured to explain to the facts of the present case, in my opinion, it is clear that the appellant did not "occupy a holding" within S. 85 (a), for it cannot reasonably be contended that he was in occupation of the hostel, and further, his right to the use and enjoyment of a seat or bed on the upper storey of the hostel was not such occupation as would render him liable to assessment under S. 85 (a).

For these reasons the appeal will be allowed with costs, the decree of the lower appellate Court will be discharged, and the decree of the trial Court restored. The appellant is entitled also to his costs in the lower appellate Court.

Mallik, J.—I agree.

A L / R K *Appeal allowed.*

(22) [1913] 17 C. W. N. 812=17 C. L. J. 131.

* A. I. R. 1928 Calcutta 835

B. B. GHOSE AND BOSE, JJ.

Nil Kanta Ghosal—Appellant.

v.

Ram Chand Roy and others—Respds.

Appeals Nos. 380 of 1926 and 369 of 1927, Decided on 4th September 1928, from original orders of Sub-Judge, Burdwan, D/- 13th September 1926 and 18th May 1927, respectively.

* (a) *Civil P.C., O. 21, R. 16*—A true owner can execute a decree obtained in the name of benamidar.

In a suit in which a benamidar obtained a decree, the true owner gave evidence that benamidar was the real owner. After the death of the benamidar the real owner applied for execution of the decree alleging that he was the real owner.

Held: that the true owner can execute such a decree obtained in the name of his benamidar: 5 C. L. R. 253, *Foll.*: A. I. R. 1925 Mad. 701, *Diss. from.* [P 835 C 2]

(b) *Civil P.C., S. 47*—Decree by a benamidar—Execution by the true owner—Judgment—

debtor challenging the ownership—Question should be decided under S. 47.

Where a judgment-debtor raises the question that the person who seeks to execute the decree obtained by his benamidar alleging to be the true owner is not the true owner, the question should be decided under S. 47. [P 836 C 1]

(c) *Civil P. C., O. 21, R. 16*—*Executor.*

Court cannot insist on payment of probate duty from executor of deceased.

D N Chakravarti, K. K Chakravarti and S. C. Khasnobis—for Appellants

Gopendra Nath Das—for Respondents.

B. B. Ghose, J.—This is an appeal by one Nilkanta Ghosal who sought to execute a decree against the respondents which was obtained by his deceased wife Kanchan Barani Debi. The lady brought the suit against the respondents in which the decree was obtained, and it appears that the respondents took the plea that the lady was the benamidar of the present appellant. In that suit the appellant evidently for the purpose of preventing the suit being dismissed on the ground of its being brought by a benamidar (as the law then understood was that a benamidar could not sue for recovery of possession of landed property) gave evidence that the lady was the real owner. Kanchan Barani died after having left a will and in her will she stated that the property in question was her husband's property and as she had no interest in it her heirs would not succeed to it. After her death her husband as executor of the will of Kanchan Barani took out probate. He applied for execution of the decree on the allegation that he was the real owner of the property and Kanchan Barani his late wife, was his only benamidar. The Subordinate Judge was doubtful whether a true owner could execute a decree which was obtained by another person as benamidar. I do not see that there is any difficulty in holding that the true owner can execute such a decree. If one really considers what a benami transaction is and what the position of the benamidar is there should be no difficulty. It is well settled that the benamidar is a mere name, and as it has been called, a mere mask. Behind the name of the fictitious owner there is the real owner and also behind the mask is the person who is the real owner of the property. That being so I do not see that there is anything which prevents the person behind the mask to take off the mask and to appear in proper person before the Court. The

principle is supported by the case of *Abdul Kureem v Chukhun* (1) decided in 1879. This case was no doubt dissented from, as pointed by the learned advocate for the respondents, in *Palaniappa Chettiar v. Subramania Chettiar* (2). But with great respect to the learned Judges the reasons stated by them do not commend themselves to me. I prefer to follow the case of our own Court. There is no reason therefore why a true owner cannot execute a decree obtained in the name of his benamidar.

The learned advocate for the respondents contends that the question whether the appellant is the true owner or not cannot be decided under S. 47, Civil P.C., by the executing Court. His argument might have required consideration if there was dispute between the person who was alleged to be the benamidar and the person who alleges himself to be the true owner. But when the judgment-debtor raises the question that the person who seeks to execute the decree was not the true owner, I do not see why that question cannot be decided under S. 47, Civil P.C.

It is next argued on behalf of the respondents that the Subordinate Judge was right in his view of the fact that the lady was the real owner of the property for which she obtained the decree. The Subordinate Judge was of opinion that the lady made the statement in her will under some misapprehension. This is an assumption which the Subordinate Judge was not entitled to make without any evidence. It is quite clear that the appellant stated in the suit itself that the lady was the real owner in order to avoid the suit being dismissed on that ground. The money for acquiring the property came undisputedly from his fund and there is no reason why he should not be considered to be the true owner. The appellant therefore is entitled to execute the decree in his right. He was also entitled to execute the decree as executor of the will of his wife. The Subordinate Judge held that he could do so. But there is no reason why his right to execute the decree should be restricted by stating that he should report to the Court which granted the probate or to the Collector and pay additional Court-fee. It is not the duty of the Subordinate

Judge to collect probate duty with regard to the will of any person. It is the duty of the probate Court and the revenue authority under the Succession Act. The Subordinate Judge is therefore wrong in limiting the right of the appellant to execute the decree as executor under the will as he has done.

The order therefore of the Subordinate Judge is set aside and the case sent back to that Court for allowing the appellant to execute the decree in any capacity he likes. This judgment will govern both the appeals.

The appellant is entitled to the costs of these appeals, but he will not be entitled to the costs of the preparation of the paper-book as unnecessary papers were printed. The hearing-fee is assessed at five gold mohurs for the two appeals together.

The cross-objection is dismissed without costs.

Bose, J.—I agree.

A.L./R.K.

Order set aside.

A. I. R. 1928 Calcutta 836

RANKIN, C. J. AND C. C. GHOSE AND
BUCKLAND, JJ.

Gangasagar Ananda Mohan Saha—
Petitioners.

v.

Commissioner of Income-tax, Bengal—
Opposite Party.

Civil Revn. No. 1296 of 1927, Decided on 13th December 1927, from order of Commr. of Income-tax, Bengal, D/- 4th May 1927.

Income-tax Act (1922), S. 66 (3)—*Commissioner must, besides question of law, state necessary facts also.*

In cases of reference, under S. 66 it is the duty of the Commissioner of Income-tax to find all the relevant facts. He is not merely required to state the questions of law and give his opinion; he is required above all things to state the facts upon which the question of law must be decided. [P 837 C 1]

Dwarka Nath Chakravarty, Gopal Chandra Das and Satyendra Kishore Ghose—for Petitioners.

Surendranath Guha—for Opposite Party.

Rankin, C. J.—In this case certain assessee applied to the Court under sub-S. (3), S. 66, Income-tax Act 1922, for an order directing the Commissioner of Income-tax to state a case for the opin-

(1) [1880] 5 C. L. R. 253.

(2) A. I. R. 1925 Mad. 701=48 Mad. 553.

ion of the Court. The application made to the Commissioner of Income-tax appears to have raised in a somewhat complicated and contentious form various questions which apparently include allegations of fact which the Commissioner of Income-tax disputes and which overlap to some extent; but the real question for determination is whether the assessee is entitled to be treated for income-tax purposes as a Hindu undivided family. The Commissioner of Income-tax is of opinion that they are not so entitled and that they must be treated as an unregistered firm. We direct that the present Rule be made absolute on that question, namely, whether or not the assessee is entitled to be treated for income-tax purposes as a Hindu undivided family. That is the sole question which we require the Commissioner of Income-tax to state for our opinion.

I desire to point out that in these cases it is the duty of the Commissioner of Income-tax to find all the relevant facts. When a case stated comes before this Court, the Court expects to find all such facts stated in the letter of reference as would enable the Court to decide the question referred to it. It is quite true that the Commissioner of Income-tax is required also to give his opinion. He is not merely required to state the questions of law and give his opinion; he is required above all things to state the facts upon which the questions of law must be decided. I trust, therefore, that when this matter comes before the Court again there will be such findings of fact as will enable the Court to apply the law.

The Rule is made absolute in the sense which I have stated.

Liberty to amend the petition to put in order.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

R.K. Rule made absolute.

* A. I. R. 1928 Calcutta 837

RANKIN, C. J. AND MITTER, J.

Tricumchand Dansing—Appellant.

v.

Chief Revenue Authority of Bengal—Respondent.

Appeal No. 33 of 1927, Decided on 15th July 1927, from original order of Pearson, J.

* *Income-tax Act (7 of 1918), S. 26*—An application under S. 26 made more than a year from the date of original demand but within a year from the revised order of assessment is within time.

The word "demand" covers a case of enhancement by the Commissioner under S. 22 or by a Chief Revenue Authority under S. 23 or under S. 24 where the Collector or the Commissioner orders a man to pay double the rate. It applies to a determination of a sum or extra sum to be payable by the assessee in such manner as to bind the assessee. [P 839 C 2]

A notice of demand under S. 26 was made on 25th March 1920. The order of assessment was revised on 2nd December 1921. On 31st May 1922 the assessee applied to the Collector to correct the mistakes in connexion with assessment.

Held: that the application was within time. [P 839 C 2]

S. C. Bose and Satish Bose—for Appellant.

B. L. Mitter and S. M. Bose—for Respondent.

Rankin, C. J.—This is an appeal from a decision of my learned brother Pearson, J., upon certain questions stated for the opinion of the Court under S. 51, Income-tax Act, 1918. The assessee in this case complained of the amount at which they had been assessed for excess profits duty and they applied to this Court and obtained an order in the nature of mandamus directing the Chief Revenue Authority to state certain questions for the opinion of the Court. The Chief Revenue Authority has stated those questions. In the result it appears that it is necessary for this Court to give its opinion upon the first of the questions so stated. That question is thus framed:

Whether the time prescribed by S. 26, Act 7, of 1918 is to be reckoned from the original demand or from the making of the revised assessment whereby refund was ordered on revision of assessment revised by the Board on 2nd December 1921.

That question becomes more or less intelligible on consideration of the following facts: The assessee were engaged in three different places including Serajgunj in the District of Pabna in the business of jute. The year for which they were being assessed was the year 1919-20 and on 15th March 1920 a notice of demand was served upon them for income-tax at a certain figure. On 25th March 1920 a notice of demand was served upon them for excess profits duty. According to that notice of demand it would appear that they had to pay in respect of excess profits duty the substantial sum of

Rs. 8,384 which they, pending subsequent proceedings, paid. Now, against the assessment to income-tax they appealed to the Commissioner under S. 21, Income-tax Act, 1918. They persuaded the Commissioner that for the previous year in question they had made no profit and to use the language of S. 22, Income-tax Act, he cancelled the assessment. As regards the assessment to excess profits duty the petitioners lodged a petition with the Chief Revenue Authority as required by the Excess Profits Duty Act.

Upon this matter coming before the Chief Revenue Authority that authority took the view, differing from the view that the Commissioner had taken in dealing with the income-tax assessment that the profits had been calculated on the wrong accounting period, that they ought not to have been calculated on Sambat 1975 but either Sambat 1974 or else for the ordinary financial year ending with the 31st March 1919. They remitted the matter on this question of the excess profits duty to the Commissioner. He remitted it to the Collector. The Collector had a report made to him by the assessor and it then appears that the Collector heard the parties, heard what they had to say upon the assessor's report and came to the conclusion that the profits for the purpose amounted to Rs. 77,000. The assessee says that they got no opportunity of examining the assessor's report, but the statement of the case made to the Court by the member of the Board of Revenue is to the contrary. The matter went to the Commissioner. He estimated and held that the profits were Rs. 49,397. Then the matter went to the Chief Revenue Authority by an application which was dealt with on 2nd December 1921. The Chief Revenue Authority came to the conclusion that the figure at which the Commissioner had arrived was the correct figure and accordingly on that basis out of Rs. 8,384 which had been paid on the original assessment, a refund to the assessee was due of Rs. 1,419 and that refund was made. The order of the Commissioner cancelling the assessee's assessment to income-tax and directing a refund of the money paid in that respect was never interfered with, and ultimately the assessee obtained refund of all that they had paid for income-tax and they were therefore in the position that,

while under S. 19, Income-tax Act, 1918 this might be adjusted upon the actual figures at the end of the year of assessment, the assessee has no grievance in respect of income-tax. Their grievance has reference to excess profits duty. They say that on going into the assessor's report on the basis of which the Chief Revenue Authority assessed them to excess profits duty on the basis of profits of Rs. 49,397 they discovered that there were three palpable mistakes. In one case by a slip of pen the figure 1 has come before the figure 5 making a difference of Rs. 10,000. It is said also that when you look at the assessor's report you find that he has taken the closing stock as part of the income for the year. In other words, they say upon an inspection of the assessor's report that it contains obvious and undoubted mistakes. Now, on none of the affidavits in this matter and (we are assured by Mr. Bose for the assessee) in no affidavits before any revenue authority have these allegations as to these palpable mistakes been disputed.

In these circumstances, the assessee sought a remedy. They applied first of all to the Collector on 31st May 1922 and they asked him to exercise his powers under S. 26 of the Act to correct the mistakes. The words of that section which has been applied to excess profits duty, are these :

"The Collector may, at any time within one year from the date of any demand made upon an assessee, rectify any mistake in connexion therewith which has been brought to his notice by such assessee and make a refund to such assessee in respect thereof."

The Collector held that the period of "one year from the date of any demand" refers to the notice of demand to be served under S. 20 of the Act. In this case the only notice under S. 20 was the original demand which was served in March 1920. The Chief Revenue Authority did not deal with this matter until the 2nd December 1921, that is to say, 18 months or more after the original demand. The Collector says, however, that as regards any mistake in that order he cannot entertain an application because it is more than one year from March 1920. That is the first question and indeed in the end the only question before us.

The learned Judge on the original side has agreed with the Collector and his view is shortly this :

I think that the demand mentioned in S. 26 has reference to the demand in the prescribed form referred to in S. 20. Consequently I would answer the question in para. 25 (a) of the petition by saying that the time under S. 26 must be reckoned from the original demand in March 1920, the only demand there has been.

Now, when we come to consider the question in this Court it is very properly conceded by the learned Advocate-General that in the circumstances of this case the order made by the Chief Revenue Authority on 2nd December 1921 was a "demand" within the meaning of S. 26, Income-tax Act, 1918. I have no doubt myself that that is so upon a consideration of the relevant sections. The ordinary section dealing with an original demand is S. 18. It says that if the Collector is satisfied that a return is correct and complete he shall assess the sum payable by the assessee. If he has reason to believe that the return is correct and incomplete then he may require the assessee to attend, and, after examining any account and hearing evidence, he shall by an order in writing determine the total income of the assessee for the previous year, and assess the sum payable by the assessee for the year in which the return is made on the basis of such determination. By S. 19, where in a subsequent year a return has been made and the actual receipts for the then previous year are known it is provided that the difference between the actual profits and the profits upon which income-tax has been paid the year before shall be taken into account and the difference shall be paid by or refunded to the assessee as the case may be. There is a provision in the case of death or insolvency which enables an immediate adjustment to be had in the meantime. S. 20 says that when the Collector has determined a sum to be payable either under S. 18 or S. 19 he shall serve on the assessee a notice of demand. The assessee objecting to the amount to which he has been assessed under S. 18 or to an adjustment under S. 19 may appeal to the Commissioner. The petition shall ordinarily be presented within 30 days of "receipt of the notice of demand". The Commissioner shall pass such order thereon whether by way of confirmation, rejection, enhancement or cancellation of the assessment or the adjustment or otherwise and fixing such time for payment as he thinks fit. The Chief Revenue Authority acting

under S. 23 may make an order enhancing the sum payable but not without hearing the assessee. By S. 24 the Collector or the Commissioner, if they are satisfied that the assessee has concealed particulars of his income, may direct the assessee to pay double the rate on the difference between the true sum and the sum which has been put forward. Now, bearing in mind these provisions of the Act, the question is: When we come to S. 26 and find the words "from the date of any demand made upon an assessee" are we to read that as meaning "from the date of receipt of any notice of demand under S. 20?" In my judgment, that is not the meaning of the phrase. We have to identify the demand in connexion with which the alleged mistake occurred. The word "demand" would cover a case of enhancement by the Commissioner under S. 22, or by the Chief Revenue Authority under S. 23. It would cover a case under S. 24 where the Collector or the Commissioner orders a man to pay double the rate. It seems to me looking to the terms of sub-S. 2, S. 21, that when the statute means to say "from the receipt of the notice of demand" it says so and that the word "demand" in S. 26 applies to a determination of a sum or extra sum to be payable by the assessee in such manner as to bind the assessee. Therefore, in my judgment, the learned Advocate-General has rightly conceded that the order of the Chief Revenue Authority was demand. That demand was made on 2nd December 1921 and it appears that the Collector within one year from that date has a power to deal with the objections.

It seems to me that in this case the other questions which have been referred to us do not arise and need not be dealt with, and as the questions marked (b), (c) and (d) are no longer pressed we confine ourselves to the first question. In my opinion, this matter must be disposed of on the basis that at the time the application was made to the Collector the application was in time, and we should answer question (a) accordingly.

The applicant is entitled to his costs of this appeal and before Pearson, J., and the costs reserved by C. C. Ghose, J., on 9th July 1925.

Mitter, J.—I agree.

A.L./R.K.

Order accordingly.

A. I. R. 1928 Calcutta 840**RANKIN, C. J. AND C. C. GHOSE, J.***Ramshai Mull More*—Appellant.

v.

Joylall—Respondent.

Appeal No. 66 of 1927, Decided on 2nd January 1928, from original order of Buckland, J., in Insolvency Case No. 196 of 1926, D/- 20th April 1927.

(a) *Presidency Towns Insolvency Act, S. 9 (e)*—Attachment in execution of award is not one in execution of a decree.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of S. 9 (e) for the purpose of creating an act of insolvency: *Re. Bankruptcy Notice*, (1907) 1 K. B. 478, *Ref.* [P 841 C 1]

(b) *Arbitration Act, S. 15*—Award.

An award is a decree for the purpose of enforcing that award only. [P 841 C 1]

S. C. Bose—for Appellant.

N. N. Sarkar and *K. P. Khaitan*—for Respondent.

Rankin, C. J.—This is an appeal from an order setting aside an adjudication in insolvency. The adjudication order itself is dated 23rd November 1926 and the petition upon which that order was pronounced was filed on 13th September of that year. The petitioning creditor was the firm of Lachmi Narain Ramchunder and the act of insolvency alleged was that the debtor had suffered his one-third share in a certain property, No. 18, Machua Bazar Street, to be attached for a period of 21 days in execution of a certain award. It appears that on 6th May of that year an award had been given by the Bengal Chamber of Commerce against the debtor for a sum of Rs. 15,250. This award was filed in this Court on 12th May and at the time the insolvency petition was presented an attachment had been subsisting since 20th May, by virtue of the provisions of the Indian Arbitration Act, namely, the provision of S. 15 which says that an award on a submission, on being filed shall be enforceable as if it were a decree of the Court. In that petition the petitioning creditors claimed that by the reason of the attachment subsisting for more than 21 days there was an act of insolvency. The learned Judge has dealt with this application on another footing. It appears that this attachment was ultimately set aside by this Court upon a petition presented in a claim case. It appears that by consent

it was accepted by the Court that the debtor had no attachable interest, he being a mere member of a Mitakshara family without any ascertainable share. It is conceded by Mr. Sircar that the proposition is not sound in law and that there was an attachable interest in this property at the time it was attached. The question on which the learned Judge proceeded was that the Court in execution having set aside the attachment on the basis that it was an attachment which never ought to have been made can that attachment be the basis of an act of insolvency? On that question I have not made up my mind and I desire to say nothing. But the second question seems to me to be reasonably plain and the proper way to look at the matter is this: that if in attachment an execution of an award be an act of insolvency then it is an act which can be utilized within three months by any other person bringing an insolvency petition against the debtor. It does not matter what the petitioning creditors' debt is; so long as the petition was within three months, the act of insolvency would be a good foundation for an adjudication. When we come to look at the words of S. 9, Presidency Towns Insolvency Act, we find that the words are these; they are words which have to be given a strict construction. I do not mean a narrow construction, but they are not words which are to be amplified upon any notion of convenience:

If any of this property has been sold or attached for a period of not less than twenty-one days in execution of the decree of any Court for the payment of money.

Let us test this case on the assumption that another creditor altogether is bringing a petition for an adjudication order in insolvency. He gets to know that within three months a person not himself has obtained an award against the alleged debtor and that there was a proceeding in which an attachment had taken place to enforce that award. Could it be said in favour of such petitioning creditor that the words "in execution of the decree of any Court for the payment of money" had been satisfied? It seems to me quite impossible to say that. It is true enough that for the purpose of enforcing an award you may treat the award as though it were a judgment and, therefore, you may apply to it all the provisions of O. 21 and various other

provisions. It is another thing altogether to say that something which is not a decree must be taken to be a decree with the result that a man is to commit an act of insolvency so that he is to be adjudicated upon a petition presented, it may be by some one who has no concern with the award at all. In my judgment the only way to deal with this matter is to deal with it in the same spirit as in the case to which we have been referred in *Re Bankruptcy Notice* (1). The words "in execution of the decree of any Court for the payment of money" cannot be extended by analogy. They must be extended, if at all, by the legislature and we cannot hold that there has been an act of insolvency when the definition given by the legislature has not been complied with. It may be said that in this case the petitioning creditor's debt is in fact the same debt over again. But as I have pointed out we cannot treat an award as a decree except for the purpose of enforcing that award. It seems to me that it is a circumstance of no importance that the petitioning creditor's debt in this case is the same debt all over again. The position must be same whatever the petitioning creditor's debt is and it is not true to say that it is a mere enforcement of this award which is being sought. It is not, therefore, true to say of the award that it is a decree for the purpose of creating an act of insolvency. I think, therefore, that on this ground this appeal fails and must be dismissed with costs.

C. C. Ghose, J.—I agree.

A.L./R.K. *Appeal dismissed*

(1) [1907] K. B. 478=76 L.J. K. B. 171.

A. I. R. 1928 Calcutta 841

SUHRAWARDY AND GARLICK, JJ.

Soudamini Dassya Choudhurani—
Plaintiff—Appellant.

v.

Sheikh Basir Mamud and others—De-
fendants—Respondents.

Appeals Nos 967 to 980 of 1923, De-
cided on 18th July 1928.

(a) *Bengal Tenancy Act, S. 109—Application under S. 105 for enhancement of rent under S. 30 (b) withdrawn—Subsequent suit for enhancement—Subject-matter different—S. 109 is no bar.*

Where plaintiff made an application under

S. 105 for enhancement of rent under S. 30 (b) in 1916 but withdrew the same and subsequently filed a suit for enhancement of rent in 1923.

Held: that the subject-matter not being the same, S. 109 was no bar to the suit: *A.I.R. 1925 Cal. 845 (F.B.), Discussed.* [P 843 C 1]

(b) *Bengal Tenancy Act, S. 35—Court has discretion to enhance rent.*

Court has discretion to enhance the rent if the circumstances are fair and reasonable to justify it. [P 843 C 1]

(c) *Bengal Tenancy Act S. 32—Scope.*

S. 32 does not prevent Court from comparing period immediately before suit with any other period during tenancy. [P 843 C 1]

S. C. Basak, U. L. Roy, Sarajit Ch. Lahiri and S. C. Das—for Appellant.

S. C. Talukdar and J. C. Guha—for Respondents

Judgment.—There is no substance in S. A. Nos. 968, 970, 979 and 980 of 1926 and they must be dismissed with costs.

As regards the other appeals, it is argued on behalf of the appellant that the procedure adopted by the lower appellate Court is not in conformity with the direction given in Ss 30 and 32 Ben. Ten. Act. The suits are for enhancement of rent on the ground of additional area under S. 52 and of rise in the price of food-crops under S. 30 (b), Ben. Ten. Act. In 1916 after the publication of the record-of-rights applications were made by the plaintiff under S 105, Ben. Ten. Act, for enhancement of rent under S 52 and also under S. 30 (b). Those applications were withdrawn so that on the authority of the Full Bench decision, *Purna Chandra v. Narendra Nath* (1), the same matter cannot form the subject of subsequent suits. The trial Court in view of the Full Bench decision held that the plaintiff's claim for enhancement under S 52 must be disallowed in view of S. 109, Ben. Ten. Act. But with regard to her claim under S. 30, it was of opinion that is was not affected by S. 109, Ben. Ten. Act. After a consideration of the evidence in the cases it came to the conclusion that the plaintiff was entitled to enhancement at 3 annas per rupee under S. 30 (b). Both parties appealed. The plaintiff's appeals were dismissed by the lower appellate Court, but the defendant's appeals were allowed as the learned Subordinate Judge was of opinion that in the circumstances of the

(1) A. I. R. 1925 Cal. 845=52 Cal. 894 (F.B.,)

cases no enhancement should be granted under S. 30. The learned Subordinate Judge says that under S. 32, Ben. Ten. Act, the Court is required to compare the average prices during the 10 years immediately preceding the institution of the suit with the average prices during any other convenient ten years. But as he thinks that the ten years immediately preceding the institution of the suit which was in 1923, included the period of the Great War during which the prices were abnormally high, he holds that S. 32, cannot be properly applied to the case. The Munsif compared the prices during the periods from 1903 to 1912 and 1913 to 1922 and came to the conclusion which he embodied in his decree. We are not quite sure that the learned Subordinate Judge is not right in saying that the comparison between the two periods mentioned by the Munsif was not the proper method of arriving at a finding as to what should be the just increment of rent to be paid by the tenants. But the learned Judge seems to be under the impression that the periods which the law requires him to compare must be consecutive periods; that is ten years immediately before the institution of the suit and ten years immediately before that period. But the law does not say so.

Under S. 32 (a), the Court shall compare the average prices during the decennial period immediately preceding the institution of the suit with the average prices during such other decennial period as to it may appear equitable and practicable. The learned Subordinate Judge has found that the decennial period before the institution of the suit should not be adopted due to the abnormal state of things during a portion of that period. He therefore compares the prices prevalent in the period from 1918 to 1922 with those prevalent during the preceding period from 1913 to 1917 and finds that the increase would be like four to six pies a rupee—an increase which in his opinion is very small. We quite see the reason of the view of the learned Subordinate Judge that the decennial period immediately preceding the institution of the suit should not form the basis of calculation. But S. 32 (a) gives the option to the Court to take any shorter periods if in its opinion it is not practicable to take the decennial periods pre-

scribed in Cl. (a). The learned Subordinate Judge has acted undoubtedly under S. 32 (a); but the error which he is said to have committed is that he has compared the period of five years immediately before the institution of the suit with the period immediately before those five years but has not compared the period immediately before the institution of the suit with any other period during the currency of the tenancy in which the normal state of things prevailed. Then the Subordinate Judge has referred to certain evidence in the case and observed that according to the plaintiff's own witnesses the rents paid by the defendants are the highest in the locality. After making this observation he records his finding in these words:

So taking into consideration the fact that the increase will be very small, if granted, and the other circumstances noted above, I think that no enhancement should be granted even under S. 32 (a).

What he seems to mean is that even after he had compared shorter periods as provided by S. 32 (a) the increase would be so small that in conjunction with the other circumstances such as higher rent paid by the defendants, there should be no enhancement granted under S. 32.

The learned advocate for the defendants argues, firstly, that the present applications of the plaintiff are barred under S. 109, Ben. Ten. Act; and though the Courts below have taken a different view he submits that it is wrong and that he is entitled to support on this ground the decree of the lower appellate Court. It is argued that the subject-matter of the applications under S. 105, is the same as the subject-matter of the present suits; in other words in the applications under S. 105, Ben. Ten. Act, the plaintiff prayed for enhancement of rent under S. 30 and the same claim is made in the present suits. Accordingly the subject-matter of the two proceedings is the same and the suits must be held barred by S. 109, Ben. Ten. Act. The expression "subject-matter" is used in the Full Bench case of *Purna Prasad v. Narendra Nath* (1) but S. 109, uses the word "matter". It says that a civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made under S. 105. We take it

that the expression subject-matter used in the Full Bench case is used in the same sense in which the word "matter" has been used in S. 109. Now the matter which was before the Court in proceedings under S. 105, was the right of the plaintiff to claim enhancement owing to rise in the price of food crops during the period of ten years preceding 1916 as compared with that in any period of ten years preceding that period. In the present suit the matter involved is whether there has been a rise in the price of the food crops during the ten years preceding 1923 as compared with any other period of ten years. The two proceedings are therefore not the same and S. 109 is no bar to the present suits.

It is next argued on behalf of the respondents that the conclusion of the learned Judge as embodied in his findings is conclusive on a question of fact and as such should not be disturbed by this Court; and that, moreover, the order passed by him was one under S. 35, Ben. Ten. Act, which gives it a discretion in granting or refusing an enhancement in consideration of particular circumstances in these cases and this Court should not interfere with such discretion in second appeals. As far as the bare statement of the law is concerned, the respondents' contention must be right. But in the present cases the learned Subordinate Judge has based his conclusion on two facts. The first is that if the enhancement is granted, the increase will be very small; and the second is that the rents paid by the defendants are higher than the prevailing rate of rent. As his conclusion is based upon these grounds, if one of these grounds is found to be incorrect in law the conclusion of the lower appellate Court should not be considered as a finding of fact. Now the learned Subordinate Judge has come to the conclusion that the increase if granted would be very small on a comparison of the prices prevailing during the five years (1917 to 1922) with those during the five years 1913 to 1917—a period during which according to him the prices were abnormally high. As we have said that there is nothing in the law to prevent the Court to compare the period immediately before the suit with any other period during the currency of tenancy, what the learned Judge should have done was to compare the period

from 1918 to 1922 with any other period before 1914. This the learned Judge has not done. If he had done that and had come to the conclusion that the increase would be so small that no enhancement should be granted he would have been justified in refusing enhancement of rent. As he has not done so, we are constrained to send the cases back for the purpose of such comparison and arriving at such conclusion on the same as he thinks proper. If after making the comparison and taking into consideration the evidence and all the circumstances of the case he comes to the conclusion that there should be no increase under S. 35, he is entitled to express his opinion in clear language, namely, by stating that any enhancement will be under the circumstances of the case unfair or unreasonable.

We accordingly set aside the decrees of the lower appellate Court, and send the cases back to that Court for a rehearing of the appeal in the light of the observation made. Costs will abide the result.

A.L./R.K.

Case remanded.

A. I. R. 1928 Calcutta 843

B. B. GHOSE AND N. K. BOSE, JJ.

P. N. Dutt Choudhuri and others—Appellants.

v.

J. H. Blades—Respondent.

Appeal No. 177 of 1927, Decided on 7th September 1928, from order of Dist. Judge, 24-Parganas, D/- 3rd January 1927.

Provincial Insolvency Act (1920), S. 42 (1) (a) —Insolvent's, assets not of requisite value—There must be a finding that insolvent was not responsible for the deficiency.

Merely stating in the order that there is nothing in the report of the Receiver to stand in the way of the insolvent's discharge is not sufficient. The Judge must be satisfied that the assets were not of the requisite value from circumstances for which the insolvent could not be held to be justly responsible. The order is not legal in absence of such finding.

[P 844 C 1]

Abinash Chandra Ghose—for Appellant.

Sachindra Kumar Ray—for Respondent.

Judgment—In this case an order of discharge was made by the learned Judge of the insolvent by his order dated 3rd January 1927. It seems that the creditors 1 and 2 asked for time on various occasions to file their objection. But they did not file their objection on 3rd January 1927 nor did they give any indi-

cation to the Court as to the reason why they were opposing the final discharge. The creditor who is the appellant before us states that he could not file his objection to the final discharge before the Receiver had submitted his report. This report was submitted on 17th December 1926, a few days before the Court closed for the Christmas vacation, and it re-opened on 3rd January. It is stated on behalf of the creditor that within this short time he could not make any enquiry on which he could base his petition for objection. This argument does not seem to be very convincing because the Receiver's report is such a short document that within the course of the 5 or 6 days that the Court remained open before the Christmas vacation he ought to have been in a position to prefer any objection or at least to indicate, as the Court said, the reason why he opposed the final discharge. But there is another serious defect in the order of the learned Judge under S. 42 (1) (a), Provincial Insolvency Act. The Court is bound to refuse to grant an absolute order of discharge under S. 42 unless the insolvent's assets were of value equal to 8 annas in the rupee on the amount of his unsecured liabilities (as it was in this case), unless the insolvent satisfies the Court with regard to certain matters stated in that clause. In the order of the learned Judge it is only stated that there was nothing in the report of the Receiver to stand in the way of the insolvent's discharge. That is not sufficient. The Judge must be satisfied that the assets were not of the requisite value from circumstances for which the insolvent could not be held to be justly responsible. There is no such finding.

This order therefore does not satisfy the provisions of the law and should, therefore, be set aside and the matter is sent back to the learned Judge. The creditors if they choose are allowed to file their objection. The learned Judge will hear their objection and then dispose of the matter according to law. The creditors may raise any objection to the final discharge but on no ground would they be entitled to delay the hearing of the matter.

There will be no order as to costs in this appeal.

R.K.

Order set aside.

* A. I. R. 1928 Calcutta 844

RANKIN, C. J. AND C. C. GHOSE, J.

Shaik Abdul Karim — Defendant — Appellant.

v

Thakurdas Thakur and others—Plaintiffs—Respondents.

Appeal No 79 of 1927 Decided on 3rd February 1928, from original decree of Pearson, J., D/- 9th May 1927.

* Civil P. C., O. 32, R. 3—*Suit against a minor—Absence of appointment of guardian ad litem—Decree is a nullity as against him—Though mere absence of recording of formal order of appointment does not vitiate proceedings, where minor had good defence but no such defence is raised and guardian's interest is adverse, the proceedings may be vitiated.*

Appointment of a guardian ad litem of a minor in a suit against him being quite incumbent, a decree against him without appointment of such a guardian ad litem is a nullity as against him.

No doubt mere absence of formal recording of such an order of appointment would not vitiate the proceedings when the Court has by its action given its sanction to the appearance of a person as such guardian; but the case is otherwise when the minor having a good defence to make, no such defence was made by the guardian and the interest of the natural guardian was adverse to that of the minor.

[P 845 C 1]

B. C. Mitter and *S. C. Ghose*—for Appellant.

S. N. Bannerjee and *H. C. Majumdar*—for Respondents.

Rankin, C. J.—The appellant, Shaik Abdul Karim was defendant in a suit brought by the plaintiff Thakurdas Thakur to set aside a sale of certain property held in execution of a decree dated 6th June 1922 passed by the Small Cause Court. The plaintiff in the Small Cause Court suit was the respondent. Haji Meah Mahomed and he brought his suit against Sulhamoyee Dasi, mother of Thakurdas Thakur who was at that time a minor and against the minor himself. The suit was brought for the recovery of the balance of sum Rs. 2,000 which was the subject-matter of a document dated 23rd January 1919.

It appears that the father of the minor was one Ramlal who died in 1903. He left a son Kanai by a wife who had predeceased him, and Thakurdas Thakur was not at that time born. Sudhamoyee, however, after his death gave birth to a posthumous son and under the will of Ramlal his property went to his two sons. A partition suit was brought in

1910 and as a result of that certain premises now in question No. 3/1 Marcus Square were allotted to the plaintiff. This process was complete in the year 1911. In these circumstances, the mother Sudhamoyee being apparently in need of money obtained advances from Haji Meah Mahomed in 1918 and early in 1919. Apparently the first advance was of Rs. 300, the second was of Rs. 100 and at the time of the document of 23rd January 1919 a further sum of Rs. 1,600 was advanced.

Now the document in question which was registered is in the form of a receipt and it is signed by Sudhamoyee without any further description than that she was the widow of Ramlal. The receipt purports to be a receipt for Rs. 2,000 on the term that the sum would be paid by deduction of Rs. 20 each month out of the rent payable by Haji Meah Mahomed for No. 3, Marcus Square the rent of which would not be enhanced until repayment of the full sum. It provided

If before payment of the said amount received Government acquire the land Haji Meah Mahomed will be entitled to be paid his money in the first instance from the compensation to be paid.

There are two characters which Sudhamoyee might be thought to be exercising in granting this receipt. She was the executor of her husbands' will and she was the natural guardian of Thakurdas. She did not at this time obtain any order from the District Court under the Guardians and Wards Act making her a certificated guardian. Some time after this transaction, namely, on 14th September 1919, Sudhamoyee applied on the original side of this Court and obtained an order appointing her guardian of the person and property of Thakurdas and by that order obtained authority to execute a new lease of the premises to certain other lessees. A lease was sanctioned and a certain amount of money was obtained thereby. At the time of obtaining the sanction of this lease no information was given to the Court about the transaction previously made with Haji Meah Mahomed. As a result of the second transaction it appears that the new lessee brought a suit against Haji Meah Mohamed for ejectment. The actual documents showing the result of that suit are not in evidence but there is certain evidence on the record from which it would appear that that suit was

compromised, Haji Meah Mohamed going out of possession of the premises on receipt of Rs. 800. I should rather gather that in consideration of his vacating the premises he got a promise of Rs. 200 which afterwards he brought a suit upon.

In this position Haji Meah Mahomed commenced the suit in the Small Cause Court with which we are now concerned. The plaint in that suit is before us and it appears that the cause-title of that suit describes the defendants thus:

Sudhamoyee Dabe widow of late Ramlal Thakur and Thakurdas Thakur, a minor by his mother and certificated guardian, the said defendant 1.

I observe that this plaint is signed by a pleader. How any pleader should be so ignorant as to suppose that this is the proper way to bring a suit against a minor and how any Court can conduct its business, if with a plain notice that no guardian-ad-litem has been appointed, it issues summons upon people for no better reason than that their names are put in the cause-title in this way, I do not profess to know. I would rather suppose that it is advisable that the authorities should take some steps either to make sure that pleaders of a less degree of ignorance are entrusted with the necessary work or that at all events they have more difficulty in getting processes of the Court issued without any proper scrutiny. However incredible it may appear the plaintiffs' pleader having put down the defendants' names in this way, the case seems to have gone on just as if it was a suit between persons who were sui juris. The plaintiffs' cause of action was thus described. He averred that on the 23rd day of January 1919 he was a tenant of a piece of land, that land belonged to the minor and that he was a tenant under an arrangement with defendant 1 as mother and natural and certificated guardian of the minor. Then he set out that the defendants meaning the mother and the minor took from him a sum of Rs. 2,000 as an advance without interest towards the rent of the said piece of land agreeing to repay the same at Rs. 20 per month from the monthly rent on the understanding not to eject him so long as the entire amount was not liquidated. Then he said that the defendants had on the 1st October leased out the land to a third party who had ejected him. Accordingly the plaintiff's claim is that he has to receive from

the defendants a sum of Rs. 1,880 still due as balance of the said advance which the defendants having broken the said arrangement are liable to refund. He claims a decree against defendant 1, that is to say, the mother personally and against the estate of the minor.

Now that plaint having been filed on 31st March 1922 the summonses were served on the 20th April; a certain pleader Mr. Ghose entered appearance and asked for two weeks' time to file power and a detailed written statement. It seems that at the time he went before the Court the minor Thakurdas was with him; but there does not seem to be any reason to suppose that what he did then was in any way out of order. At all events the Court gave him time. Thereafter nothing seems to have happened except that the pleader saw the minor from time to time more than once. He appears to have gone to the house where the defendants were living but he did not succeed in having any conversation with the mother. The minor told on behalf of his mother that the claim was true, that they had had the money and that they really could not dispute the debt. In giving these instructions through her son to the pleader, I do not suppose for one moment that there is no evidence to suggest that the lady was actuated by anything worse than honesty and common sense. I do not think it is reasonable to impute to her that she was trying to get an improper decree which should have been passed against herself, passed against the minor's estate in order that her own interest might be safe-guarded at the expense of the boy. As a matter of fact, any careful computation of her own interest would probably have shown her that she as much as the boy was interested in resisting, if possible, a decree against the minor's property and relegating the plaintiff, if possible to a mere personal decree against herself. However, that being the view that was taken, it appears that on the 9th May another adjournment was given. On 6th June 1922 the plaintiff with his pleader was present and there was no appearance for the defendants. Accordingly, after taking the evidence of the plaintiffs' gomasta the learned Chief Judge decreed the suit *ex parte* against both the defendants. The amount of the decree was also to be levied out of the estate of the minor in

the hands of the lady. Thereafter the decree was transferred to the original side and the property which appears to have been subject to more than one mortgage was sold subject to these mortgages and a sum of Rs. 500 was obtained towards satisfaction of Haji Meah Mahomads' decree. The purchaser at that sale was the present appellant. Upon that the present suit was brought by Thakurdas Thakur who had attained majority on 16th May 1924. He brought this suit in March 1925 to set aside that sale altogether and for a declaration that the Small Cause Courts' decree was null and void and inoperative against him.

The learned Judge has decreed his suit. He has treated the decree as a nullity and set aside the sale. He has proceeded mainly upon the ground that the mother's interest in the Small Cause Court suit was adverse to the minor. We have to decide if the learned Judge was right.

With reference to the document of 23rd January 1919, the mother, as I have already mentioned, might be regarded as executrix of the father or as natural guardian of her son. Mr. S. N. Banerjee for the respondent has contended that as this transaction was some 16 years after the testator's death and many years after the partition of 1911, it was entered into when the estate of the testator was really in the hands of the beneficiaries and the lady had not at that time the character of an executrix. He says further that if one looks at the document one finds nothing in that to constitute a claim on her behalf to be the executor. He contends further that if she be regarded as an executor then the transaction is simply this that she has borrowed certain money for the benefit of her trust and that she alone is liable in law on any promise to repay that money. It may of course be the duty and the power of an executor to pledge or sell the assets in order to obtain money, but it is not contended that there is in this document any security to Haji Meah Mahomad which in the present circumstances can be enforced. Therefore he says—and he quotes authority for the proposition—that the claim, if the lady be regarded as executrix, was a claim against herself and that there was no claim against the minor or against his estate. The line of cases upon which he relies contains

such well-known cases as *Farhall v. Farhall* (1). The whole law on the subject may be found summarized in Leake on contracts at p. 1265. If, again, the lady be looked at as the natural guardian of the minor's property then it may be that being free from the restrictions imposed by the Guardians and Wards Act, she would have power to mortgage the property in a proper course of administration or for necessity. But again it does not appear that there is any such mortgage or sale of the minor's property entered into by this document. He contends that if the plaintiff has to recover on contract the only defendant against whom he can shape a case of that sort would be the mother herself.

Sir Benod Mitter, on the contrary, has contended that, while he does not dispute the doctrine of *Farhall v. Farhall* (1), if you find that an executor or a guardian is managing a property on behalf of a minor then those acts if properly done will bind his beneficial interest and he says that this instrument of 23rd January 1919 should be looked at really as a lease by the mother of the property belonging to the son. It is a lease on the term that certain rents should be paid in advance, and, therefore, when the lender sues to recover his advance he is entitled to have recourse not merely to the lady herself but also to the son's estate; for the present purpose it is not actually necessary that this Court should decide that question but I have no doubt that it is a serious question and that to this suit the minor had a defence of a very substantial character. I doubt exceedingly whether on that document or on any facts that have been brought out in this case there was any cause of action against the minor. However, for the present purpose it is not necessary to do more than to say that it is not a case to which no reasonable defence applies. I entirely agree with Sir Benode Mitter when he says that in a case of this sort it is no use paying any attention to a purely imaginary defence. One has to find out as best as he can whether there was any really substantial defence with a real prospect of success. In my judgment, the present case is one in which there was such a defence. That being so what has happened in this case? It is quite

true that on the face of the plaint the plaintiff was claiming that the mother should represent the infant. It is quite true that the vakil who acted in the matter was acting on behalf of both. Whether he did or did not have a properly executed power has in the circumstances of this case no importance. What happened was that he got a fortnight's time to put in a defence. There was a further adjournment and no appearance and the Court decreed the suit in such a way as to show that it was present to the minds of the Court that it was dealing with the estate of an infant as well as with the liability of Sudhamoyee Dasi.

The first question, therefore, which arises is, putting aside for the moment the question of adverse interest, whether this case is within the doctrine of the well-known case of *Walton v. Banke Behari Prasad Singh* (2) decided by the Privy Council. In my opinion this case is very far indeed from *Walton's* case (2) apart altogether from any question of adverse interest. In that case there had been a suit. There had been various appearances by the mother as in the character of guardian of the infants. It is true that on the day of hearing no appearance was made and that actually at the trial no fight was put up on the infant's behalf. The Privy Council in dealing with the matter was of opinion that the infants were effectively represented in that suit by their mother and with the sanction of the Court. "There is nothing to suggest" say their Lordships, that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the now plaintiffs to be their guardian ad litem is shown to have been drawn up, and that it is not definitely shown that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother, a pardanashin lady, before serving it upon Gajadhar, the only adult male member and the karta of the family. It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs; nor indeed could there well be any, since it has been found that the original debt was one for which the present plaintiffs were liable.

Now, the present case is not a case in which I am prepared to say that there is nothing to suggest that the interest of Thakur Das was not duly protected. It

(1) [1872] 7 Ch. 128=41 L. J. Ch. 146=20 W. R. 157=25 T. T. 685

(2) [1903] 80 Cal. 1021=30 I. A. 182=8 Sar. 519 (P. C.).

is not a case in which I am now satisfied that the claim against Thakur Das was a claim to which there was no answer. It is one thing, when all that is wrong with the proceeding that a formal order which should have been recorded has not been recorded, to give validity to the proceeding. It is another thing altogether when you have a case in which there appears to have been substantial defence and that defence was never raised at all. In my judgment, were we to hold in this case that the rule in *Walian v. Banke Behari Prashad Singh* (2) covered a case of this sort we would be opening the door to fraud and malpractice and opening it very wide.

The next question which arises is the question whether or not the mother was a person disqualified from being a guardian by reason of adverse interest. The learned Judge on the original side has treated this matter as too obvious for argument and has said that the contrary was not really contended before him. He says:

It was to the mother's interest to saddle on to the son's estate what was *prima facie* upon the face of the document a personal liability of her own.

Sir Benod Mitter has very properly pointed out that while in a sense it is true that if no judgment went against the son's estate she would remain solely liable upon a decree against herself, nevertheless if you look at the realities of the position as disclosed at all events by the lady's petition to this Court for appointment as certificated guardian you will find that the son's property was the only source of maintenance and support belonging to either of them. Accordingly Sir Benod points out with great force that if this lady's interests are to determine the matter a calculation of her interest would probably show that the best thing in the world for her would be to defeat the Small Cause Court suit as against Thakurdas and allow it to end merely in a personal judgment against herself which could not be executed against her personally and to pay which she had no assets. It would, he points out, have done her very little harm to have a judgment against herself. Had this case arisen for decision upon this question I would have had some difficulty in holding upon such grounds that there was not an adverse interest. *Prima*

facie the interest was adverse and *prima facie* it is to the interest of a person even if he has no assets either to escape a personal judgment or to get some one else to share with him the burden of the money to be paid. It is in this case not necessary to proceed upon this ground and I would desire in particular to guard myself against holding that in any case where a guardian ad litem is appointed by a Court the person afterwards by showing adverse interest can get a right to treat the decree as a nullity. I doubt extremely whether the case of *Rashid-un-nisa v. Mahomad Ismail Khan* (3), which is relied upon for that proposition really goes so far and I am not to be taken as subscribing to everything that is said in the case of *Sellappa Goundan v. Masa Naiken* (4). But it is clear enough that in a case like this where there was no appointment by the Court at all an adverse interest would introduce an element that would make it impossible to apply the doctrine in *Walian's* case (2). That proposition was not disputed and I believe that to be right.

On the whole it appears to me that the conclusion arrived at by the learned Judge is right and that this appeal should be dismissed with costs payable to the plaintiff.

The cross-objections are dismissed without costs.

C C Ghose, J.—I agree.

M R / R K.

Appeal dismissed.

(3) [1909] 31 All. 572=3 I. O. 861=36 I. A. 168 (P. C.).

(4) A. I. R. 1924 Mad. 297=47 Mad. 79.

A. I. R. 1928 Calcutta 848

RANKIN, C. J. AND MUKHERJI, J.

Jogesh Chandra Kundu and others—
Defendants—Appellants.

Radha Gobinda Rai and others—
Plaintiff Respondents.

Appeal No. 1816 of 1925, Decided on 3rd May 1928, from appellate decree of Sub-Judge, Zillah Dinajpur, D/- 8th April 1925.

(a) *Bengal Tenancy Act, S. 87—Abandonment—Mortgage of a non-transferable occupancy holding—Mortgagee subsequently foreclosing and getting possession—This amounts to abandonment.*

There can be no distinction between a sale of a whole holding and a mortgage of the whole

holding where the mortgagee has foreclosed and been given possession by the Court. In the case of a non-transferable occupancy holding, such a transfer amounts to abandonment such as entitles the landlord to re-enter. Anything short of showing that the interest of the tenant has ceased will not entitle landlord to re-enter. The mere fact that the tenant is allowed to live in the house after delivery of possession does not affect the principle : 42 Cal. 172, *Expl. & Rel. on.* [P 849 C 2 ; P 850 C 1]

(b) *Bengal Tenancy Act, S. 87—Abandonment—Transfer of a part only or not by way of sale—Landlord cannot recover possession in the absence of abandonment.*

Where the transfer is of a part only or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (inter alia) an abandonment within the meaning of this section 42 Cal. 172, *Foll.* [P 849 C 2]

(c) *Bengal Tenancy Act, S. 87—Suit for ejectment on the ground of abandonment—Mortgagee obtaining possession by foreclosure—Mortgagee must prove that inference of abandonment should not be drawn.*

Where in a suit for ejectment on the ground of abandonment by the original tenant, it is shown that the defendant is mortgagee who had foreclosed and taken possession of the holding, the burden of proof is on the mortgagee to show why the inference of abandonment should not be drawn. [P 850 C 1]

Gunada Charan Sen and Prafulla Chandra Nag—for Appellants.

Dwarka Nath Chakravarti and Asita Ranjan Ghose—for Respondents.

Rankin, C. J.—This is a suit by a zemindar against certain defendants who are now the appellants before us. But about the lands in Sch. 2 for which the lower appellate Court has given the plaintiff a decree, no question arises here. The question that arises is with regard to the lands of Sch. 1 to the plaint, and it appears that those lands were originally covered by a non-transferable occupancy holding of which the tenant was one Beng Mandal. It further appears that this tenant Beng Mandal in 1907 granted a mortgage over this holding to the defendants. It also appears that the defendants sued and obtained a foreclosure decree and that in 1914 and later on in 1921 they obtained symbolical delivery of possession through Court. Some question has been raised as to the delivery of possession in 1921. But there was delivery of possession in 1921 as appears from the document which the learned lower appellate Court relied on. In these circumstances the question arises whether or not there was an abandonment of the tenancy by Beng Mandal

some time prior to January 1922 when the plaintiff instituted his suit. On that question it appears to me that our first resort should be to what is laid down by the Full Bench in the case of *Dayamoyi v. Annoda Mohan Roy* (1), and the principle that is there laid down is this that where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; and the first question is whether there is any difference in the case between a sale of the whole holding and the case of a person who has granted a mortgage where the mortgagee has subsequently foreclosed and been given possession by the Court. In my opinion there can be no distinction between those two cases. The present is not mere case of mortgage any longer. Accordingly it seems to me that we must apply the principle that ordinarily in these circumstances the Court will directly infer that there has been an abandonment such as entitles the landlord to re-enter. It appears from the statement of the principle given by the Full Bench that this inference of law—while it is an inference of law on the same lines as those laid down by S. 87, Ben. Ten. Act—is not of itself a direct application of that section. The statement goes on to say that where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (inter alia) an abandonment within the meaning of the section.

Applying those principles what appears in the present case is this : Taking the matter as in 1921 when for the second time delivery of possession obtained from the Court, it appears that for about a year after that Beng Mandal himself was allowed to remain in the house or homestead. He appears to have died in about a year's time. Secondly, the question arises as regards certain of the lands of the holding that had been sublet by Beng Mandal to tenants. As regards them, the delivery of possession would immediately put those tenants in the position of having attorned to the defendants. Thirdly, the question arises as to whether or not any of the lands which Beng Mandal used to cultivate continued

(1) [1915] 42 Cal. 172=20 C. L. J. 52=27 I.C. 61=18 C. W. N. 971 (F.B.).

to be cultivated either by him or by his sons or heirs. On that point the Courts have differed. The learned Subordinate Judge has taken the view that it is not proved to his satisfaction that after the delivery of possession in 1921 Beng Mandal was in possession of any other land of the jote at all. It appears also from the Munsif's judgment that what seems to have happened was that Beng Mandal hung on in the house until he died and that his sons and heirs removed here and there at other places, and in these circumstances we must take that finding of fact to be that it is not proved that Beng Mandal was in possession of any of the other lands.

It remains, therefore, as a special matter for consideration in this case to take note of the fact that the tenant was allowed to go on till he died in a space of about a year in the house. One has to ask oneself whether that is a circumstance that would remove this case as a matter of law from the ordinary category. In my judgment that would not be sufficient in itself to show that Beng Mandal who had mortgaged, who had been foreclosed, who had allowed symbolical possession to be obtained against him was still professing or intending to discharge his responsibility to the zemindar treating himself as responsible for the rent. I see no reason because of that fact which is readily explained by the permission of the defendants to say that the ordinary inference of abandonment should not be drawn. In that view of the case the learned Subordinate Judge is right in putting the burden upon the defendants. Once it is shown that they are mortgagees who have foreclosed and taken possession I think that the burden of proof is on the defendants to show why the inference of abandonment should not be drawn; and as they have not managed to show that there was any occupation of the lands it seems to me that the learned Subordinate Judge's judgment should be upheld.

Mr. Dwarka Nath Chakravarti as part of his argument endeavoured to maintain, if I rightly understood him, that in this case the plaintiff could succeed against the defendants short of showing that the interest of the original tenant Beng Mandal had come to an end. I see no reason to alter my opinion or to change what I have said in the case of *Ramesh*

Chandra v. Daiba Charan (2). It was contended that under *Dayamayi's* case (1) because a transfer was valid between the transferrer and the transferee therefore when the landlord came to sue the transferee on the ground that he was a mere trespasser and had no title, the trespasser was in this position that he could not assert any title and still could not deny that the whole of the tenant's title had vested in himself and therefore had left the transferrer. It is said that in these circumstances the transferee could not set up *juitenti* of the transferrer.

With the greatest possible respect I dissent from that principle. It seems to me to be a perversion of the true principle. If the landlord can say to the transferee "you have got no title" the transferee can resort to the landlord upon that basis; and it is for the landlord to show that he has an immediate right to possession; hence I am wholly unable to see that short of showing abandonment a suit of that character can succeed at all.

In this case, therefore, I think that under *Dayamayi's* case (1) the zemindar succeeds in showing abandonment, and I think, therefore, that this appeal should be dismissed.

I do not think that it would be reasonable at all to send the matter back for any further investigation. It seems to me reasonably clear that the Subordinate Judge took a view upon which the principles of law which I have endeavoured to state are applicable.

This appeal is dismissed with costs.

Mukherji, J.—I agree.

W S/R K *Appeal dismissed.*

(2) A. I. R. 1924 Cal. 900.

A I. R. 1928 Calcutta 850

MITTER, J.

Sm. Manikya Bewa—Plaintiff—Petitioner.

v.

Pushpa Charan Majhi and others—Defendants—Opposite Parties.

Civil Rule No. 447 of 1928, Decided on 11th July 1928, against the decree of Small Cause Court Judge, Dacca.

(a) *Limitation Act, S. 19*—Plaintiff depositing certain sum with defendant 1 and father of defendant 2—Defendant 1 admitting deposit in written statement in partition suit by

mother of defendant 2 as next friend—Defendant 1 and mother of defendant 2 accepting by joint petition award made on reference of partition suit to arbitration by which defendants' liability with regard to deposit was declared—Written statement coupled with award and joint petition amounts to promise by defendant 1 to pay debt.

Plaintiff sued for return of Rs. 500 deposited with defendant 1 and the father of defendant 2. Plaintiff's suit was dismissed on the ground of limitation. In a suit for partition which was instituted by the mother of defendant 2 as his next friend a written statement was put in by defendant 1 in which he admitted this deposit by the plaintiff. In the partition suit the matter was referred to arbitration and an award was made on 10th September 1924 by which the liability of defendants 1 and 2 was declared in equal shares with regard to whatever was the deposit made by the plaintiff. That award was accepted by a petition to which both defendant 1 and the mother of defendant 2 were parties.

Held: that the written statement coupled with the award and joint petition amounted to a promise by defendant 1 to pay the debt.

[P 851 C 2]

(b) *Contract Act, S. 25—Guardian of infant cannot promise to pay debt barred by limitation.*

It is not open to the guardian of an infant to make a promise to pay a debt which is barred by limitation within the meaning of S. 25.

[P 852 C 1]

(c) *Limitation Act, S. 19—Acknowledgment made in a document to which creditor is not a party is valid.*

It is not necessary that the acknowledgment should be made in a document to which the creditor need be a party and an acknowledgment made in a document to which the creditor is not a party is a valid acknowledgment: 33 Cal. 1047, *Foll.*

[P 852 C 1]

(d) *Limitation Act, S. 21—Acknowledgment not stating amount of liability acknowledged by guardian is not proper.*

An acknowledgment which does not state the amount of liability in respect of which the guardian of minor acknowledged his liability is not a proper acknowledgment.

[P 852 C 1]

Jatish Chandra Guha—for Petitioner

Bepin Chandra Bose—for Opposite Parties.

Judgment.—This rule was issued on the opposite party who are defendants 1 and 2 in the suit to show cause why the judgment and decree of the Small Cause Court at Dacca dismissing the suit of the plaintiff who is the petitioner before me should not be set aside. It appears that plaintiff deposited the sum of Rs. 500 with her relations who are defendant 1 and the father of defendant 2. The defendants refused to return this money and this has given rise to the cause of action for the suit. The Small Cause Court Judge found on the evi-

dence that plaintiff had deposited the money in question with defendant 1 and the father of defendant 2 but dismissed plaintiff's suit on the ground of limitation. It appears that in a suit for partition which was instituted by the mother of defendant 2 as his next friend a written statement was put in by defendant 1 in which he admitted this deposit by the plaintiff. In the partition suit the matter was referred to arbitration and an award was made on 10th September 1924 by which the liabilities of defendants 1 and 2 were declared in equal shares with regard to whatever was the deposit made by the plaintiff. The amount of the deposit was not stated in the award. That award was accepted by a joint petition to which both defendant 1 and the mother of defendant 2 who is said to be his lawful guardian were parties. So far as the liability of defendant 1 is concerned it seems to be clear that the written statement which was put in by defendant 1 coupled with the award and the petition of 11th September 1924 amount to a promise to pay the debt which was due to plaintiff by reason of the deposit. The suit was instituted within three years from the date of the joint petition which was put in on 11th September 1924. Consequently limitation could be saved if Art. 60, Lim. Act was held to apply. Article 60 is the proper article applicable seeing that plaintiff's own case is that this was money which was deposited with defendant 1 and father of defendant 2 under the agreement that this money was payable on demand by her. So far as defendant 1 is concerned, as I have already said, limitation is saved by reason of the acknowledgment made in the written statement and the subsequent joint petition of 11th September 1924. The decree of the Small Cause Court Judge in so far as it dismissed plaintiff's suit, in its entirety must be set aside. There will be a decree against defendant 1 for the sum of Rs. 250 (Rupees two hundred and fifty only) with interest at six per cent. per annum from the date of the demand in Magh 1333 up to the date of realization.

It remains to notice the argument of the learned advocate for the petitioner that the suit should also be decreed against defendant 2. It appears that defendant 2 is an infant. There was a demand for

this debt during the lifetime of his father Madhu Majhi. The father is said to have died six or seven years prior to the institution of the suit and it was not open to the guardian of the infant to make a promise within the meaning of S 25, Contract Act as according to the findings of the learned Subordinate Judge the debt of the plaintiff was barred by the Statute of Limitation. It is said, however, that this petition of 11th September 1924 was put in at a time when the claim had not become barred by the Statute of Limitation. It appears to me that the petition standing by itself taken with the award is not a proper acknowledgment within the meaning of S 19 read with S. 21, Limitation Act. The sum showing the liability of defendant 2 is not mentioned. It is true that in that award the present plaintiff was not a party but it is not necessary in view of the decision of the Judicial Committee of the Privy Council in the case of *Maniram Seth v. Seth Rupchand* (1), that the acknowledgment should be made in a document to which the plaintiff need be a party. However that may be, it appears to me that the acknowledgment was not the proper acknowledgment as it did not state the amount of liability in respect of which the guardian of the defendant acknowledged the liability of defendant 2.

In these circumstances the suit will be dismissed so far as the liability of defendant 2 is concerned. There will be a decree, as I have already said, against defendant 1 for a sum of Rs 250 (Rupees two hundred and fifty only) with interest at six per cent. per annum. The rule is made absolute to this extent. There will be no order as to costs.

D.B/R.K. *Rule partly made absolute*

(1) [1906] 33 Cal. 1057=33 I. A. 165=10 C. W. N. 874 (P. C.).

A. I. R. 1928 Calcutta 852

MALLICK AND GARLICK, J.J.

Gopal Chandra Goldar and another—
Defendants 1 and 3—Appellants.

v.

Shashi Bhusan Dutta and others—
Plaintiffs—Respondents.

Appeal No. 2683 of 1925, Decided on 6th June 1928, from appellate decree of Addl. Dist. Judge, Khulna, D/- 28th July 1925.

Civil P. C., S. 11—Compromise decree on the basis of a Commissioner's map—Court in subsequent suit cannot go into the correctness or otherwise of the map.

A sued B for recovery of khas possession of some lands. The lands in dispute were included in a bigger area which formed the subject-matter of a previous litigation between the same parties, which was compromised and in which a decree was made in accordance with a Commissioner's map. In the present suit the lower Court held that the Commissioner in the litigation had committed a mistake and came to the conclusion that the disputed lands fell to the share of A.

Held: that the lower Court was wrong in law when it went behind the compromise decree and proceeded to consider the question whether the Commissioner had committed any mistake in preparing the map. It ought to have proceeded in determining the case on the basis of the Commissioner's map as such.

[P 853 C 1]

J. N. Kanjilal and Mukunda Behary Mullick—for Appellants.

Brāja Lal Chakravarty and Srish Chandra Dutt—for Respondents.

Judgment.—This appeal arises out of a suit for recovery of khas possession of some lands on a declaration of the plaintiffs' title thereto. It appears that the lands in dispute in the present case are included within a bigger area which formed the subject-matter of a previous litigation in the year 1889. The suit between the parties in the year 1889 was compromised and a decree was made therein in accordance with the petition of compromise that was filed. By that decree of compromise it was decreed that the lands consisting of plots *Ka, Kha, Ga, Gha* and *Una* lying just on the west of plot No 1 as shown in Gangesh Babu the Commissioner's map that was prepared in the case and which was found to belong to one Rajamuddi Sheikh were to be divided in the proportion of 11 and 8 and the 11/19ths share lying on the east was to go to the plaintiffs and the remaining 8/19ths share to go to the defendants. In the year 1902 there was another litigation between the parties relating to a small plot of land and in that litigation there was a Commissioner appointed who relaid the map prepared by Gangesh Babu in the first litigation namely of the year 1889. According to the plaintiffs in the present case the lands in dispute lie within their 11/19ths share of the subject-matter in dispute in the litigation of 1889 while according to the defence the disputed lands lie not within the 'plaintiffs' share but

within the share of the defendants. A Pleader, Babu Abinash Chandra Mukerjee, was appointed a Commissioner in the suit which has given rise to the present appeal. Abinash Babu relaid the western boundary of plot No. 1 in the map prepared by Gangesh Babu and the Court of first instance accepted the map prepared by Abinash Babu and on the basis of Abinash Babu's map came to the conclusion that the lands in dispute were included within the defendants' share and not within the share of the plaintiffs and on that finding the trial Judge dismissed the plaintiffs' suit. On appeal, the lower appellate Court reversed the decision of the trial Judge and holding that Gangesh Babu had committed a mistake when measuring Rajamuddi's land came to the conclusion that the lands in dispute fell within the share of the plaintiffs and on that finding allowed the appeal and decreed the plaintiffs' suit. Defendants 1 and 3 have appealed to this Court.

The principal contention on behalf of the appellants before us has been that the lower appellate Court was not justified in law in going behind the compromise decree whereby the land lying just on the west of plot No. 1 as shown in Gangesh Babu's map was divided in the proportion of 11 and 8 between the parties. This contention is, in our opinion well founded and should prevail. In the decree that was made in the suit of 1889 it was directed that the land that was to be divided between the parties in the proportion of 11 and 8 was the land lying just on the west of plot No. 1 as depicted on Gangesh Babu's map. It is true that in the decree it was also stated that plot No 1 was the land of Rajamuddi. But there is nothing in the decree to show that the land was just on the west of Rajamuddi's land, was to be divided between the parties in the proportion of 11 and 8. That being so, if the compromise decree in the litigation of the year 1889 is to be given effect to, the lands lying just on the west of plot No. 1 as shown in Gangesh Babu's map must be held to have been the land that was directed to be divided between the parties. Whether Gangesh Babu had made any mistake in plotting plot No. 1 in his map was not a question which could be legitimately gone into in the present litigation. The compromise de-

creed was based on Gangesh Babu's map and no matter whether the map of Gangesh Babu wherein he showed where the western boundary of plot No. 1 was, was right or wrong, the lower appellate Court ought to have proceeded in determining the case on the basis of that map of Gangesh Babu. This map prepared by Gangesh Babu has been relaid in the present litigation by a pleader Commissioner as observed before and this pleader Commissioner has in his map depicted the western boundary of plot No 1 in the map of Gangesh Babu. It appears that no exception was taken to this work of relaying as done by Babu Abinash and if Abinash Babu's map showing in it the western boundary of plot No 1 as it is to be found in the map prepared by Gangesh Babu is accepted as correct there can be no dispute that the disputed property would fall within the share of the defendants and not the share of the plaintiffs. We are, therefore, of opinion that the lower appellate Court ought to have proceeded to determine the case on the basis of the map as prepared by Gangesh Babu which was the basis of the compromise decree in the litigation of 1889 and that the learned Additional District Judge was wrong in law when he went behind the compromise decree and proceeded to consider the question whether Gangesh Babu had committed any mistake when measuring the land of Rajamuddi.

In view of the aforesaid observations the appeal must be allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored. The appellants will be entitled to their costs in all Courts.

W S./R K.

Appeal allowed.

* A. I. R. 1928 Calcutta 853

SUHRAWARDY AND GARLICK, JJ.

Emperor—Petitioner.

v.

Kisori Mohan Chaudhuri and others—
Opposite Parties

Reference No. 8 of 1928, Decided on 4th September 1928, made by the Dist. Judge, Rajshahi, D/- 25th July 1928.

* *Legal Practitioners Act, S. 13*—*The conduct of a pleader should not be inconsistent with the position he holds in the administration of justice.*

* A legal practitioner, as any other person, has a right to entertain political opinions

which may or may not be acceptable to the authorities. But having obtained license to practise in Courts, if he acts inconsistently with the position which he has obtained by virtue of the license granted to him, he abuses it and brings himself within the four corners of the Legal Practitioners Act : A. I. R. 1922 Cal. 515 and A. I. R. 1922 P. C. 351, *Foll.*

[P 854 C 2]

The action of legal practitioners counselling the public not to attend Court and thereby interfering with the administration of justice amounts to misconduct within the provisions of S. 13.

[P 854 C 2]

Surendra Nath Guha—for the Crown.

A. N. Choudhury, Krishna Kamal Maitra, Bireswar Bagchi, Jatindra Mohan Choudhury, Manindra Nath Roy, Dinesh Chandra Roy and Jitendra Kumar Sen Gupta—for Opposite Parties.

Judgment—In this matter three pleaders of Rajshahi Judge's Court have been called upon under S. 13, Legal Practitioners Act to show cause why they should not be dealt with under S. 14 of the Act. We have heard the learned Senior Government Pleader and Mr. A. N. Choudhury, counsel, who appeared on behalf of the pleaders. In the present case we do not propose to pass any sentence or take any action under S. 14, Legal Practitioners Act, our reasons being—first, that no untoward result followed from the act of the pleaders as has been admitted by the learned District Magistrate. The work of the Court was not hampered and it appears that the notice or manifesto signed by the pleaders did not have any appreciable effect in the locality. The learned Magistrate was willing to drop the proceedings if the pleaders admitted that their action had been wrong and he has referred this matter to us for the purpose of vindicating the principle involved; secondly, there is no evidence of the publication of the manifesto. It may be presumed that it was published; but then there is nothing on the record to show whether it was published and the extent to which it was published. Thirdly, that the pleaders who signed the manifesto are three out of more than one hundred pleaders practising in the Judge's Court at Rajshahi. They do not seem to occupy such an influential position as to persuade the litigants not to appear in Court as is clear from the fact that there was no stoppage of work of the Courts on that day.

Though in the circumstances of this particular case we are not inclined to take any action we express our strong disapproval of the conduct of the pleaders concerned. A legal practitioner, as any other person, has a right to entertain political opinions which may or may not be acceptable to the authorities. But having obtained license to practice in Courts, if he acts inconsistently with the position which he has obtained by virtue of the license granted to him, he abuses it and brings himself within the four corners of the Legal Practitioners Act. This was the view taken in *Emperor v. Rajani Kanta Bose* (1), *Shankar Ganesht Dahar v. Secretary of State* (2). It seems that the warning given by this Court in *Rajani Kanta's* case has had no effect. Though in the circumstances of this case we refrain from taking any action it must be understood as a rule that the action of legal practitioners counselling the public not to attend Court and thereby interfering with the administration of justice is one which cannot be lightly dealt with. With these remarks we direct that no further action be taken in this matter.

A. L. / R. K.

Order accordingly.

- (1) A. I. R. 1922 Cal. 515 = 49 Cal. 732 (S. B.)
(2) A. I. R. 1922 P. C. 351 = 49 Cal. 845 = 49 I. A. 319 (P. C.)

A. I. R. 1928 Calcutta 854

CUMING AND MUKHERJI, JJ.

Gopeswar Sen and others—Defendants
—Appellants.

v.

Burdwanadhipati Maharajadhiraj Bijoy Chand Mahatab Bahadur—Plaintiff
—Respondent.

Appeal No. 102 of 1925, Decided on 23rd January 1928, from appellate decree of Dist. Judge, Bankura, D/- 9th September 1924.

(a) *Practice*—New plea making further evidence necessary, cannot be allowed in second appeal.

A point, which is never put forward in either of the lower Courts or even in the grounds of appeal, cannot be allowed to be taken up for the first time in second appeal when it necessitates the case to be remanded in order that further evidence should be adduced. [P 855 C 1]

(b) *Evidence Act, S. 34—Hudabandi papers—Bengal Tenancy Act, S. 50.—Evi. Act S. 32.*
The hudabandi papers are admissible in evidence to rebut the presumption under S. 50,

Ben. Ten. Act but do not by themselves charge a person with liability. They are admissible under S. 32, S. 34, does not apply : 16 C. L. J. 328, *Expl.*; A. I. R. 1927 Cal. 855, *Rel. on.*

[P 856 C 1]

* (c) *Evidence Act*, S. 32, Cl. (2)—*Entry by itself is insufficient for charging a person with liability—(Obiter).*

Per Mukerji, J.—The only material difference as between an entry relevant under S. 34, and one relevant under S. 32, Cl. (2), is that in the former case the person who made the entry may be available as a witness, while in the latter case he is not. Such entries, no matter whether they are relevant under one or the other section are not to be considered as alone sufficient to charge any person with liability : 28 Bom. 294 ; 10 Bom. L. R. 811 ; 16 C. L. J. 24 ; and 16 C. L. J. 328, *Doubted.* [P 857 C 1, 2]

C. C. Biswas, K. C. Ghose and Sukumar Dey—for Appellants.

Brojo Lal Chakravarti and Sarat Kumar Mitter—for Respondent.

Cuming, J.—The facts of the case out of which this appeal has arisen are briefly these. The landlord applied under S. 105, Ben Ten. Act for the enhancement of the rent of a certain tenure. In the Record-of-Rights the tenancy had been described as a permanent non-mukurari tenure bearing a jam of Rs 16 8 7. The defence was that it was a mokurari tenure and the rent was not liable to be enhanced. The first Court held that the presumption under S. 50, B. T. Act which the defendants had succeeded in establishing had been rebutted.

The Court fixed Rs 55 8-0 as the rent of the tenancy. The lower appellate Court upheld this decision.

The first point that has been urged by the appellant is that if he can prove that he has held at the same rate of rent for 20 years it will be presumed not only that he had held at the same rate of rent but that the tenancy was in existence at the time of the permanent settlement and hence the principles of S. 6, Ben. Ten. Act apply and that the Court should have applied these principles.

The simple answer to this contention is that it was never put forward in either of the lower Courts or even in the grounds of appeal to this Court. If the appellant succeeded in the contention the case might have to be remanded in order that further evidence should be adduced. We are not prepared to allow the point to be taken for the first time in second appeal more specially as it finds no place even in the grounds of appeal to this Court. The next point which has been

contended is that the hudabandi papers on which the lower Courts have relied are not admissible in evidence to rebut the presumption under S. 50, Ben. Ten. Act having regard to the provisions of S. 34, Evidence Act. The appellant's main reliance is placed on a decision reported in *Aktowli v. Tarak Nath* (1). Now S. 34, Evidence Act, states that books of accounts regularly kept in the ordinary course of business are relevant whenever they refer to a matter into which the Court has to inquire but such statement shall not alone be sufficient evidence to charge a person with liability.

Now S. 34 does not make books of accounts inadmissible unless corroborated. It states distinctly that such books are admissible but not sufficient by themselves to charge any person with liability. Even though they are uncorroborated they are still evidence. It is not correct to say that such books are inadmissible. They are admissible. It is not therefore correct to say that such books of accounts are inadmissible unless corroborated if required to charge a person with liability. It would be more correct to say that though admissible they do not establish the facts required to be proved i.e., that a person owed a certain sum of money, unless corroborated.

In the case on which the appellant has relied *Aktowli v. Tarak Nath* (1), Mukerji, J., seems to have held that in that case the jamabandi papers were improperly admitted in evidence. Presumably it was held though this is not quite clear that they were inadmissible because not corroborated by virtue of S. 34, Evidence Act.

But S. 34 does not make such books inadmissible if not corroborated. It makes them admissible but provides that by themselves they are not sufficient to charge with liability. If I understand that decision rightly it would appear to be held that such books uncorroborated cannot be used to rebut the presumption under S. 20, Ben Ten. Act.

But in the concluding portion of the judgment the learned Judge remarks that it was pointed out in the case of *Ram-pyarabai v. Balaji* (2), that if a statement is admissible under S. 32, corroboration would not be needed in terms of S. 34

(1) [1912] 16 C. L. J. 328=17 I. C. 266=17 C. W. N. 774.

(2) [1904] 28 Bom. 294=6 Bom. L. R. 50

and that that view was accepted by this Court in *Dukha Mandal v Grant* (3). If that be so then the decision does not support the view the appellant would have us take. In the case of *Umed Ali v. Khajeh Habibulla* (4), it seems to have been held that if the talub-baki papers were admissible under S. 32 (2) it was unnecessary to consider whether they were relevant under S. 34.

In the case of *Dukha Mandal v. W. M. Grant* (3), it seems to have been held that if the entries were admissible either under S. 32 or S. 34 no corroborating evidence was necessary and that they could be used to show variation in the rent.

In the case of *Jonab Biswas v. Siva Kumari Debi* (5), it seems to have been held that there were not the necessary elements to bring the papers within S. 32 and that, therefore, they were admissible only under S. 34 and in that case they required corroboration.

There is another case to be also considered, an unreported case being appeal from appellate decree No 3631 of 1911 decided by D Chatterji and Beachcroft, JJ. In that case it was held that these jama-wasil-baki papers could be used to rebut a presumption under S. 50 because they do not by themselves charge any person with liability.

The general trend of the authorities would seem to be that if the papers are admissible under S. 32, S. 34 has no application. There is further authority for the proposition that they do not of themselves charge a person with liability if used merely to rebut the presumption under S. 50.

For the purposes of this appeal these authorities are sufficient for the proposition that these papers are admissible in evidence to rebut the presumption under S. 50.

The next question which has been urged in appeal is that these entries do not rebut the presumption under S. 50. The question is whether these entries do show an alteration in the rate of rent. The particular entry on which the plaintiff-respondent relied to prove the alteration in the rate of rent is an entry in the jama-wasil-baki papers of 1210 and a hudabandi of 1201. These are the docu-

ments or evidence that have been produced to show any change of rent. We have carefully considered these documents and we are not prepared to say that on a proper construction of these documents any change in the rate of rent has been proved for the simple reason that it is not possible to say exactly what these documents really mean.

In the document of 1201 we find the following entry against this tenancy.

Jama including cesses Rs. 19. Less Rs. 3 and balance jama Rs. 16 Total jama Rs. 16. What the sum of Rs. 3 deducted is, it is impossible to say. Equally is it impossible to say how much of the jama is rent and how much cesses. That being so the document of 1201 does not show clearly what was the jama then. There is the same difficulty in dealing with the papers of 1210. Against this particular tenancy is entered, detail of Panchak Rs. 14. Total jama Rs. 14. Balance jama Rs. 14. Excess after taking accounts Rs. 1-8-0. Full jama Rs. 15-8-0.

The figure for the full jama Rs. 15-8-0 is sicca rupee and equivalent to Rs. 16-8-10 the present jama. So in 1210 the rent apparently was the same as it is now.

The respondent would contend that the papers show that the rent has increased from Rs. 14 to Rs. 15-8-0. I cannot say that it does.

The total jama is shown as Rs. 14 and the full jama as Rs. 15-8-0. What is the distinction between total and full jama I do not understand nor do I understand what is meant by "excess after accounts" which sum added to Rs. 14 make up Rs. 15-8-0.

All I can say is that it is not clear what these documents mean and that they cannot be construed as proving that there has been any change in the rate of rent. The result is that the appeal must succeed and the plaintiffs' claim for enhanced rent be entirely dismissed with costs in all Courts.

Mukherji, J.—I agree and desire to add a few words.

Section 43, Act 2 of 1855 was as follows:

Books proved to have been kept in the course of business shall be admissible as corroborative and not as independent proof of the facts therein stated.

In S. 34, Act 1 of 1872 the words "regularly kept" are substituted for the

(3) [1912] 16 C. L. J. 24=16 I. C. 467.

(4) [1920] 47 Cal. 263=56 I. C. 33=31 C. L. J. 68.

(5) A. I. R. 1927 Cal. 855.

words "proved to have been regularly kept," and in the illustration to the section the word used is "shows" and not "proves." It is apparent, therefore, that the law embodied in S. 34, Act 1 of 1872 is not quite the same that was contained in S. 43, Act 2 of 1855, and this seems to be conceded on all hands. The expressions "corroborative evidence," "independent evidence" and substantive evidence" that are found in many of the reported decisions bearing upon S. 34, Act 1 of 1872 are somewhat out of place in view of the wording of that section and have but been handed down to us from the words "corroborative" and "independent" that appeared in S. 43 of the old Act and those words as well as the word "substantive" that were used in the decisions thereunder. The present Act deals, amongst others, with the relevancy of evidence and in some instances with its probative value.

The plain words of S. 34 indicate that the section deals with all entries in books of accounts regularly kept in the course of business, in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and next, providing that when such entries are sought to be used as statements for a particular purpose, namely to charge any person with liability, they shall not alone be sufficient evidence for that purpose. S 32, Cl (2) makes relevant a statement, consisting of an entry made by a person who is not a witness before this Court, in books, not necessarily books of account but, kept in the ordinary course of business. A book of account may be one of such books, and where an entry appears in a book of account it comes both under S 32, Cl (2) and S 34. The Illustration to S. 34 makes it plain that if the book of account is regularly kept in the course of business, the entry will be relevant notwithstanding that the person who made the entry has not been examined to prove the truth of the transaction to which the entry relates and notwithstanding that he is available as a witness. The only material difference as between an entry relevant under S 34 and one relevant under S 32, Cl. (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not. ¹ I find it very diffi-

cult to appreciate on what ground the legislature could intend to exempt entries relevant under S. 32, Cl. (2) from the disability that it imposed on entries relevant under S. 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under one section or under the other, are not to be considered as alone sufficient to charge any person with liability. The other view, however, namely, that the latter part of S 34 applies only to such entries which are relevant only under S 34 and not under S 32, Cl (2) is backed by the high authority of Sir Lawrence Jenkins, C. J., in the case of *Ram Pyarabai v. Balaji Shridhar* (2), and has been accepted as correct in other cases (e g, *Daji Ataji Khare v Govind Narayan Bapat* (6), *Dukha Mandul v W. N. Grant* (3), *Aktowli v. Tarak Nath Ghose* (1), and it is perhaps too late to contest it. If this other view is adopted it should be held that it was intended by the legislature that where the maker of the entry is available as a witness the entry alone will not be sufficient proof to charge a person with liability but, where the maker is not available as a witness but the entry is relevant by reason of one or other of the conditions mentioned in the opening paragraph of S 32 being present, there is no statutory obligation to look for anything else to found the liability.

Personally I entertain grave doubts as to whether this could have been the intention of the legislature or if it was, it would not have been declared in much clearer terms. Fortunately, however, in practice we seldom come across a case in which the entry which comes under S 32, Cl (2) is really sought to be used alone to charge any person with liability. The present case, in my opinion, is certainly not one of that description. The ekwal hudabandi papers of 1201 and the jama-wasil-baki papers of 1210, upon which reliance has been placed on behalf of the plaintiff in the present case, in my judgment, have not been used alone to charge the defendant with the liability to pay enhanced rent. They have been used to rebut the presumption which the defendant claims under S. 50, Ben. Ten. Act, and quoting the words of Markby, J., in

(6) [1908] 10 Bom. L. R. 811.

the case of *Belait Khan v. Rash Behary Mookherjee* (7) where jama-wasil-baki papers were used for a similar purpose, I may say :

I do not consider that it can be said that these documents have been used alone in order to charge the defendants with the liability that has been imposed on him. He is charged with the rent of the land by reason of its occupation by him, that rent being considered to be a fair and equitable rent for the land occupied and what these documents have been used for is not to charge him with the liability but to answer the claim which he set up to exemption from what would be the ordinary liability of a tenant. It, therefore, seems to me that those documents have not been used in this case as alone sufficient to charge him with that liability in the sense in which those words are used in S. 34, Evidence Act.

The decision of Markby, J., was dis-sented from by Prinsep and Bose, JJ., in *Surnomoyi v Jahur Muhammad Nasyo* (8). It should, however, be noted that in *Belait Khan v. Rash Behary* (7), there were, in fact, other materials on the record in support of those papers, and as regards the view of Markby, J., as to the nature and scope of the use of the papers when the presumption of fixity of rent is sought to be rebutted by them, it does not appear to have been dissented from in the other decision referred to above. This view of Markby, J., has been adopted in recent times in this Court in the case of *Nirod Krishna Ghose v. Prodhot Kumar Tagore* (9) where the learned Judges D Chatterjee and Beachcroft, JJ. said :

It is not right to say that these papers have the effect of imposing any liability upon the tenants. Their effect is to rebut the presumption under S. 50, Ben. Ten. Act by showing that previous to the 20 years for which uniform payment of rent has been shown, there was realization of different rates of rent. The liability to enhancement is imposed not by these papers but by the law which in the absence of the presumption under S. 50 or upon a rebuttal of that presumption, imposes a liability to enhancement on tenants.

So also in the case of *Dukha Mandal v. Grant* (3), Harrington, J., and Caspersz, J., concurring said that by the jamabandi papers that were similarly used in that case

it was not sought to impose a particular liability on any person, but it was only sought to show what the nature of the tenancy was.

I am aware that in *Aktowli v. Tarak Nath Ghose* (1), the learned Judges of this Court suggested that a wider meaning

should be given to the latter part of S. 34 and that though the papers may not directly impose the liability they ultimately lead to that result and they treated the decision in *Surnomoyi v. Jahur Muhammad Nasyo* (8) as supporting their view. With the utmost respect to the learned Judges I should venture to say that though the point may have arisen in the case of *Surnomoyi v Jahur Muhammad Nasya* (8), it does not appear to have been decided in that case; and there is, indeed, very little authority in support of this view. Moreover this view if I may say so, ignores the word "alone" which appears in the section and to which effect must be given. I should say also that the case of *Jonab Biswas v Siva Kumari Devi* (5) upon which reliance was placed on behalf of the appellants, in this connexion, in my opinion does not touch this question.

The fact that ekjai hudabandi papers and the jama-wasil-baki papers on which the plaintiff relies in the present case are relevant under S. 32, Cl. (2), does not, if the latter part of S. 34 does not apply, mean that they should necessarily, in any event, be regarded as conclusive of the truth of the entries contained in them. The evidentiary value of such entries when they are sought to be used against the tenant has got to be carefully appraised, the entries themselves being scrutinized with care and the circumstances under which they were made being carefully considered. The occasions on which they have, without corroboration, been implicitly relied on against the tenants are few and far between. The reason why they find this disfavour is that they are made behind the back of the tenants and they put the tenants entirely at the mercy of the zamindar or his agents. When, however, there is nothing to suggest that they were made with a motive and all the circumstances point to their having been made in the ordinary course of business, the chances of their accuracy and of the transactions to which they relate being true are considerably enhanced. It depends therefore on all the circumstances of any particular case whether, used for a purpose such as the present, they would require corroboration or not for their acceptance.

It is unnecessary, however, to discuss the probative value of the papers now before us because I am clearly of opinion

(7) [1874] 22 W. R. 549.

(8) [1882] 10 C. L. R. 545.

(9) 1916] 32 J. C. 794.

that taking them at their face value, they fail to establish, with any degree of certainty, either that the defendant's tenancy came into existence after the permanent settlement or that there was realization of rent at any time since then at a rate different from what the defendant has now been paying for about a century and a quarter.

W.S/R K.

Appeal allowed.

A. I. R. 1928 Calcutta 859

B B GHOSE AND N. K. BOSE, JJ.

Jahir Mandal — Judgment-debtor — Petitioner

v

Rani Radha Rangini Devi and others — Opposite Parties

Civil Rule No. 170 of 1928, Decided on 17th July 1928, from Appellate Decree of Sub-Judge, Mymensingh, D/- 22nd November 1927, in Miscellaneous Appeal No. 115 of 1927

Bengal Ten. Act, S. 153, Expl. — Irregularity due to fraud or negligence also is covered by Explanation.

The question whether the proceedings in publishing or conducting the sale were regular or not would fall within the Explanation, whether that irregularity was due to fraud or negligence or for any other reason: 32 Cal. 957 (F. B.), *Deemed nullified by Expl.*; 16 C. L. J. 512 and 18 C. W. N. 1266, *Dist.: Chatterjee, J., in 22 C. L. J. 244, Diss. from: A. I. R. 1927 Cal. 633, Foll.* [P 860 C 2]

Radhabinode Pal and Jitendra Mohan Banerjee—for Petitioner

Gunada Charan Sen, Annada Charan Karkoon and Sachindra Kumar Roy—for Opposite Parties.

B. B. Ghose, J.—This rule was obtained by the judgment debtor in a decree for rent which was obtained by the opposite party for less than Rs. 50. The holding of the petitioner was sold for Rs. 34 and it was purchased by the decree-holder. The sale took place in the year 1916. The application for setting aside the sale was made in the year 1926. It was alleged that the petitioner was kept from the knowledge of his right to make the application for setting aside the sale by the fraud of the opposite party and, therefore, the petitioner was entitled to extension of time for making the application under S. 18, Lim. Act. It was alleged that the sale was vitiated on the ground of non-service of process and fraud

and inadequacy of price. It was opposed by some only of the opposite parties. The points argued before the Munsiff were (1) whether the application was barred by limitation, (2) whether the sale was liable to be set aside on account of suppression of process of attachment and sale proclamation or for irregularities in publishing and conducting the same or on account of fraud, (3) whether the sale was bad for inadequacy of price. The learned Munsiff held that the petitioner was entitled to the benefit of S. 18, Lim. Act and, therefore, the application was not barred by limitation. The learned Munsiff next dealt with the question as to the irregularities and his findings are expressed in these words:

To my mind notices under O. 21, R. 66, Civil P. C., were all suppressed and not served. The absence of such notices is a material irregularity vitiating the sale. The proclamation of sale is blank. It does not contain the name of the place, the date of sale and the amount of the decree nor the value of the land to be sold. Everything was done in a hurry. The provisions of O. 21, R. 66 were not at all complied with. These irregularities in publishing the sale are material irregularities vitiating the sale. To my mind the proclamation of sale was also suppressed with fraudulent motive.

He then found that Darbesh Sarkar the Tahsildar of the landlord was after all these lands and seemed to have been a party to the fraud with a sinister motive to get hold of the land; and he found afterwards that it was this Darbesh who took settlement from the landlord of the lands in question after the auction sale and he himself personally was eager to get hold of the lands. Upon these findings the sale was set aside. On appeal by the decree-holder the Subordinate Judge held that the application was barred by limitation and in that view the Subordinate Judge did not deal with the other questions relating to the irregularities mentioned by the Munsiff in his judgment. A second appeal was preferred against the decision of the Subordinate Judge by the petitioner which was dismissed on the preliminary objection taken by the opposite party. In the alternative the petitioner obtained this Rule.

The only ground that has been urged before us is that there was no appeal from the decision of the Munsiff to the Subordinate Judge having regard to the provisions of S. 153, Ben Ten. Act. The Munsiff we are told was empowered to deal with these matters finally under

the provisions of S. 153, Ben. Ten. Act, and, therefore, no appeal lay. It was contended on behalf of the opposite party that as the Munsiff found that there was fraud an appeal to the Subordinate Judge was competent, and in support of this contention the opposite party relies upon the Full Bench case of *Kali Mandal v. Ramsarbaswa Chakravarti* (1). In that case the question put to the Full Bench was whether an appeal lay from an order setting aside a sale or declining to set aside a sale in execution of a decree for rent, as there was no appeal from the decree in the suit on account of the prohibition contained in S. 153, Ben. Ten. Act. Maclean, C. J., in his judgment in that case in answer to the question put to the Full Bench relied upon the opinion expressed by himself in the previous case of *Ganga Charan v. Sashi Bhusan* (2). In the earlier case of *Ganga Charan v. Sashi Bhusan* (2) as well as in the later case the question was whether the sale was vitiated on the ground of irregularity in publishing or conducting the sale. Maclean, C. J., was of opinion that in deciding this the Court has to go into the question of conflicting title. As he put the matter in the case of *Ganga Charan v. Sashi Bhusan* (2) :

The opposite party says : This is my land because the sale to me is a good sale. The petitioner says : It is my land because the sale to you is a bad one ; and that was the question which was decided by the order which was in appeal to the Additional District Judge.

The opinion of the Full Bench that the regularity of proceedings in publishing or conducting a sale was a question of conflicting title was superseded by the legislature. The Explanation added to S. 153 makes it clear that the regularity of the proceedings in publishing or conducting the sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. The learned advocate for the opposite party relies upon the opinion expressed in some cases that the Full Bench decision aforesaid has been affected by this Explanation only partially, so that where the question of fraud is raised the Full Bench decision retains its force. I may, however, point out that no question of fraud was at all

discussed in any of the judgments in the Full Bench case. The question related to the regularity of the proceedings in publishing or conducting the sale. If that is nullified by the Explanation added to S. 153, to my mind the whole effect of the Full Bench case of *Kali Mandal v. Ramsarbaswa* (1), has been nullified by the legislature. I would further venture to state that the regularity of the proceedings in publishing or conducting a sale does not necessarily exclude the question of fraud. The irregularity in the proceedings may be for non-publication of the notices or any material error, which may be due to fraud, negligence or simple inadvertence. How is the Court to differentiate between these ? The fact is established that the requisite notices were not served. It is only by mere inference in the majority of cases that the Court can come to any conclusion that service was not made with fraudulent motive or that it was due to sheer negligence on the part of the decree-holder or his men.

In this particular case the Munsiff found that the Tehsildar of the landlord did not serve the notices with fraudulent motive for his own interest in order to get the property himself after purchasing it for his master, the landlord. Will there be difference as regards the right of appeal on account of the fraud of a servant of the decree-holder for his own purpose or on account of the fraud of the decree-holder himself ? I think not. It can not reasonably be contended in my judgment that if a third party commits a fraud with regard to the sale of certain properties the effect should be the same as if the fraud was committed by the decree-holder himself. To hold that there should be an appeal if the fraud is brought home to the decree-holder, and if the fraud was due to the act of a third person say of the peon there should be no appeal, seems to me also illogical. As a matter of fact it is often very difficult to discover where proper notices were not served whether it was on account of fraud or negligence. Therefore the real question in my judgment is whether the proceedings in publishing or conducting the sale were regular or not would fall within the Explanation, whether that irregularity was due to fraud or negligence or for any

(1) [1905] 32 Cal. 957=1 C. L. J. 476=9 C. W. N. 721 (F.B.).

(2) [1905] 32 Cal. 572=1 C. L. J. 255.

other reason. The Explanation says "A question as to the regularity etc.," which in my opinion includes every ground affecting the regularity.

It is urged on behalf of the opposite party that there has been a conflict of decisions in this matter and, therefore, the question should be referred to a Full Bench. The only case in which this question of fraud directly arose is the case of *Nobin Chandra v. Bepin Chandra Roy* (3). There the learned Judges composing the Bench were divided in opinion and I respectfully disagree with the opinion expressed by Chatterjea, J., where he observed that the effect of the Full Bench case in *Kali Mandal v. Ramsarbaswa* (1), has been only partially nullified by the Explanation attached to S 153, Ben. Ten. Act. It seems to me that by adding the explanation the legislature only declared what the law was and as I have already stated it entirely nullifies the effect of the Full Bench case. Although there are observations to the same effect in the cases of *Beni Madhab Roy v. Bissessarwar Bharati* (4) and *Arjun Das v. Gunendra Nath Basu* (5), it should be noted that those were not cases relating to fraud in publishing or conducting a sale. Those cases therefore are no authority for the proposition put forward by Mr. Sen for the opposite party. The previous cases have been discussed in a recent judgment by Mukherji J., in the cases of *Maharaja Bahadur Singh v. Karami Mar* (6), where the learned Judge expressed a strong dissent from the view that where there is fraud alleged or found in publishing or conducting a sale there is an appeal in such a case as this. I entirely agree with the opinion expressed by that learned Judge. Under the circumstance a reference to the Full Bench is not called for.

I therefore hold that in the present case there was no appeal against the order of the Munsiff to the Subordinate Judge and that appeal was heard without jurisdiction. The Rule is made absolute. The judgment and order of the Subordinate Judge are set aside and those of the

(3) [1915] 22 C. L. J. 244=29 I. C. 308=19 C. W. N. 953.

(4) [1912] 16 C. L. J. 542=15 I. C. 436=17 C. W. N. 84.

(5) [1914] 18 C. W. N. 1266=27 I. C. 294=20 C. L. J. 341.

(6) A. I. R. 1927 Cal. 69b.

Munsiff restored with costs in all Courts. The hearing-fee in this Rule is assessed at three gold mohurs.

Bose, J.—I agree.

R.K.

Rule made absolute.

* A. I. R. 1928 Calcutta 861

B B GHOSE AND BOSE, JJ.

Kanak Prova Debi and others—Judgment-debtors—Appellants.

v.

Dhirendra Nath Roy and others—Decree-holders—Respondents.

Appeal No. 13 of 1928, Decided on 28th May 1928.

* (a) Civil P. C., O. 21, R. 15—Trial Court passing decree for costs severally—Appellate Court giving a joint decree—Application for execution made by one of the joint decree-holders for his share only and entertained by the Court keeps alive the entire decree.

Decree for costs was made severally in favour of defendants by the trial Court and jointly by the appellate Court against the plaintiffs. In 1917 within three years of the date of decree, defendants separately applied for execution of the decree for their separate interest. Within three years after the above execution they again applied for execution of decree severally. In 1923 only one of them made an application for execution. In 1924 they made a joint application for execution of the decree.

Held: that although the Civil P. C. does not permit an application for execution as made in 1917, 1920 and 1923, the applications so made, being accepted by the Court and order made for execution after service of notice on the parties, they were effective in keeping alive the entire decree: 1 All. 231; 4 All. 72, Diss. from: 15 W. R. 449, foll.; 3 Mad. 79, I.L.J. 8 I. A. 123, Rel. on. [P 862 C 2]

(b) Civil P. C., S. 11—Execution proceedings. Omission to object to execution application being not in accordance with law operates as res judicata. 8 Cal 51 P. C. Fell. [P 862 C 2]

Jadu Nath Kanjilal and Bhudhar Halder—for Appellants.

Surjya Kumar Guha and Surendra Nath Bose (Senior)—for Respondents

B. B. Ghose, J.—This is an appeal by the judgment-debtors against the order of the District Judge affirming the decision of the Munsiff rejecting their application that the execution of the decree is barred by limitation.

The only question in this case is whether an application made by one of two joint decree-holders for execution of the joint-decree with reference to his share of the interest awarded to him under the decree keeps alive the decree for subsequent execution. In this case the decree for costs was made by the trial Court severally in favour of the respon-

dents. The judgment-debtors who were the plaintiffs in that case appealed and on their appeal, the appellate Court awarded costs to the respondents in this case jointly. In 1917 within three years of the date of the decree both the two sets of decree-holders separately applied for execution of the decree to the extent of what each considered to be his separate interest. It does not appear that any objection was taken on behalf of the judgment-debtors, nor did the Court proceed under O 21, R 17 or reject the application on the ground that such application was not maintainable. Within three years after that execution both sets of decree-holders again applied for execution of the decree severally. In 1923 only one set of decree-holders made an application for execution. In 1924 the same decree-holders presented a fresh application for execution of the decree apparently for their share or what they considered to be their share in the decree. The other decree-holder was subsequently allowed to be joined in the application and the application proceeded as if made by both sets of decree-holders.

The objection now is that under O 21, R 15 any one or more of joint decree-holders are allowed to apply for execution of the whole decree for the benefit of them all; and it is contended that the Code does not provide for an application for execution by a joint decree-holder of a share of the decree. It is urged therefore that the applications made from 1917 downwards were not applications in accordance with law, and, therefore, the present application in 1924 for execution of the decree was barred by limitation. As the learned District Judge has observed the decisions of the several High Courts on that question are not uniform. The Allahabad Court has held that such an application is not in accordance with law, and, therefore, does not keep alive the decree: see *Ram Autar v. Ajudhia Singh* (1) and *Collector of Shahjampur v. Raja Jagannath Singh* (2). On the other hand it was held by this Court in the case of *Koylas Nath (Ghose v. Nitya Shama Dassee)* (3), that although the application for such execution is irregular and ineffectual for the purpose of execution, if made bona fide under a mis-

apprehension of the law, it may be regarded as a proceeding which keeps the decree alive. Similarly it was held in the case of *P. P. Kuthath Haji v. Bavotti Haji* (4), that although the Civil Procedure Code does not allow one of several decree-holders to apply for partial execution of a joint decree, yet an application by one of such decree-holders for execution of the decree in respect of so much of the relief granted to all, as he considers appertains to him individually, may keep in force the decree as being an application according to law.

Under such circumstances I think we must follow the decision of this Court and hold that although the Civil Procedure Code does not permit an application so made being accepted by the Court and order made for execution after service of notice on the parties were effective in keeping alive the decree. Further in the present case the principle laid down in the case of *Munqul Pershad Dicht v. Grija Kant Luhiri* (5) would apply. The view apparently taken by the Munsiff that the judgment-debtors not having raised an objection to the legality of the order made by the Court in the previous execution proceeding are not precluded from raising the question of limitation now does not appear to be supported by any reason or authority. The case which the Munsiff purports to follow has been misread by him. The application of 1923 should be held to have kept alive the entire decree.

The appeal is therefore dismissed. There will be no order for costs in this appeal, under the circumstances.

Bose, J—I agree

A.L./R K *Appeal dismissed*

(1) [1881] 3 Mad. 79.

(2) [1881] 8 Cal. 51=8 I. A. 123=11 C. L. R. 113=4 Sar. 249 (P.C.).

A. I. R. 1928 Calcutta 862

RANKIN, C. J. AND C. C. GHOSE, J.

Keramat Ali—Accused—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 630 of 1927, Decided on 20th February 1928, from order under S. 476, Criminal P. C.

(a) *Criminal P. C., S. 476—Mere existence of contradiction in the evidence of a person is not sufficient to make enquiry.*

To prosecute a witness under S. 193, Penal Code, merely on the basis of contradiction in

(1) [1876] 1 All. 231.

(2) [1881] 4 All. 72=(1881) A. W. N. 120.

(3) 15 W. R. 449.

his evidence, is a very doubtful procedure. Mere existence of contradiction in the evidence of a witness is not sufficient for making an enquiry in the interests of justice. [P 863 C 1]

(b) *Criminal P. C., S. 476—Finding as to expediency of enquiry is necessary.*

A Magistrate should record a finding that it is expedient in the interests of justice that an enquiry should be made under S. 476.

[P 863 C 1]

Mahendra Kumar Ghose and Sures Chandra Talukdar—for Appellants.

Anil Chandra Ray Choudhury—for the Crown.

Rankin, C. J.—This is an appeal from an order made under S. 476, Criminal P. C., directing a complaint to be made. The complaint is for an offence under S 193, I. P. C., i. e., complaint for giving false evidence. It appears that the appellant was the first witness for prosecution in a case in which 14 persons were charged with rioting and arson in connexion with some char lands and it would seem that in the course of his deposition he made contradictory statements and that upon that basis the order complained of has been made. The formal complaint sets out different passages and leaves the matter there with a request to take necessary steps. When we look at the order-sheet of the learned Sessions Judge we find that this order was made on the application of the Public Prosecutor. It seems to have been a fact that the present appellant did his best to say by way of explanation that he was tired and confused and that he did not contradict himself out of malice or wilfully. It does seem to me that to prosecute people because they give evidence which is contradictory, merely on the basis of that contradiction, is a very doubtful procedure.

In the present case the learned Sessions Judge has taken no pains to do what he is ordered to do by S. 476. I look in vain for any recorded finding to the effect that "it is expedient in the interests of justice that an enquiry should be made" into the offence in this case. In my judgment as the learned Sessions Judge has not recorded that finding I do not feel it incumbent on me to assume that he properly considered this matter and came to a right conclusion. In my judgment the case is not one which appears to me from a mere existence of contradiction to require in the interests of justice that an enquiry should be made. I

would allow the appeal and set aside the order directing a complaint to be made.

C. C. Ghose, J.—I agree.

A L/R.K

Appeal allowed.

A. I. R. 1928 Calcutta 863

MALLIK AND GARLICK, JJ.

Pulin Behary Saha — Defendant 1—Appellant.

v.

Mathura Nath Saha Biswas and others—Defendants—Respondents.

Appeal No. 2635 of 1925. Decided on 12th June 1928, from appellate decree of Addl. Dist. Judge, Jessore, D/- 1st June 1925.

(a) *Contract Act, S. 137 -- Principal and agent—Relationship of.*

Where goods purchased by a person are received by another and dealt with by him, it is a sufficient inference in law that the former is an agent for the latter. [P 864 C 1]

(b) *Practice—Pleadings—Variation—Plaintiff pleading express authority of the principal in making purchases by an agent is not precluded from setting up a case of implied authority.*

Where plaintiff pleads that an agent who has purchased goods from him, had an express authority from the principal for making purchases, it does not exclude him from setting up a case of implied authority if a case of implied authority can be made out from the facts and circumstances and other evidence.

[P 864 C 2]

Narendra Kumar Bose and Rajendra Bhusan Bakshi—for Appellant.

Gopal Chandra Das and Nikunja Behary Roy—for Respondents.

Mallik, J.—This appeal arises out of a suit for recovery of prices of some articles alleged to have been supplied by the plaintiffs to defendants 1 and 2 on the allegation that defendant 2 who had taken the goods from the shop of the plaintiffs had acted as an agent of defendant 1. The Court of first instance gave a decree against defendant 2 alone holding that defendant 2 had not acted as an agent of defendant 1. On appeal by the plaintiffs the lower appellate Court found that defendant 2 by whom the goods had been taken from the plaintiffs' shop was a servant of defendant 1 and in a way it found also that the goods which had been taken from the shop of the plaintiffs had been received by defendant 1 and had been dealt with by him and on these facts the lower appellate

Court gave a decree against defendant 1 alone on the ground that defendant 2 had acted as an agent of defendant 1. Defendant 1 has appealed to this Court.

There were two points urged before us on behalf of the appellant. The first one was that the lower appellate Court was wrong in law in inferring from the facts found by it that defendant 2 was an agent of defendant 1 for the purpose of the purchase. We are unable to agree with the learned advocate for the appellant in this view of the matter. The lower appellate Court has held that defendant 2 was a servant of defendant 1 and it is an undeniable fact that the goods were actually taken from the plaintiffs' shop by defendant 2. The lower appellate Court, as I have said before, found in a way that the goods taken from the shop of the plaintiffs by defendant 2 were received by defendant 1 and dealt with by him. These facts, in our opinion, were sufficient for an inference in law that defendant 2 was an agent of defendant 1. The learned advocate contended that the findings to the effect that the goods supplied by the plaintiffs found their way to defendant 1, and were dealt with by him were unsupported by any evidence. The evidence which the learned Additional District Judge has discussed in connexion with this matter may not have been sufficient for the findings arrived at by him on the point. But it cannot be said that these findings are based on no evidence at all and unless it can be said that the findings are based on no evidence we cannot, in second appeal, interfere with them.

The other point that was taken by the learned advocate for the appellant was that the lower appellate Court having in a way disbelieved the plaintiffs' case of an express authority by defendant 1 to defendant 2 ought not to have made defendant 1 liable on a case of implied authority. But the pleading of the plaintiffs, as it is to be found in the plaint, would show that the plaintiffs did not confine their case to a case of express authority only. The plaint, as we read it, may be taken to include a case of express authority as well as a case of implied authority. Our attention was drawn to the fact that some of the plaintiffs in their evidence deposed only to a case of express authority. But that would not, in my opinion, exclude

them from setting up a case of implied authority if a case of implied authority could be made out from the facts and circumstances and other evidence appearing in this case.

Both the points that were taken before us on behalf of the appellant, therefore, fail and the appeal must be dismissed with costs.

Garlick, J.—I agree.

A.L./R.K.

Appeal dismissed.

A. I. R. 1928 Calcutta 864

PEARSON, J.

Haji Ramjan Ali—Plaintiff.

v.

Hafiz Abdul Gaffur and others--Defendants.

Suit No. 1181 of 1925, Decided on 21st November 1927.

Calcutta High Court Original Side Rules—O. 9, R. 13, Civil P. C., is applied by analogy—But R. 13 does not prevent Court in case of negligence from restoring suit on proper terms.

It is the general practice on the original side to follow the analogy of R. 13, O. 9, on general principles of justice. No doubt, as a rule, the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case comes before the Court. But on the original side at all events the terms of R. 13 do not prevent the Court where there is an element of negligence from restoring the suit upon proper terms. *A. I. R. 1928 Cal. 772, Appl.* [P 864 C 1]

Judgment.—In this matter I passed an order on 8th November that the ex parte decree of 2nd May should be set aside. The order has not yet been completed, and I have been asked to reconsider it on further argument. It is argued that Art 164, Lim. Act, concludes the matter, for that article provides a limitation period of 30 days for an application by a defendant to set aside a decree passed ex parte, the time from which the period begins to run being either the date of the decree or, where summons has not been duly served, the time when the applicant has knowledge of the decree. It is said that in the circumstances of this case the period of limitation should commence from the date of the decree; that there is no question in the present case as regards the due service of the writ of summons, and it is only in the latter case that the period of limitation commences to run from the time when

the applicant has knowledge of the decree.

But on the other hand it is contended that Art. 164 does not apply in this case, because it would only apply to cases of applications under the Civil Procedure Code. It is then contended that this is not an application under O. 9, R. 13, Civil P. C. and in support of that contention the case of *Banerjee v. Suhrawardy* (1) is referred to. The applicant argues that that case is no authority in the present circumstances, for there the question was as to the defendants' rights where no appearance had yet been entered, according to the procedure prevailing on the original side : whereas in the present case appearance had been entered, and all preliminary steps taken to make the suit ripe for hearing. The argument therefore is that that case only shows that O. 9, R. 13, is not exhaustive : there may be cases to which O. 9, R. 13, does not apply, and it does not cover such circumstances where that procedure is inapplicable. I have read the judgment of Rankin, C. J. in that case with attention, and although it is of course correct to say that that judgement is to be taken relative to the facts in that case, it appears to me that the reasoning is applicable also to the present circumstances. In the present case the failure to appear was a matter concerned with the procedure peculiar to the original side of this Court under its rules, in which the applicant's attorney was possibly negligent or not as diligent as he might have been, with the result that the decree was made *ex parte*. I will only refer to the passage from the judgment of the Chief Justice which I consider makes the reasoning there applicable also to the present case. He says :

I am unable to hold that the exact words of R. 13, O. 9, are to be applied on the footing that they are directly applicable under the rules of the original side and that they are exhaustive. It has been the general practice on the original side to follow the analogy of R. 13, O. 9, on general principles of justice. As a rule, the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case came before the Court. But on the original side at all events the terms of R. 13 do not prevent the Court where there is an element of negligence from restoring the suit upon proper terms.

The present circumstances are such as to enable the Court to act upon its dis-

cretion apart from the specific provision of Art. 164, Lim. Act. It is here no question of using inherent jurisdiction to override a statutory provision : it is not statutory provision specifically applicable to the circumstances of this case.

I will just add one word. In my previous judgment I attributed a certain carelessness to the Court office. This is so far to be minimised by the fact (since ascertained) that the error in the suit number as appearing in the list was due at any rate primarily to the fact that the requisition to place the suit in the prospective list, signed by the plaintiff's attorney itself was headed by that error in the suit number.

The result is that the order already made will stand including the order for costs. The costs of the present application will be costs in the cause.

A.L./R.K.

Order accordingly.

A. I. R. 1928 Calcutta 865

B. B. GHOSE AND N. K. BOSE, JJ.

Hafez Uzir Ali—Decree-holder—Appellant.

v.

Nasimannessa Bibi and others—Respondents.

Appeal No. 410 of 1927, Decided on 19th July 1928, from appellate order of 2nd Addl. Dist. Judge, 24 Parganas, D/- 7th July 1927.

(a) *Civil P. C., S. 47—Application under S. 47—Setting aside sale asked for—Art. 181, Limitation Act and not Art. 163 applies—Limitation Act, Arts. 166 and 181.*

An application under S. 47 falls within Art. 181, Lim. Act and not under Art. 166 of the Act, although in the result the applicant has asks for setting aside the sale. [P 866 C 2]

(b) *Civil P. C., S. 47—Application to set aside sale—Stranger auction-purchaser interested in the result—S. 47 applies.*

In an application by decree-holder to set aside the sale, the fact that the auction-purchaser who is not party to the suit, is interested in the result, is no bar to the application of S. 47: *A. I. R. 1917 P.C. 121 and 19 Cal. 683 (P.C.), Rel. on.* [P 866 C 2]

(c) *Civil P. C., S. 47—Some property of decree-holder sold through mistake instead of judgment-debtor's property—Remedy is under S. 47 and not by a separate suit.*

Where the question relates to the matter of execution of a decree and if it is alleged that by mistake the property which was sought to be sold was not sold but some other property belonging to the decree-holder himself was put up for sale, that matter should be decided in the execution proceedings and not by a sepa-

rate suit: 41 Cal. 590 (P.C.), Rel. on; A. I. R. 1922 P.C. 252, Ref. [P 867 C 1]

(d) *Execution sale—Mistake—Contract Act* S. 72.

Relief on the ground of mistake can be given in the case of sales held through the intervention of Court. [P 867 C 2]

Sarat Chandra Roy Chowdhury and Nasim Ali—for Appellants.

Sarat Chandra Basak, Kali Kinkar Chakravarty and Abdul Ali—for Respondents.

Biraj Mohun Majumdar—for Dy. Registrar.

B. B. Ghose, J.—This is an appeal by the decree-holder against the order of the Additional District Judge of 24 parganas, affirming an order by the Munsif refusing the application of the decree-holder for setting aside a sale. The short history of the case is that the decree-holder brought a suit against the judgment-debtors in order to establish his niskar right to $7\frac{1}{2}$ bighas of land in which the judgment-debtors were alleged to have a tenancy right. That suit declaring the lakheraj right of the decree-holder was decreed as against the judgment-debtor. A certain sum of money was allowed to the decree-holder for costs. In execution of the decree for costs the decree-holder purported to sell the interest of the judgment-debtors in the property in question, that is to say the tenancy under the decree-holder's lakheraj interest. In the schedule annexed to the execution petition the property was described as the darbast hakuk of the judgment-debtors under the petty niskar No. 488. The learned Munsif found that it was obvious that the words "tenancy right of the judgment-debtors in petty niskar 488" were omitted and there was no doubt that the omission was accidental. The learned Munsif was of opinion, and there is no reason why that opinion should not be held to be absolutely right, that it was absurd to suppose that the decree-holder wanted to attach and put up to sale his own niskar property. The auction purchaser took the attitude in the trial Court that he had purchased the niskar interest of the judgment-debtors, and in the view that the judgment-debtors had no niskar interest the Munsif held that the decree-holder has suffered no loss and, therefore, his application should not be granted. It seems that if in his opinion the decree-holder was liable to suffer loss he

would have interfered under the provisions of S. 151, Civil P. C. From his order dismissing the application the decree-holder appealed to the District Judge. On appeal the learned Judge was not satisfied with the reasons given for the alleged mistake having occurred. He held that the petition was verified by the decree-holder himself and he should be bound by it. The investigation into title did not come within the scope of the appeal before him. The learned Judge also held that the application which purported to have been made under S. 47, Civil P. C. was barred under Art. 166, Lim. Act. In that view he dismissed the application.

With regard to the question of limitation it is sufficient for me to observe that an application under S. 47, Civil P. C. falls within Art. 181, Lim. Act and not under Art. 166, of the Act. although in the result the applicant asked for setting aside the sale

From the judgment of the learned Judge the decree-holder has preferred this appeal. A preliminary objection has been taken by the respondents that there is no second appeal. The appellant contends that the application falls within S. 47, Civil P. C., and so the order has the effect of a decree and there is a second appeal. It is contended on behalf of the respondents that the auction-purchaser in this case being a third party S. 47 has no application. This matter has been settled by the Privy Council in the case of *Prasanna Kumar Sanyal v. Kali Das Sanyal* (1), that where a question has arisen as to execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed the fact that the purchaser who is no party to the suit is interested in the result has never been held a bar to the application of the section. This position has been re-affirmed by their Lordships in the case of *Ganapathy Mudaliar v. Krishnamachariar* (2) where their Lordships referred to the case of *Prasanna Kumar Sanyal*. S. 47, therefore applies even if a third party is the auction-purchaser where the application falls within the provisions of that section

(1) [1892] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P.C.).

(2) A. I. R. 1917 P.C. 121=41 Mad. 403=45 I. A. 54 (P.C.).

It is next contended on behalf of the auction-purchaser respondent that the application is not one falling under S. 47 of the Code. I do not think that there is any substance in that contention. If the sale is set aside it would be a matter relating to the execution of the decree and the decree-holder would have to begin a fresh if he desires to execute the decree. If it is not set aside then the decree will have to be satisfied. It is in my opinion an application relating to the execution, discharge or satisfaction of the decree and a matter like this falls within the provisions of this section.

It has further been argued on behalf of the auction-purchaser respondent that if the decree-holder desires to set aside the sale on the ground of mistake he ought to bring a suit for it and not proceed by way of application. In my opinion where the question relates to the matter of execution of a decree and if it is alleged that by mistake the property which was sought to be sold was not sold but some other property belonging to the decree-holder himself, was put up for sale that matter should be decided in the suit itself and in the execution proceedings and not by a separate suit. As authority for this proposition the observation of their Lordships of the Judicial Committee in the case of *Thakur Berhma v. Jiban Ram Marwari* (3) at p. 43 (of I A. Ed.) may be cited. Their Lordships say:

If by mistake a wrong property was attached and an order made to sell it, the only course open to the decree-holder on the discovery of the mistake was to commence the proceeding over again:

see also *Lamabhadra v. Kadiriyasami* (4).

The whole question, therefore, is whether there was a mistake and secondly, whether the decree-holder is entitled to the relief sought for, that is, to set aside the sale on the ground of such mistake. The learned advocate for the auction-purchaser respondent argued that the District Judge on appeal seemed to find that there was no mistake, but the learned Judge did not say so. His opinion is stated in this way. "I am not satisfied with the reasons for the alleged mistake having occurred." What the learned Judge meant by that expression it is difficult to understand. What the

decree-holder alleged was that he told the pleader what property was to be sold and that was taken down by his clerk, as it appears, in Bengali. The decree-holder certainly could not have intended to sell his own property as the learned Munsif pertinently observes. The evidence has been read over to us and there is no reason to suppose that the decree-holder intentionally wanted to put up to sale what might very well be construed his own lakheraj property. There is no doubt in my opinion that the description of the property sought to be sold was given by mistake in the application. It is not necessary to pursue the question whether the mistake was of the decree-holder or of the pleader's clerk who wrote out the petition for execution. It is necessary here to mention that apparently the decree-holder was unacquainted with the Bengali script as he signed his name in Urdu. But, however that may be, as I have already stated there cannot be any doubt whatsoever that the decree-holder did not want to put up his own property to sale.

That being so the next thing is to enquire whether the Court can give any relief. It cannot be disputed that mistake is a good ground for relief in cases of sale inter vivos, and I do not see any principle why if mistake is proved relief cannot be given in the case of a sale held through the intervention of the Court. There are instances where sales have been set aside on the ground of mistake. One of these cases I have already cited, the case of *Thakur Berhma v. Jiban Ram Marwari* (3). In my opinion therefore the Court should give relief to the decree-holder on the ground of mistake.

It has, however, been argued on behalf of the auction-purchaser that the learned Munsif was right in holding that no harm has been done to the decree-holder by reason of the alleged mistake. I put distinctly to the learned advocate of the auction-purchaser whether he would be satisfied with the declaration that he has purchased the right, title and interest of the judgment-debtors whatever it is. The learned advocate could not take upon himself to make any admission on behalf of his client. That shows that the auction-purchaser means trouble, that is he wants to dispute the right of the decree-holder to the naskat title in the property as also his right to recover any

(3) [1914] 41 I. A. 38=21 I. C. 536=41 Cal. 590 (P.C.).

(4) A.I.R. 1922 P. C. 252=14 Mad. 463=48 I.A. 155 (P.C.).

rent on account of the tenancy which he really intended to sell. That being so the view of the learned Munsif that there has been no injury done to the decree-holder by reason of the mistake cannot be supported

In my judgment the proper order in this case should be to set aside the sale and to allow the auction-purchaser the refund of the entire purchase money with interest from the date of the deposit upto this date at the rate of six per cent per annum. The appeal is therefore, decreed, the orders of both the Courts below set aside and the sale held in execution of the decree of the decree-holder is set aside. The decree-holder will be entitled if he so desires to proceed with the execution of the decree according to law. The interest decreed to the auction-purchaser will be payable by the decree-holder

Having regard to the attitude of the auction-purchaser respondent throughout he must be made liable for the costs of these proceedings. If he had acted in a straightforward manner the proper order which I should have thought was to make the decree-holder liable for all costs. But in the present circumstances the auction-purchaser must be liable for costs, especially as one of the auction-purchasers is the clerk of the very pleader on account of whose mistake this unfortunate circumstance has taken place.

The appellant is entitled to his costs in all Courts. We assess the hearing-fee at three gold mohurs.

The application is allowed without costs and the persons will be added as parties respondents to the appeal as prayed

Bose, J.—I agree.

A.L./R.K. *Application allowed.*

**** A. I R. 1928 Calcutta 868**

B. B. GHOSE AND GARLICK, JJ.

Kailash Chandra Dutt—Defendant 2—Appellant.

v.

Jogesh Chandra Majumdar and others—Plaintiff and remaining Defendants—Respondents.

Appeal No. 1796 of 1925, Decided on 15th May 1928, from appellate decree of Addl. Dist. Judge, Cachar, D/- 4th March 1925

**** Specific Relief Act, S. 42—Articles of Association providing for election of direc-**

tors annually—Non-election of directors for a particular year—Directors of previous years continuing—Suit by a share-holder for declaring the acts of the directors as void—Such a suit cannot lie as no legal right or character of share-holder is denied—Such a declaration should be refused also in Court's discretion—No meeting for electing directors having been held, old directors continue—Companies Act S. 86.

The directors of a company were elected in 1921. According to the Articles of Association of the company the directors were to be elected annually. A general meeting was convened on the 22nd June 1922 at which among other things it was proposed to elect new directors. Before the election of the directors was completed the meeting came to an end and there was no general meeting for election of directors. The old directors continued to act. A suit was brought for a declaration that the directors elected in 1921 were no longer the directors of the company and that all acts done by them were illegal and void.

Held : that the plaintiff did not claim to be entitled to any legal character or to any right as to any property which had been denied. A declaratory suit was not maintainable under the provisions of S. 42 : 39 Cal. 704 and A.I.R. 1916 P. C. 78, *Rel. on.* [P 869 C 2]

Held further : that even assuming that such a suit was maintainable, the effect would be that there would be no directors of the company to carry on the business of the company. Such declaration ought not to be made by the Court in the exercise of its discretion.

[P 869 C 2]

Held further : that the general meeting not being held in which the directors are to be elected, the directors elected at the previous general meeting would continue in office.

[P 870 C 1]

Hemendra Kumar Das—for Appellant
Gunada Charan Sen and Priya Nath Dutt—for Respondents.

B. B. Ghose, J.—This is an appeal by defendant 2 one of the directors of a limited company at Cachar. The suit out of which this appeal arises was by one of the share-holders. The learned Judge states the facts as follows : There is an Insurance Company with a registered office at Silchar. This company has a capital of over a lakh of Rupees, and according to the opinion of the learned Judge everything does not appear to have gone on well with this company and internal faction has been causing a good deal of trouble. The directors of the company were elected in 1921. According to the Articles of Association of the company the directors are to be elected annually. A general meeting was convened on 22nd June 1922 at which among other things it was proposed to elect new directors. Before the election of the directors was completed the meet-

ing came to an end and, therefore, there was no general meeting for election of directors. The old directors apparently continued to act, and the present suit was brought for a declaration that the directors elected in 1921 were no longer the directors of the company and that all acts done by them were illegal and void. The Subordinate Judge made the declaration asked for. The defendants appealed and the learned Judge has affirmed the decision of the Subordinate Judge.

The first question that arises in this case is whether such a suit for declaration is maintainable under the provisions of S. 42, Specific Relief Act. There cannot be any doubt that in order to obtain a declaratory decree the plaintiff must bring his suit within the provisions of S. 42, Specific Relief Act. With regard to the question of declaratory decree it is useful to refer to the observations of Sir Lawrence Jenkins, C. J., in the case of *Deokali Koer v Kedar Nath* (1). At p. 708, the learned Chief Justice says with reference to S. 42, Specific Relief Act as follows :

It is in this section (apart from particular legislative sanction) that the law as to merely declaratory decrees applicable in the circumstances of this case is now to be found. The terms of the section are not a precise reproduction of the provision contained in the Act of 1859 and the English law ; in one direction they are more comprehensive, in another more limited. It is a common tradition that the section was designed to be a substantial reproduction of the Scotch action of Declarator, but whether this be so or not is of no great moment. We have to be guided by its provisions as they are expressed. The section does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property"; it is the disregard of this that accounts for the multifarious and at times, eccentric declarations which find a place in Indian plaints. If the Courts were astute as I think they should be to see the plaints presented conformed to the terms of S. 42, the difficulties that are to be found in this class of cases, would no longer arise. Nor would plaintiffs be unduly hampered if the provisions of S. 42 were enforced, for it would be easy to frame a declaration in such terms as would comply with the provisions of the section where the claim was one within its policy.

Sir Lawrence Jenkins when a member of the Judicial Committee again observed in delivering the Judgment of the Judicial Committee in *Sheo Parson Singh v. Ram Nandan Prasad* (2), at p. 97 (of

43 I. A.) as follows :

The Court's power to make a declaration without more is derived from S. 42, Specific Relief Act, and regard must therefore be had to its precise terms.

After reciting the terms of S. 42 the judgment goes on :

A plaintiff coming under this section must therefore be entitled to a legal character or to a right as to property. Can these plaintiffs predicate this of themselves ?

It is hardly necessary to point out that in this case the plaintiff does not claim to be entitled to any legal character or to any right as to any property which has been denied by the defendants. It follows therefore that such a declaratory suit is not maintainable under the provisions of S. 42, Specific Relief Act, and as there is no other special legislative sanction such a suit would not in my opinion be at all tenable.

The next question is, even assuming that such a suit was maintainable, should such declaration be made by the Court in the exercise of its discretion. It need hardly be pointed out that S. 42 provides that the Court may in its discretion make a declaration with regard to certain matters. What would be the effect of such a declaration as the present even if the plaintiff was entitled to ask for it ? The effect would be that, the directors who were acting as such would be declared to be no directors at all. In effect there would be no directors of the company to carry on the business of the company. The learned Judge says in one part of his judgment that a company may go in without directors. No doubt it may be in certain special cases, but in such a case the company itself must determine that it should have no directors ; but some other agency should carry on the business of the company. In this case the company has not so determined ; and therefore assuming that the Court may have jurisdiction to make such a declaration, in my judgment such declaration ought not to be made in the exercise of its discretion. I may refer to the observations of Viscount Finlay in the case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* (3), at p. 445, where his Lordship stated that jurisdiction to give a declaratory judgment should be exercised, sparingly, with great care and jealousy,

(1) [1912] 39 Cal. 704=15 I. C. 427=16 C. W. N. 838.

2) 1916 P. C. 78=43 Cal. 694=43 I. A. 91.

(3) [1921] A. C. 483.

and with extreme caution, citing authorities for each of these statements.

With regard to the merits, the Articles of Association provided that the directors should be elected annually at a general meeting. It follows, therefore, that so long as the general meeting is not held in which the directors are to be elected the directors elected at the previous general meeting would continue in office. It is contended by the learned advocate for the respondent that according to the true interpretation of the articles the directors would hold office only for one year from the date of their appointment, and if no general meeting is held at the lapse of one year the directors would automatically vacate their office and the company would go on without any directors at all. I am unable to accept this contention of the learned advocate as it seems to me that it would be unreasonable to hold that this is the true meaning of the Articles of Association.

On all these grounds I am of opinion that the judgment and decree of both the Courts below should be discharged and the plaintiff's suit dismissed with costs in all the Courts.

Garlick, J.—I agree.

R.K. *Suit dismissed.*

* * A. I. R. 1928 Calcutta 870

RANKIN, C. J. AND C C GHOSE, J.

Baikuntha Nath Das—Plaintiff—Appellant.

v.

Sheik Azidulla and others—Defendants—Respondents.

Appeals Nos 51, 52, 54 and 55 of 1926, Decided on 8th February 1928, from the decree of Roy, J. in Appeals from appellate decrees Nos. 1981, 1982, 1984 and 1985 of 1924, D/- 3rd August 1926.

(a) *Civil P. C., S. 100—Plea of limitation should be allowed even for first time in second appeal but case cannot be remanded to find out facts for showing that claim is barred—Lim. Act, S. 3.*

No doubt, it is the duty of the Court in second appeal to entertain even for the first time the question of limitation; but to remand a case on the ground that further investigation would disclose facts which would show that the plaintiff is time barred is wrong.

[P 871 C 2]

(b) *Assam Land and Revenue Regn. (1 of 1886), S. 80—Date of confirmation in the certificate is not conclusive.*

The statement in the sale-certificate of the date of confirmation of sale is not final and conclusive: 24 C. L. J. 62, *Rel. on.* [P 871 C 2]

(c) *Assam Land and Revenue Regn. (1 of 1886) S. 80—Purchaser at revenue sale suing for possession—Suit within 12 years from symbolical possession—Defendants defaulting proprietors—Suit is governed by Art. 142 or 144 and not by Art. 121 and is within time—Limitation Act, Arts. 142 and 121.*

A suit by an auction-purchaser at a revenue sale under S. 80 to recover possession of the purchased property is governed not by Art. 121 but by Art. 142 or 144, and the fact that symbolical possession was obtained is a good defence so far as any defaulting proprietor was concerned if the suit is brought within 12 years from such possession: 44 Cal. 412, *Appl.*

[P 872 C 1 & 2]

* * (d) *Cosharers—One of the defaulting proprietors can by purchase in a revenue sale get good title when the default and sale are not fraudulently obtained.*

There is no doctrine which prevents one of the defaulting proprietors from being a purchaser at a revenue sale unless the default and the sale were fraudulently procured by him so that the law, in view of his fraud, would regard him as a trustee of all his previous co-owners.

[P 872 C 1]

(e) *Practice—New plea cannot be allowed in second appeal.*

A new and speculative case, never advanced before, cannot be allowed in second appeal.

[P 872 C 2]

Gopal Chandra Das and Hemendra Kumar Das—for Appellant.

Gunada Charan Sen and Priya Nath Dutt—for Respondents.

Rankin, C. J.—These are four appeals from a judgment and decree of my learned brother Roy, J. sitting on second appeal. The plaintiff on 3rd December 1921 brought a number of suits asking for ejection of the several defendants in respect of 8 annas share from certain plots. Five of the suits were decreed and from that appeals were taken by the several defendants to the lower appellate Court who dismissed the appeals. In this Court Roy, J., remanded the cases to the lower appellate Court with a direction that that Court should allow the parties an opportunity to produce further evidence on certain points and should rehear the cases. It appears that the plots in question belonged in equal shares to two taluks one of which is numbered 54720. This taluk was sold to one Prokas Chandra Shaha on 22nd September 1909 for default of payment of revenue under the Assam Land and Revenue Regulations (Regn. 1 of 1886)

The 60th day after that date was 21st November 1909. But the sale certificate dated 6th January 1910, states that the sale was confirmed on 3rd December 1909 that is, exactly within 12 years from the date of the institution of these suits. The auction-purchaser Prokas some three years afterwards sold to certain other defendants or their predecessors-in-title who in 1913 gave patni of some plots including the plots in suit to one Dianut Ram Saha who sold the patni to the plaintiff. The plaintiff claimed by his plaint that the various defendants were setting up fictitious titles. It appears, however, that certain previous owners of the taluk had granted several patnis and five of these patnis were set up by the defendants in the suits the defendants' cases being that they were in occupation of the plots from which it was sought to evict them under valid patnis. It appears that these defendants refused to apply for a local investigation and the first Court held that in the absence of local investigation and in the absence of any effective evidence there is nothing to show the boundaries of their patnis. It was not proved that the defendants' alleged patnis covered the suit lands. This was the conclusion come to in the suits which the first Court decreed. In the other suits and as regards any other lands than the land for which the decree was passed the first Court on the finding that certain patnis set up by the defendants did cover the suit lands, dismissed the plaintiffs' suit. It is not evident to me that the plaintiff can be supposed to have desired in this suit brought in 1921 to set aside or annul any encumbrance under the sale 12 years before. The first Court entertained no such case and acted upon no such assumption and finding that the defendants' patni in certain cases covered the suit lands dismissed the plaintiffs' suit.

One of the defences set up in the trial Court was the defence of limitation and that was dealt with on the basis of the sale-certificate; the learned Munsif finding that 3rd December 1909 was given as the date when the sale became conclusive adopted that date. He did not deal with the difficulties which undoubtedly arise under the regulation by S. 80 under which a revenue sale is final if no application has been preferred to set aside the sale on the 60th day from the date of sale.

From that decree an appeal was taken by the defendants in the present case and from the grounds of appeal it would appear that the plea of limitation was again raised by the defendants. At the hearing of the appeal it would clearly appear from the judgment that the plaintiffs' title as purchaser was not contested but that the appellants asked that the case should be remanded for a local investigation upon the question of boundary. The learned Subordinate Judge rightly held that this prayer came too late and he dismissed the appeals having dealt only with this question of local investigation.

Upon second appeal to this High Court two grounds appear to have been taken. One was the question of limitation which had not been argued in the lower appellate Court. Now, as to that it is clear enough that if from the plaintiff's own case or from his pleadings or from the admitted or proved facts it could be seen that the plaintiff's suits were statute barred, it would be the duty of the Court in second appeal to entertain even for the first time the question of limitation; but it is tolerably obvious that it would be in ordinary circumstances entirely wrong upon a suggestion that further investigation would disclose facts which would show that the plaintiff is time barred to grant a remand upon this ground in second appeal. Now the point which is taken in this High Court was that on the admitted dates the sale became final on 21st November 1909 and that accordingly the plaintiff's suit was time barred. If that be the only question then it does seem to me on the authority of *Jitendra Kumar Pal v. Mohendra Chandra* (1), that the statement in the sale-certificate, would not be final and conclusive for the present purpose; and on that basis the only question to consider is whether or not there was some reason to suppose that there had been an application to set aside the sale which extended the time under S. 80, of the Regulation. It appeared however, on this point being taken for the first time in second appeal that there is in evidence the circumstance that symbolical delivery of possession was given to Prokas the auction purchaser, on 19th January 1910 and it is reasonably clear on the doctrine of the case of *Mohim Chandra v. Pyari Lal*

(1) [1915] 24 C.L.J. 62=37 I. C. 239.

Das (2), that that would be a good answer so far as the auction-purchaser was concerned against any defaulting proprietor.

Now the learned Judge has rejected the contention that this is a good answer against the defaulting proprietors but he has done so on the ground that in the present case Prokash has been held to be in some extent, at all events, a benamidar for one Dianat Ram Sarma who was himself one of the defaulting proprietors; and he has apparently held that the doctrine in the case cited above does not apply except where the purchaser is a stranger. On that ground he has apparently rejected the date of delivery of symbolical possession as a material date in this case. This introduces the second point taken by the learned Judge as a good point against the plaintiff. On the footing that Prokas when he purchased was a benamidar for one of the defaulting proprietors the learned Judge appears to have held that a defaulting proprietor purchasing at a revenue sale although he paid the full purchase money remains still a co-sharer with his previous co-sharers the other defaulting proprietors. He appears to have held that, that being so, he merely stands in this position that he can only bring a suit for partition as against them. This point, however, was not defended or maintained by Mr. Sen in this Court. I do not understand that there is any doctrine which prevents a defaulting proprietor being a purchaser at a revenue sale and this is not a case where it has been found against the plaintiff that the default and the sale were fraudulently procured by one defaulting proprietor so that when he purchased, the law in view of his fraud, would regard him as a trustee of all his previous co-owners.

The first question to be decided is the question of limitation. On that question it appears to me on the facts of this case that Art. 121, Lim. Act, has nothing to do with the matter. This is not a suit to annul incumbrances and so far as the particular cases which were decreed are concerned they were decreed upon the basis that the suit lands were not shown to be comprised in any of the patnis set up by the defendants. That being so the question is a question either under Art. 142 or 144; probably if the ruling of *Mohim*

Chandra Choudhury's case (2) be right Art. 142. In each of these four cases now before us the persons whose eviction is sought that is, the contesting defendants, were themselves defaulting proprietors. If that be so the symbolical possession as against them is, in my opinion, equivalent to actual possession and the plaintiff's suit having been brought within 12 years of that date was brought in time.

There remains only one other argument which the learned advocate for the respondent raises and that is this. He contends that although the contesting defendants were defaulting proprietors and although they have been found to have no patni right in the suit lands nevertheless they may at the time of delivery of the symbolical possession have been in occupation of the suit lands not qua proprietors but claiming right under the one or other of their patnis and that in that state of affairs symbolical possession would not avail as against them to save the plaintiffs' suit. I have great difficulty in seeing how the law involved in this contention can be right. But it is quite clear that this is a case which was not proved and not, I think, imagined at the time the suit was tried. It is a new and speculative case never advanced before, and it is quite wrong, in my opinion, in second appeal where the point was not taken in the lower Court to allow an investigation of a case so very different from anything that was dealt with at the time. In my judgment it would be entirely wrong to interfere with the findings of the Courts below in a case of this character.

Upon the question whether or not Prokas Chandra Saha should have been held to be a benamidar for Dianat Ram Shaha I can only say that if that question were open to me I should find singularly little evidence but in my view of the law this element makes no difference whatever in the present cases.

In the circumstances it seems to me that these Letters Patent appeals should be allowed with costs, the decrees of the learned Judge should be set aside and the second appeals to this Court should be dismissed with costs in each case.

C. C. Ghose, J.—I agree.

A.L./R.K.

Appeals allowed.

* A. I. R. 1928 Calcutta 873

C. C. GHOSE AND GREGORY, JJ.

E. S. Olpadvolla — Accused — Petitioner.

v.

James Wright—Complainant — Opposite Party.

Criminal Revn. No 426 of 1928, Decided on 22nd May 1928.

* *Penal Code, S. 486—Use of another firm's bottles innocently and according to common practice — No conviction under S. 486 can stand.*

The complainant and the accused were soda-water manufacturers, and each had special bottles of his own firm. It was a common practice of the place that water-manufacturing firms used bottles indiscriminately, i. e., bottles of one firm were sent by customers to another firm for being filled with mineral water. Accordingly the accused's firm used bottles of the complainant's firm.

Held : that as there was no intention to do anything harmful within the meaning of S. 486, conviction under that section could not be valid.

[P 874 C 1]

Langford James, Charu Chandra Biswas, Manindra Kumar Bose and Prafulla Chandra Chakravarty—for Petitioner.

Judgment—In this case the petitioner who is the proprietor of the well-known firm of Soda-water manufacturers called Byron & Co. has been convicted under Ss. 483 and 486, I. P. C., and 6 and 7, Merchandise Marks Act. The short facts involved in this case are as follows: It appears that the complainant James Wright who is connected with a firm called Rose and Thistle has introduced into the market soda-water supplied in bottles with a "frosted appearance bearing the letters "R and T Ltd." at the bottom of the bottles. These bottles have a special paper label bearing the words "Rose and Thistle Ltd. Frosted Soda." These bottles have a capsule called crown cork. It appears that in Calcutta there is a common practice for various kinds of bottles to be used by different mineral water manufacturing firms indiscriminately, that is to say, customers send in indiscriminately Byron's bottles to Rose and Thistle in order that the bottles may be filled with soda-water or other waters and Rose and Thistle bottles to Messrs. Byron & Co., for a like purpose. The complainant says that the accused in this case has no right whatsoever to fill his bottles. The accused has stated before the Magistrate that he

has no intention of filling the complainant's bottles but that inasmuch as these bottles are brought in by coolies and sent to the manufacturers in order that they may be filled in it is not possible for him to prevent what has happened in this case. The Magistrate observes that the complainant's manager admits that he has given orders in their factory that outsider's bottles will not be accepted; but he finds it difficult to get the order carried out owing to the fact that the men cannot read English and that the bottles are brought in indiscriminately. In these circumstances the complainant complained before the Magistrate in respect of the user of his bottles by Messrs. Byron & Co.

The Magistrate has found that the design of the bottle of the complainant described as a bottle with a "frosted appearance" has been registered under the Patents and Designs Act, that the label is also registered under the said Act, but he states that the bottle itself is part of the complainant's trade-mark and he has accordingly gone into the case on that footing and has found that the accused has been guilty of counterfeiting the complainant's trade-mark and further that he has been selling goods with a mark i. e., with counterfeit trade-mark and has thereby rendered himself punishable under Ss. 483 and 486, I. P. C.

It is not necessary for us to refer to the sections in the Merchandise Marks Act because those sections follow closely the provisions of the Indian Penal Code in that behalf.

The first question is whether the accused is guilty of having committed an offence punishable under S 483, I. P. C. The two ingredients mentioned in the section itself are, first, that there should be a trade-mark and, secondly, that there should have been a counterfeiting of the trade-mark.

Mr. James' first contention is that the design of the bottle being registered under the Patents and Designs Act, it is not a trade-mark because, having regard to the language used in the Patents and Designs Act, a design registered under the Patents and Designs Act cannot be a trade-mark as defined in S. 478, I. P. C. Secondly Mr. James contends that even assuming that the design of the bottle itself is a trade-mark there is no counterfeiting in this case having regard to the definition of

the word "counterfeit" in S. 28, I. P. C. Thirdly Mr James's contention is that having regard to the findings of fact arrived at by the learned Chief Presidency Magistrate it is quite clear that what has happened has been done innocently.

So far as the last point is concerned it is abundantly clear from the judgment of the learned Chief Presidency Magistrate that he has found practically, if not in so many words, that there was no intention to do anything harmful within the meaning of S 486, I. P. C., and that all that has happened has so happened in the usual course of business in this trade in Calcutta. It is not clear why the accused should be deprived of the benefit of the findings of fact arrived at by the learned Chief Presidency Magistrate when considering the words specified in S. 486, I. P. C. In our opinion it is clear that the accused has acted innocently within the meaning of S. 486 and that that being so the conviction and sentence under S. 486, I. P. C., must be set aside.

So far as the conviction under S. 483 is concerned, there is a good deal to be said in favour of the view that the bottle itself, frosted though it be, cannot be considered a trade-mark. At any rate, there is sufficient doubt on the facts of this case which would entitle us to give the benefit of the doubt to the accused. There is also considerable force in the contention that having regard to the language of S. 28, I. P. C., the case cannot properly be brought within the four corners of S. 483, I. P. C. In that view of the matter the conviction and sentence under S. 483, I. P. C., must be set aside.

It follows from what has been stated above that the conviction under the corresponding sections, namely, Ss. 6 and 7, Merchandise Marks Act must also be set aside.

The fine, if paid, will be refunded.

W.S/R.K. Conviction set aside.

A. I. R. 1928 Calcutta 874

SUHWARDY AND CAMMIAD, JJ.

Rakhal Chandra Chakladar and others

—Plaintiffs—Appellants.

v.

Baikuntha Nath Barai and others—
Defendants—Respondents.

Appeal No. 1664 of 1925, Decided on 11th May 1928, from appellate decree of Addl. Sub-Judge, Bakarganj, D/- 24th March 1925.

(a) *Contract Act, S. 38 — Plea of tender holds good only if it is accompanied by deposit in Court.*

One of the requisites of a valid tender is that the party making the tender must always be ready to fulfil the obligation whenever called upon, or, as it is otherwise expressed, a tender in order to be valid must be kept good, in accordance with the requirements of the law. The plea of legal and valid tender must not only allege that the person raising the plea is still ready but must be accompanied by payment into Court : 16 Bom. 141, *Appr.*

[P 875 C 1]

(b) *Civil P. C., O. 24, R. 3—Deposit of admitted amount stops running of interest.*

In order to stop running of interest it is necessary for the party to deposit the amount admitted by him in Court : 25 Cal. 34, *Dist.*

[P 875 C 1]

(c) *Bengal Tenancy Act, S. 150—Plea of excess shall not be taken cognizance of unless it is accompanied with deposit.*

Section 150 is applicable to cases where the defendant admits that money is due from him to the plaintiff on account of rent and plea of tender shall be rejected if it is not accompanied with deposit : 30 Cal. 947 and 4 Pat. 304, *Ref.*

[P 875 C 2]

Brojendra Nath Chatterji and Nil Kanta Ghose—for Appellants

Pyari Mohan Chatterji and Bankim Chandra Roy for Krishnar Lal Banerji—
for Respondents.

Judgment.—The only question that has been canvassed in this case is with regard to the validity of the tender of rent made by the defendants. The plaintiffs brought a suit for rent on the basis of a kabuliati executed before the Bengal Tenancy Act came into force in which interest on arrears of rent was stipulated at one anna per rupee per month. The plaintiffs claimed interest at half-anna per rupee and damages and costs. The only defence with which we are now concerned is that the rent was sent to the plaintiffs by money orders which were refused and, therefore, they are not entitled to claim interest. The trial Court held that the tenders were not good and allowed the plaintiffs' claim in full and half-costs. Defendants 3 and 4 appealed and the learned Subordinate Judge was of opinion that the tenders were good and effective and dismissed the plaintiffs' claim for interest, allowing him a decree for the rent and cesses claimed.

The plaintiffs have appealed and it is contended on their behalf that on the facts found by the Courts below the tender must be held to be illegal and in-

operative. It has been found and it must be accepted as a fact, that the defendants remitted rents even before they actually became due to the plaintiffs by money orders which were refused; but afterwards the defendant neither deposited the money in Court under S. 61, Ben. Ten. Act, nor paid the admitted amount in Court after the institution of the suit. As a matter of fact it was not deposited until after the decision of the trial Court when execution was taken out. The requisites of a valid tender have been considered in many cases and have been explicitly laid down in text books. One of the requisites of a valid tender is that the party making the tender must always be ready to fulfil the obligation whenever called upon; or, as it is otherwise expressed a tender in order to be valid must be kept good, in accordance with the requirements of the law. Now the plea of legal and valid tender must not only allege that the defendant is still ready but must be accompanied by payment into Court. Leake on Contract, 7th Edition, p. 645. The law of tender has been partly borrowed into the Indian Contract Act from the English law and that portion of it which has not been incorporated in the Indian law should be applied as embodying rules of justice, equity and good conscience. Under O. 22, R. 3, of the Rules under the English Judicature Act a plea of tender is not to be received in Court unless accompanied by payment in Court. The same view has been taken in this country in *Abdul Rahman v. Nur Mahommad* (1). Under O. 24, Civil P. C., 1908, in order to stop running of interest it is necessary for the defendant to deposit the amount admitted by him in Court. In the present case by not depositing the amount in Court, the defendants have not only rendered themselves incompetent to raise the plea of valid tender but have forfeited their right to remission of interest under O. 24, Civil P. C.

In answer to the appellants' case on this point the learned advocate for the respondents has relied upon the Full Bench decision of this Court in *Kripa Sindhu Mukherji v. Annoda Sundari Debi* (2). That case has no bearing upon the question in controversy in the pre-

sent case. Before the Full Bench decision it was held that a tender of rent under the Bengal Tenancy Act must be followed by a deposit under S. 61 of the Act. The Full Bench disagreed with this view and held that a tender in order to be legal and valid need not be followed by deposit under S. 61, Ben. Ten. Act. But it did not consider the further question as to whether under the law it is necessary in order to render a tender effective to deposit the money in Court at the institution of the suit. In the Full Bench case in fact the money was tendered several times to the plaintiffs, his pleader and Naib and ultimately when it was refused it was deposited in Court before the institution of the suit. On these facts the Court held that it was a valid tender which was kept good as shown by the conduct of the tenant and it should stop the running of interest from the date of the tender.

Apart from the considerations which apply to the present case with reference to the law of tender, there is a particular section in the Bengal Tenancy Act which deals with the procedure to be followed where a tenant in a suit for rent admits a certain amount to be due to the landlord. S. 150 says when a defendant admits that money is due from him to the plaintiff on account of rent but pleads that the amount claimed is in excess of the amount due, the Court shall refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due. This provision of the law was not apparently brought to the notice of the Courts below. As in the present case the defendants admitted that the actual rent fixed under the kabuliya was due from them to the plaintiffs and they not having deposited that amount in Court, the Court ought to have under the law refused to take cognizance of the plea that the amount claimed was in excess of the amount which was actually due to the landlords. That the law as laid down in S. 150, Ben. Ten. Act, is applicable to cases where the defendant admits that money is due from him to the plaintiff on account of rent has been held in several cases. *Banarashi Pershad v. Makhan Roy* (3). The Patna High Court in *Kesho Prasad Singh v. Triloke Nath Tewari* (4), has taken a

(1) [1892] 16 Bom. 141.

(2) [1898] 25 Cal. 31=6 C.L.J. 273=11 C.W.

(3) [1903] 30 Cal. 947=7 C.W.N. 514.

wider view of the application of the section. In this view also the defendants' plea of tender must be rejected. In our opinion this appeal must succeed. The respondents ask us to remand the case to the lower appellate Court in order to determine the question what amount of interest the plaintiffs are entitled to claim from the defendants under the contract. This is a question which we find from the judgment of the lower appellate Court was not raised before that Court. The only contentions of the defendants were that the tender was a valid tender and that the Munsif should not have allowed interest, damages and costs to the plaintiffs presumably on the ground that the tender was valid. We have looked into the judgment of the trial Court and we do not think that it would be necessary to remand the case for consideration of the question now raised before us by the respondents.

The result is that this appeal is allowed, the decree of the Court below set aside and that of the trial Court restored. But as this litigation has been occasioned by the unreasonable refusal by the plaintiffs of the rent sent to them by money order, we direct that the plaintiffs should bear their own costs throughout.

A. L./R K.

*Appeal allowed.***A. I. R. 1928 Calcutta 876**

B. B. GHOSE AND GARLICK, JJ.

Adam Ali and another—Plaintiffs—Appellants

v.

Chandu Molla and others—Defendants—Respondents

Appeal No 1717 of 1925, Decided on 9th May 1928, from appellate decree of 1st Sub-Judge, Dacca, D^l 27 April 1925.

Bengal Tenancy Act, S. 87—Part of holding sold in 1908—Subsequent partition in 1919 between cosharers of taluk—Portion sold falling to share of plaintiffs—Plaintiff suing in 1922 to eject purchaser—Purchaser cannot be ejected as he is not trespasser—Suit is also barred as adverse possession began in 1908 and not at the date of partition.

A holding consisting of six plots belonged to 1. Out of these six plots, three were sold in 1908 to C. Subsequently in 1919 there was a partition between the cosharers of the taluk and the three plots purchased by C were allotted to plaintiffs. In 1922 plaintiffs brought a suit to eject C, alleging that he was a trespasser on the land.

Held : that the landlords had no right to eject C because A had not abandoned the hold-

ing which would give the landlords the right to khas possession. The act of partition among the landlords without concurrence of the tenant had surely the effect of dividing the holding so as to give the plaintiffs right to recover their share of the rent which had been fixed on the portion allotted to their shares, but that did not confer a new right upon the plaintiffs to bring ejectment against C who was not liable to be ejected previous to partition : 2. *Pat. L. J.*, 225, *Foll.* [P 877 C 2]

Held : further that the act of the landlords effecting the partition cannot be held to be a trespass by the defendants. Trespass must be considered to have commenced when A sold three plots, that is in 1908. [P 877 C 2]

Nares Chandra Sen Gupta and Urukramdas Chakravarti—for Appellants.

Sarat Chandra Basak and Radhicanaran Guha—for Respondents.

B. B. Ghose, J.—This is an appeal on behalf of the plaintiffs in an action in ejectment on the ground that defendant 1 has purchased a portion of a non-transferable occupancy holding which originally belonged to one Azimuddin Bepari as appertaining to estate No 8376. The Subordinate Judge has found that the original jote of Azimuddin consisted of six plots of land. Out of these, three plots were sold by Azimuddin in 1908 to one Kinu Mundle. These three plots were again purchased by defendant 1 in 1913. The plaintiffs had one ganda share in the taluk No 8376. There was a partition of the taluk among the cosharers under the Estates Partition Act ; and the portion of the holding consisting of the three plots which defendant 1 had purchased was allotted to the share of the plaintiffs by virtue of the partition. The plaintiffs brought this suit in November 1922 on the allegation that defendant 1 was a trespasser on the land and that they were entitled to eject him on that ground. The Munsiff decreed the suit. On appeal by defendant 1, the Subordinate Judge has reversed the decision of the Munsiff and dismissed the suit of the plaintiffs. The Subordinate Judge held that Azimuddin was in possession of a portion of the holding and that being so, the plaintiffs had no right to seek ejectment as against the defendants. Evidently the learned Subordinate Judge was referring to the case of *Dayamoyi v. Ananda Mohan Roy* (1). The learned Judge further held that the defendants were in adverse possession of the limited interest of a tenant for more than 12

(1) [1915] 42 Cal. 172=20 C. L. J. 52=27 I. C. 61=18 C. W. N. 971 (F.B.).

years. Upon these two grounds he has dismissed the plaintiffs' suit for khas possession.

It is contended on behalf of the plaintiffs here that the decision of the Subordinate Judge is erroneous. The ground stated shortly is that before the partition in 1919, the landlords had no right to sue in ejectment, because the original tenant was in possession of a portion of the holding. The defendants, however, had no right as against the landlords to remain in possession. After the partition a portion of the holding which was in possession of the defendants became a new holding under the provisions of S. 81, Estates Partition Act, and when the plaintiffs became entitled by reason of the partition to have the new holding, they found that the land was in possession of a trespasser and not the original tenant, Azimuddin, and, therefore, they have the right to eject the trespasser. It is further argued that to hold otherwise would have this effect, that if Azimuddin transfers the remaining portion of his holding which has now been allotted to different cosharers, then every one of the cosharers would have the right to eject the transferees from different portions of the holding. The effect would be that notwithstanding the separation of the original holding into different parts by which different holdings were created, an artificial link would remain which would still bind the different new holdings together; and as this anomalous position is unreasonable, the plain and simple position should be accepted that as the plaintiffs find the trespasser in possession of the holding of which they are the sole landlords they can bring ejectment. The answer to this is that the Bengal Tenancy Act is not free from anomalies and to find one consistent rule to govern all circumstances would probably be an unprofitable task. To my mind, the answer to Dr. Sen Gupta's argument is this. When the transfer was made of a portion of the holding in 1908 by the original tenant Azimuddin, the landlords had no right to eject the transferee or the old tenant, because the old tenant had not abandoned the holding which would give the landlords the right to khas possession. The act of partition among the landlords without concurrence of the tenant had surely the effect of dividing the holding so as to give the plaintiffs right to reco-

ver their shares of the rent which had been fixed on the portion allotted to their shares of the taluk. But that cannot be said to confer a new right upon the plaintiffs to bring ejectment against the defendants who were not liable to be ejected previous to partition; or in other words, if it was held that before the partition Azimuddin continued as a tenant with regard to the entire holding, by that partition it cannot be said that Azimuddin had abandoned the new holding so as to convert the transferee into a trespasser. I am fortified in the view I take by the observations made by Chamier, C. J. in the case of *Suraj Deo Narayan Singh v. Patchh Narayan Singh* (2), to which our attention was drawn by the learned advocate for the respondents. The observations no doubt were obiter having regard to the finding in that case that there was a usage proved which justified the transfer. But still I think respect is due to the observations made there; and as I fully agree with the reasons of the learned Chief Justice, I should prefer to follow him.

There is one other point which I think I should deal with. The learned Subordinate Judge has found that the defendants were in adverse possession of the limited interest for more than 12 years. Dr. Naresh Chandra Sen Gupta argues that this finding is wrong, because the plaintiffs had no notice of the trespass. Now, if the defendant is considered to be a trespasser, when did the trespass begin? I do not think the trespass should be held to begin in 1919 when the partition was effected. The act of the landlords effecting the partition cannot be held to be a trespass by the defendants. Trespass must be considered to have commenced when Azimuddin sold these three plots, that is in 1908. Therefore if the plaintiffs take their stand on the ground that defendant 1 is a trespasser, then it must be held that defendant 1 has been a trespasser from 1908 in respect of the limited interest of a tenant. Plaintiff cannot base his claim on the ground that he had no notice.

On all these grounds, I am of opinion that the judgment and decree of the Subordinate Judge should be confirmed and this appeal dismissed with costs.

Garlick, J—I agree.

, R.K.

Appeal dismissed.

(2) [1917] 2 Pat. L. J. 225=39 I. C. 98=1 Pat. L. W. 443.

A. I. R. 1928 Calcutta 878

MITTER, J.

Jyoti Prosad Singha Deo Bahadur—
Appellant.

v.

Jogendra Ram Roy and others—Res-
pondents.

Appeal No 266 of 1928, Decided on
29th March 1928, from original decree of
Sub-Judge, Asansole, D/- 30th July 1926.

Court-fees Act (7 of 1870), as amended in
1922, Sch. 2, S. Art. 17, Cl. (6)—*Art. 17 (6) ap-*
plies to appeals against decrees from partition
suits.

In appeals against decrees from partition
suits, the proper Court-fees payable are Rs. 15.
It does not matter whether the ground of
attack is with reference to the allotment of
specific portion of immovable or moveable prop-
erty or the ground of attack is the question of
costs: 12 C. W. N. 37 and A.I.R. 1925 Cal. 320,
Ref.; 19 Mad. 350 and 3 P. L. J. 443, Dist.

[P 879 C 1]

Karunamoy Ghose—for Appellant.

Judgment.—This is a reference under
the Court-fees Act. The facts which
have given rise to this reference may be
briefly stated as follows: The plaintiff,
who is the appellant before this Court,
filed a suit for partition in the Court of
the Subordinate Judge of Asansole. There
was a preliminary decree and ultimately
there was a final decree on 30th July
1926, and the plaintiff-appellant, was
awarded the costs of commission as
against certain of the defendants. His
costs of the commission were, however,
not embodied in the decree. These costs
amounted to Rs. 1573-5-9. Against that
order amending the decree the defendants
now respondents, moved the Subordinate
Judge on 21st December 1927 rescinding
his previous order of 4th June 1927 so
far as it related to the costs of the com-
mission. He then directed that the
direction of payment of costs of the
commission to the plaintiff be deleted
from the decree. Against this decree as
finally amended the plaintiff has preferred
the present appeal in which this question
of Court-fees arises. The suit out of
which this appeal arises was a partition
suit and the question of Court-fees with
reference to such suits is determined by
the provisions of Sch. 2, Art. 17. Sch. 2,
Art. 17, Cl. (6), Court-fees Act, reads as
follows:

Plaint or memorandum of appeal in each of
the following suits:

VI. Every other suit where it is not possible

to estimate at a money value the subject-matter
in dispute, and which is not otherwise provided
for by this Act.

It has been held in several cases in
this Court and the position now taken is
firmly established, that a suit for parti-
tion of a joint property is, with reference
to the matter of Court-fees, governed by
Sch. 2, Art. 17, Cl. (6), Court-fees Act.
References may be made in this connexion
to the case of *Bidhata Rai v. Ram Cha-*
ritar Rai (1) and to the later case of
Rajani Kanta Bag v. Rajabala Dasi (2).

It has been contended by the learned
vakil for the appellant that as a partition
suit has been held to fall within Art. 17
the only question which has to be con-
sidered is as to whether the memorandum
of appeal in the present case arises out
of a suit for partition for if it does he is
liable to pay Court-fees of Rs. 15 as is
provided for in this article. There are
two cases one of the Madras Court and
the other of the Patna Court which have
to be considered in this connexion. It
may be noticed that in both cases the
appeals did not arise out of suits for
partition but they arose out of the deci-
sions in money suits and the article
which governs such cases would be Sch. 1,
Art. 1, Court-fees Act. It is true that
some of the observations made in those
cases are somewhat general. For instance
in the Madras case reported *In re Makki*
(3) the question was whether when apart
from, and independently of, any other
reliefs which an appellant seeks in an
appeal from a decree, he seeks distinct
relief on the ground that by the decree
under appeal the costs of the parties in
the proceedings which terminated with
the decree have not been properly as-
sessed or apportioned, should the value of
such distinct relief be reckoned as part of
the subject-matter in dispute for the
purposes of Sch. 1, Court-fees Act or
should the said value be excluded from
computation? and the answer to the
question was that as the appellant had
made the costs the subject-matter of the
dispute and, therefore, the Court-fee
stamp is leviable. Similarly in the case
of *T. K. Rowlin v. Lachmi Narayan Jha*
(4), the question was

what is the correct Court-fee when relief is
sought with regard to costs independently of

(1) [1908] 12 C.W.N. 37=6 C.L.J. 651.

(2) A. I. R. 1925 Cal. 320=5 Cal. 128.

(3) [1892] 19 Mad. 350.

(4) [1918] 3 Pat. 177. 448=4 Pat. L. W. 221=
44 L. C. 59=(1918) P.H.C.C. 264.

the result of the main contests between the parties

and the answer was

when the appeal against costs is distinct and separate from other parts of the appeals, Court-fees must be paid ad-valorem on the costs decreed.

There the question arose in the case of appeals or cross-objections in suits for redemption or foreclosure, when the amount declared by the Court to be due at the date of the decree could be ascertained by reference to the judgment and decree. These cases, therefore, do not bear directly on the present question.

The present case seems to be clearly governed by the plain language of Art. 17, Sch. 2, Cl. (6) and the moment it is shown, as has been shown in this case, that the memorandum of appeal arises in the suit where it is not possible to estimate the money value of the subject-matter in dispute and which is not otherwise provided for by the Act the plaintiff can claim that the Court-fees payable are Rs. 15. So far as this Court is concerned it has always been recognized that in appeals against decrees from partition suits the proper Court-fees payable are Rs. 10 and this has been raised to Rs. 15 by the amendment of 1922. It does not matter whether the ground of attack is with reference to the allotment of specific portion of immovable or movable property or the ground of attack is the question of costs. Suppose in a partition suit a sum of money has been awarded to one of the parties as owelty money and the party against whom the payment of the owelty money has been directed is aggrieved by such a decree then he is entitled to prefer an appeal to this Court; and it can hardly be said that in such a case although the matter arises in a partition suit the Court-fees leviable would be the amount of the owelty money which forms the subject-matter of the complaint in the appeal.

I do not see how the question of costs can depend on any different footing. If, for instance, the plaintiff in the present case had appealed against a portion of the partition decree which was unfavourable to him and in addition had appealed against the order of costs it could not be contended that he was bound to pay in addition to Rs. 15 as provided for by Art. 17 an ad valorem Court-fee on the specified amount of costs which has been disallowed against him.

I think, therefore, the proper Court-fee payable is Rs. 15.

A.L./R.K.

Order accordingly.

A. I. R. 1928 Calcutta 879

C. C. GHOSE AND JACK, JJ.

Etraj Mandal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No 774 of 1928, Decided on 3rd September 1928.

Criminal P. C., Ss. 133, 137 and 139-A—Order under S. 133—Claim denied—Opposite party asked to produce evidence—In the absence of any specific opportunity to adduce evidence under S. 137, order must be set aside.

A conditional order was made under S. 133. The opposite party denied the claim. He was asked to adduce evidence.

Held: that the contention that the party understood that he was to adduce evidence in support of his case relevant to an enquiry under S. 139-A, had force and inasmuch as no specific opportunity was given to him to adduce evidence under S. 137, the order complained of should be set aside. [P 879 C 2]

Mrityunjoy Chatterji, Sures Chandra Taluqdar and Ramendra Mohan Mazumdar—for Petitioner.

Narendra Kumar Basu—for the Crown.

Order.—The complaint that is made in this case is that the petitioner was not afforded an opportunity of adducing evidence under S. 137, Criminal P. C. We have examined the record and it appears to us that the position was this. A conditional order was made under S. 133, Criminal P. C. The opposite party, who is represented by Mr. Chatterji, appeared before the Magistrate and denied the existence of any public right in respect of the water-course in question. Thereupon the Magistrate directed him to adduce evidence in support of his case. The petitioner urges that he understood that he was to adduce evidence in support of his case relevant to an enquiry under S. 137-A and that not until the enquiry under S. 139-A was concluded could he be expected or required to produce evidence relevant to an enquiry under S. 137. As far as the sections go, the petitioner would seem to be right in his contention. In that view of the matter, inasmuch as no specific opportunity was given to the petitioner to adduce evidence under S. 137, Criminal P. C., the order complained of must be set aside and the matter must go back to the Magistrate for an enquiry as laid down in Ch. 10, Criminal P. C.

A.L./R.K.

Retrial ordered.

* A I. R. 1928 Calcutta 880

SUHRAWARDY AND GRAHAM, JJ.

Tarini Charan Sardar and others—
Defendant—Appellants.

v.

Srish Chandra Pal—Plaintiff—Respondent.

Appeal No. 1975 of 1925, Decided on 2nd February 1928, from appellate decree of 3rd Addl. Dist. Judge, 24 Parganas, D/- 6th April 1925.

* *Execution sale—Rights of Purchasers—A purchaser at an auction sale is not bound by the description given in sale proclamation—He can claim higher rights, that is, the rights of the judgment-debtor.*

In an execution sale the decree-holder may be bound by the description given by him in the sale proclamation, but the purchaser who has purchased the property described in a particular way in the sale proclamation can claim a higher or different right which the judgment-debtor actually had and which the purchaser has really purchased. [P 880 C 2]

(b) *Bengal Tenancy Act—Word “jote”—Meaning of words—Land Tenure.*

Jote is a general term with respect to a holding and it is not necessarily equivalent to a “Raiyati jote”; A. I. R. 1922 P.C. 241; 21 C. W. N. 188; and 8 C. W. N. 117; *Foll.*

[P 880 C 2]

(c) *Bengal Tenancy Act, S. 160—A raiyat holding at a fixed rent is entitled to the benefit of S. 50—Bengal Tenancy Act, S. 50.*

A raiyat holding land at a fixed rent can acquire a right of occupancy and claim protected interest under S. 160, Ben. Ten. Act. He is entitled to the benefit of S. 50 if he proves the particular state of facts laid down therein: A. I. R. 1922 Cal. 287, *Foll.*

[P 882 C 1]

Nasim Ali—for Appellants.

Brojo Lal Chakravarti, Rishindra Nath Sarcar and Kali Sankar Sarkar—for Respondents.

Suhrawardy, J—This appeal is by the defendant in a suit for rent in respect of a holding in which the plaintiff claimed rent for a period of four years at the old rate and further claimed enhancement of rent on the ground that in consequence of improvement made at his cost there had been an increase in the productive power of the land. The trial Court held that the value of the land had increased on account of certain improvements made by the plaintiff but that he was not entitled to claim enhanced rent on the ground that the defendant succeeded in raising the presumption in his favour under S. 50 (2), Ben. Ten. Act. The plaintiff appealed and the learned Additional District Judge

held that in this particular case the tenant was not entitled to the presumption under S. 50 (2), Ben. Ten. Act, though he had proved payment of rent at a uniform rate for a period of more than 20 years. The reasoning adopted by the learned Judge is this: In 1890 this Jote along with another was sold in execution of a rent decree by the plaintiff and purchased by the defendant; in the sale proclamation the property sold was described as a jote; a jote ordinarily means an occupancy holding; and an occupancy holding is under the law a holding the rent of which is liable to be enhanced; the defendant having purchased the property as a jote must accept that position and cannot now turn round and say that he is a raiyat at fixed rate. In other words the learned Judge, though he has not used that expression is of opinion that from the description of the property in the proclamation of sale under which he has purchased it, he is estopped from pleading that the right he purchased was anything different from the right of an occupancy holding. This view, in my opinion, is clearly erroneous. It has been conceded before us by the learned vakil for the respondent, and in my opinion rightly that no question of estoppel arises in this case. The holding was described as a jote in the sale proclamation by the plaintiff and the defendant has purchased the interest of the defaulting tenants whatever that was. The decree-holder may in a proper case be bound by the description given by him in the sale proclamation but to my knowledge no case has gone to the extent of holding that because the purchaser purchased the property described in a particular way in the sale proclamation, he cannot claim a higher or different right which the judgment-debtor actually had and which the purchaser had really purchased.

Now, with regard to the assumption made by the learned Judge that the term “jote” ordinarily means occupancy holding, there is high authority to hold that it is not so. In *Midnapore Zemindary Co. v. Naresh Narayan Singh* (1) the Judicial Committee observed:

Jote is a general term and it is not necessarily equivalent to a “raiayati jote.”

(1) A. I. R. 1922 P.C. 241=48 Cal. 460=48 I. A. 49 (P. C.).

The same view was taken in this Court in *Rajani Kanta v. Yusuf Ali* (2) and *Nawab Ali v. Hemanta Kumari* (3). These cases have been attempted to be distinguished on the ground that the holdings referred to in them consisted of more than one hundred bighas and therefore, the presumption under the law was that they were tenures. The interpretation of the term "jote" in those cases does not seem to have been affected by the fact that the holdings under consideration were more than 100 bighas. After holding that the term "jote" did not necessarily mean a raiyati holding the Courts proceeded to determine the nature of the tenancy in those cases and having found that the area was over 100 bighas they allowed the presumption of law to be raised in favour of their being tenures.

Even if the interest sold in 1890 were that of a raiyati at fixed rate one would not expect any other description of the land except what was given in the sale proclamation, namely, that it was a jote. If "jote" means a holding in its general sense as it ordinarily does, the interest of a raiyat at a fixed rate will also be called a jote and it is too much to expect from the landlord that in the sale proclamation he would admit that the jote he was selling was held by the last tenant at a rent fixed in perpetuity. The mere description of the property sold in 1890 as a jote-right does not in my opinion support the case of the plaintiff even if the defendant is held bound by it. It is still open to the Court to investigate as to what was sold and what was purchased by the defendant.

The lower appellate Court has observed and it seems that its decision was to a great extent influenced by the view he took of the law, that a raiyat at a fixed rent or rate of rent cannot be an occupancy raiyat, though an occupancy raiyat by a subsequent grant can acquire the status of a raiyat at fixed rent. This is not the law as at present settled by the recent decisions of this Court. In the case of *Dulhin Gulab Koer v. Balla Kurmi* (4) decided by a Bench of five Judges it was held that the settlement officer was right in giving effect to the presumption that the raiyats

meaning ordinary raiyats were holding at fixed rates of rent and in recording them as raiyats holding at fixed rates. The learned Judges agreed with the observations made by Ameer Ali, J., in the case at the stage at which the case was before the Division Bench; and one of the observations made by that learned Judge will be found at p. 749 of the report :

Any raiyat, therefore, by whatever name he may be called if he pleads and proves the particular state of facts provided in S. 50 is entitled to its benefit.

The last word upon the subject has been said in the case of *Sarveswar Patra v. Bejoy Chand Mahatab* (5) in which it was held that the raiyat holding land at a fixed rent may acquire a right of occupancy and claim protected interest under S. 160, Ben. Ten. Act. Richardson, J., went into the history of the law on the subject and came to the conclusion that there is nothing in the law to prevent a raiyat at fixed rate acquiring a right of occupancy in other words both the rights may be combined in the same person. Nor does the law make it impossible for an occupancy raiyat to obtain the right of a raiyat at fixed rate. These decisions and the other pronouncements on this subject in various cases of this Court created a class of raiyats not enumerated in S. 4, Ben. Ten. Act., namely, occupancy raiyats holding at a fixed rent or rate of rent. Whether an occupancy raiyat who is proved to have held at a fixed rent or rate of rent from the time of the Permanent Settlement may be elevated to the status of a raiyat at fixed rate is not for our present purpose to discuss. But it cannot be disputed that the law recognizes a raiyat with such rights. In the proviso to S. 37, Cl. (4), Act 11, 1859, one of the protected interests described in the section is that of a raiyat having a right of occupancy at a fixed rent. Reference may also be made in this connexion to the decision in *Lakshmi Charan Shaha v. Hamid Ali* (6) where the same view has been taken.

The learned Judge in support of his view has referred to several cases which apparently have no bearing on the point under discussion. In *Jagabandhu Shaha*

(2) [1917] 21 C. W. N. 188=34 I. C. 92.

(3) [1904] 8 C. W. N. 117.

(4) [1898] 25 Cal. 744=2 C. W. N. 580 (F.B.).

(5) A. I. R. 1922 Cal. 287=49 Cal. 280.

(6) [1918] 27 C. L. J. 284=41 I. C. 543.

v *Magnamayi Dasi* (7), the case was not governed by the Bengal Tenancy Act, but was decided upon the general principles of law. In that case the tenants succeeded in proving uniform payment of rent for a period of 40 years. The learned Judges held that without further proof of the origin and nature of the tenancy it would not be possible as a matter of law to draw an inference from this fact alone that at the inception of the tenancy the rent was fixed in perpetuity because the forbearance of the landlord in suing the tenant for a period of 40 years might be due to various reasons not inconsistent with the tenancy being an ordinary one. In *Guru Charan Nandi v. Sarab Ali* (8) there is a clear finding that the tenancy was created 40 years before the institution of the suit and, therefore no presumption could be drawn from the fact of uniform payment of rent for that period. The learned Judge has also referred to two cases from 26 C. W. N. one being the case of *Bamandas Vidyasagar v. Shadhu Munjhu* (9) and the other *Prosunna Kumar Sen v. Durga Charan* (10). I fail to see that these cases have any connexion with the point involved in the present case. It was held in those cases that where the Record-of-Rights have been finally published the tenant is precluded by S. 115, Ben. Ten. Act, from claiming presumption under S. 50 of that Act. The case before us is not based on the Record of Rights and there is no presumption one way or the other arising from it.

It has been contended before us that the finding of the lower appellate Court that the presumption under S. 50, Ben. Ten. Act, has been rebutted by the sale certificate in this case is a finding of fact. I am unable to agree with this contention. It seems to me to be arguing in a vicious circle. The Judge held that the defendant was bound by the description of the holding as a jote in the sale-certificate and then he said that the production of the sale-certificate rebutted the presumption under S. 50 inasmuch as the sale certificate describes the holding sold as a jote.

(7) [19 6] 44 Cal. 555=24 C. L. J. 363=36 1. C. 884=22 C. W. N. 89.

(8) [1919] 23 C. W. N. 1041=52 I. C. 79=30 C. L. J. 9.

(9) [1921] 26 C. W. N. 945.

(10) A. I. R. 1922 Cal. 146=49 Cal. 919=26 C. W. N. 947.

The result of a careful consideration of the facts of this case and of the law is that the defendant though he may be an occupancy raiyat is still entitled to claim the presumption under S. 50, Ben. Ten. Act, and since he has proved in this case that he has paid rent at a uniform rate for more than 20 years he is entitled to such presumption and the question which has been put in the judgment of the learned Judge namely, whether in consequence of the description of the holding as an ordinary jote in 1890 in the defendant's title-deed, the defendant is entitled to the benefit of the presumption under S. 50, Ben. Ten. Act., must be answered in the affirmative.

In the above view this appeal is allowed. The judgment of the lower appellate Court is set aside and that of the Court of first instance restored with costs in all Courts.

Graham, J.—I agree.

A L/R K.

Appeal allowed.

**** A. I R. 1928 Calcutta 882**

SUHRAWARDY AND GRAHAM, JJ.

Sourindra Nath Basu and others—
Plaintiffs—Appellants.

v.

Nirmal Chandra Banerjee and others—
Defendant 2—Respondents.

Appeal No. 1982 of 1925, Decided on 7th February 1928, from appellate decree of First Sub-Judge, Zillah, 24 Parganas, D/- 13th June 1925.

** (a) Adverse possession—Claimant must have actual possession as against the person entitled to possession—Real tenant executing a sham kabuliyat in favour of a third person—Actual possession with the real tenant with knowledge of sham kabuliyatdar and continuing in possession as owner—No title by adverse possession can be claimed.*

The question of adverse possession is a question of fact and the claim can only arise when a party remains in possession as against the party who held actually the rights to possession. If a real tenant executes a sham kabuliyat in favour of a third person, but to continue to be in actual possession, as he was before the kabuliyat was executed with the knowledge that it was his property of which he was in possession and that the kabuliyat was a sham transaction, the third person cannot claim title by adverse possession. [P 884 C 2]

*** (b) Adverse possession—Principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor, does not apply in favour of a trespasser.*

The principle that possession against a tenant or a lessee is not necessarily adverse as

against the landlord or lessor, applies only where the landlord or lessor has title to the land and the right to immediate possession, if impediments in the shape of a lease or tenancy disappear and does not apply to a trespasser: 29 Cal. 518 (P. C.), Appl. [P 885 C 1]

(c) Civil P. C., O 41, R. 22—Cross-objections.

Where appeals relating to the matter in cross-objections are dismissed under O. 41, R. 11, cross-objections cannot be heard in the cross-appeal. [P 885 C 1]

Biyo Lal Chakrabarty and Hiralal Chakravarty—for Appellants

Rupendra Kumar Mitter, Kanai Dhone Dutt and Mrityunjay Dey—for Respondents.

Judgment.—This appeal arises out of a suit for establishment of title and recovery of his possession of five plots of land A B C D and E described in the plaint said to be appertaining to the plaintiff's tenancy of 2½ bighas bearing a rental of Rs. 2-8-0 under the defendants and standing in the name of Ram Sona Dassi. Both the Courts below have allowed the plaintiff's claim with reference to four plots A C D and E and dismissed the suit so far as it related to plot B. The present appeal by the plaintiffs is accordingly confined to plot B which is a cutcheri bari. The plaintiff's case is that all the five plots in suit were purchased by Ram Sona Dassi (the plaintiff's predecessor) from Bagdi, the original holder of the tenancy, in 1261 B. S. Under the defendant who is the zemindar there was a putnidar by the name of Sristidhar Mondal who took a lease from the plaintiff's predecessor of plot B and had his cutcheri bari. Thereafter Sristidhar's successor-in-interest in the putni Rama Nath Burman executed a registered kabuliyat in respect of plots A and B in 1301 in favour of the plaintiff's predecessor and was in possession by payment of rent till he was dispossessed by the defendants in 1908. The plaintiff thereafter obtained a decree against Rama Nath for arrears of rent under the lease and purchased it at auction in execution of rent decree on 3rd November 1914. It further appears that the plaintiff's predecessor brought a suit against Sristidhar for rent of plot B but it was dismissed and the decree of dismissal was upheld by the High Court in second appeal. The defendants are the purchasers of the zemindari interest of the property in suit in a revenue sale and subsequently they obtained by purchase the putni right of Rama Nath in the estate,

and took possession of the land in suit on 11th January 1908.

Now as to the plaintiff's title to this property, it has been found by the Courts below that the kobala under which the plaintiff's predecessor Ram Sona is alleged to have purchased among other properties the land in suit from Padu Bagdi was not a genuine document. This finding has not been challenged before us. The position therefore is that the plaintiff has no title to this property. The substantial question which has been ably argued by Mr Chakrabarty on behalf of the plaintiffs is that though he has no title to the land in suit he has by adverse possession against the persons who was entitled to khas possession of the property, obtained a good title to it. This contention is based on the fact that in 1301 the putnidar Rama Nath executed a kabuliyat in favour of the plaintiff's predecessor in respect of the land in suit though actually it belonged to him on that date and remained in possession thereof till 1314 B. S. or 1908 as a tenant under the plaintiffs; and therefore, according to the principle of the decision of the Judicial Committee in the *Secy. of State v Krishna Mani Gupta* (1), the plaintiff obtained a good title by adverse possession as against Rama Nath himself. It may be noted at the start that this case was not made out in the Courts below and there is no sufficient discussion of the evidence bearing upon this point. It is a question which is not free from consideration of facts and it is difficult for us in second appeal to appreciate its true bearing on the facts of this case. But as it has been placed before us as a question of law on the facts found in the case it is necessary to examine it closely. If the case as set up by the plaintiff namely that in 1301 Rama Nath had the title to the land in suit but he executed a kabuliyat in favour of the plaintiff alleging plaintiff's possession therein and treating himself as a tenant in respect thereof and remained in possession of it as a tenant under the plaintiff for a period of more than 12 years by payment of rent, is proved the plaintiff is undoubtedly entitled to succeed on the principle of *Krishna Mani Gupta's* case (1). But the findings of the lower appellate Court do

(1) [1902] 29 Cal. 518=29 I. A. 104=6 C. W. N. 617=8 S. L. 260 (P. C.).

not support the plaintiff's case as put before it. With regard to the kabuliyat executed by Rama Nath in favour of the plaintiffs, the learned Subordinate Judge in the appellate Court makes the following observation:

If we accept Rama Nath's said kabuliyat as a genuine and bona fide document, we find that the plaintiff's case is proved to be true in respect of all the sub-plots. There are, however, sufficient reasons for finding that Rama Nath's said kabuliyat was executed under exceptional circumstances and does not support the plaintiff's case in respect of plot B. Haran Bose (predecessor-in-interest of the plaintiff) was practically in Rama Nath's employ and it was not unlikely that such a kabuliyat was obtained under registration at the instance of an Am-muktear.

Later on after discussing some evidence on the point and referring to the judgment in a suit which was brought by Rama Nath against the defendants for recovery of the plots A and B in which Rama Nath succeeded in obtaining a decree in respect to plot A but his claim with respect to plot B was dismissed, the learned Judge observes thus.

The said judgment shows under what exceptional circumstances Rama Nath's kabuliyat might have been executed and there is nothing in the present suit to suggest a contrary state of things.

In the judgment in that case it was found that the story that Sristidar (the former putnidar) had taken settlement of the land from Haran was not true and that the plaintiffs had failed to prove that Rama Nath continued to pay rent to Haran after execution of the kabuliyat in 1301 till his rights were sold away in 1914; and as regards the kabuliyat of 1301 after Haran Bose had lost his rent suit against Sristidhar there was a litigation between Rama Nath and Sristidhar for years about this putni and that the kabuliyat was executed about the time of litigation and so it was not impossible that Rama Nath executed the kabuliyat at the time in order to get the help of Haran Bose, an influential tenant and the son of a former ijaradar of the mahal. These are the findings in the previous case upon which the Subordinate Judge relied and the observation made by him that Haran Bose was a servant of Rama Nath and the kabuliyat and registration of it were procured at the instance of the Am-muktear sufficiently establishes the basis upon which the learned Subordinate Judge has practically found that the kabuliyat was not

a bona fide document. He has further gone on to consider the nature of the suit brought by Rama Nath against the defendants for recovery of this plot of land and plot A. He observed that that case, though it was brought in the name of Rama Nath, the plaintiff in the present case was really the plaintiff in that case and accordingly he was of opinion that the decision in that case operated as *res judicata* against the plaintiff who though not a party in form was the real plaintiff; and if that decision did not operate as *res judicata* it would certainly be very good evidence against the plaintiff. This opinion as expressed by the learned Subordinate Judge is supported by authority but it is not necessary to discuss it as the present case can be disposed of on the findings of fact arrived at by him namely that the kabuliyat of 1301 on which the plaintiff bases his claim for adverse possession against Rama Nath was not a bona fide document. There is further no finding in this case that Rama Nath continued to occupy the land as the plaintiff's tenant or ever paid rent to the plaintiff in respect of it. The question of adverse possession is a question of fact and the claim can only arise when a party remained in possession as against the party who had actually the right to possession. If the kabuliyat of 1301 was brought about for some purpose with the collusion of Rama Nath and the plaintiff's predecessor Haran Basu, the plaintiff's possession under it will not be adverse as against Rama Nath who remained in actual possession as he was before the kabuliyat was executed, with the knowledge that it was his property of which he was in possession and that the kabuliyat was a sham transaction. The title claimed by adverse possession must fail. It has been found that the plaintiff has no title by purchase to this land; as it is found that he acquired no title by adverse possession the plaintiff's suit must fail.

The learned Subordinate Judge has also held that the plaintiff's suit is barred by limitation. The defendant obtained possession of this land in January 1908 and the present suit was brought in April 1920. The learned vakil for the appellants argues that time runs not from the date of the defendants' possession but from the date of his purchase

of Rama Nath's interest on which date he acquired the right to possession of the land in suit, and for this view he relies upon the well-known principle that possession against a tenant or a lessee is not necessarily adverse as against the landlord or lessor. But this principle only applies where the landlord or the lessor has title to the land and the right to immediate possession, if impediments in the shape of a lease or tenancy disappears. In the present case the plaintiff on his own showing was a trespasser or in constructive possession of the land in suit through his tenant Rama Nath—whether under a temporary or a permanent lease it makes no difference, when in such a case the tenant holding the land under a trespasser is dispossessed, the dispossession would affect the tenant and the landlord also under whom he was holding, and it is more so when the rightful owner dispossesses the tenant and takes possession of the property which really belongs to him. In any view of the matter the plaintiff's suit must be taken to be barred by limitation, and as a trespasser he cannot claim that dispossession of Rama Nath by the defendant in 1903 did not affect his interest which at that moment he had none.

On all these grounds we are of opinion that there is no merit in this appeal and it must be dismissed with costs.

The defendant has filed cross-objections in this appeal in respect of plots other than plot B. But we are told that the defendants had filed a separate appeal in respect of those plots which was dismissed by this Court under O. 41, R. 11 Civil P. C. The cross objections therefore cannot be heard. They are dismissed without costs.

A. L. R. K.

Appeal dismissed.

A. I. R. 1928 Calcutta 885

RANKIN, C. J. AND MUKHERJI, J.

Srijan Gazi—Defendant—Appellant

v.

Abdul Sattar and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 2299 of 1925, Decided on 17th May 1928, from decision of Mitter, J., D/- 26th January 1929.

Bengal Tenancy Act, S. 48—S. 48 applies even if the holding is not co-extensive—Under-riyat of a part of holding agreeing to pay to riyat higher than 150% of the rent of whole holding—Riyat cannot recover more than 150% if under-riyat offers to pay 150%.

Section 43 is not limited only to cases where the holdings are absolutely co-extensive, and if the under-riyat of a part of a holding offers in Court to pay as much rent as would equal the amount of rent paid by the riyat for the total holding plus fifty per cent. of that, the riyat cannot recover more than that amount in spite of an agreement between the under-riyat and himself to pay rent at a higher rate. [P 886 C-2]

Atul Chandra Gupta and Radhika Ranjan Guha—for Appellant.

Abinash Chandra Guha and Bhupendra Nath Das—for Respondents.

Rankin, C. J.—This is a Letters Patent Appeal from a decision of my learned brother Mr. Mitter, J., sitting in second appeal. The suit was brought by the plaintiff against the present appellant for rent. The position is this. The plaintiff is a riyat who, for a holding of two plots, pay a rental of Rs. 9-8-0. He has let one of those two plots to the defendant appellant who is an under-riyat and he has left that at a rent of Rs. 32-0-0 per annum. The tenant-defendant's contention is that, under S. 48, Ben. Ten. Act, the plaintiff cannot recover the rent at the rate claimed. He says that, although there has been let to him only a part of the plaintiff's holding, nevertheless the plaintiff cannot, under S. 48, Ben. Ten. Act, recover more than the total rent which he pays for his total holding plus 50 per cent. on that. In other words, the defendant's contention is that Rs. 14-4-0 is the maximum amount which the plaintiff can claim from him. That contention has been negatived by the lower appellate Court and by Mitter, J., on second appeal, the view taken being that S. 48, Ben. Ten. Act does not apply at all except in a case where the riyat's holding and the under-riyat's holding are co-extensive. Now, it is quite clear that, as a matter of common-sense and as a matter of presumed intention of the legislature with reference to the mischief of the section, the view taken by these learned Judges involves a certain paradox. I do not say that this consideration is conclusive, but it is, certainly paradoxical to be told, that if the plaintiff had let both these two plots to the defendant, the utmost he could have got by

way of rent from the defendant is Rs. 14-4-0, but because, of these two plots, he has let only one to the defendant, he can for that one recover as much as Rs 32. We have, therefore, to see whether it is really true that S. 48, Ben. Ten. Act, must be read as limited to cases where the holdings are absolutely co extensive.

Now, the authority which has been cited to us on behalf of the appellant is the case of *Nim Chand Saha v. Joy Chandra Nath* (1). That was a case where the raiyat held land under a lease and by this lease certain classes of land were specified and certain rates of rent were prescribed for certain classes of land. A part of that land, he let out to the defendant, the under raiyat, and the under-raiyat's contention was that, as it was ascertainable which class of land had been sublet, the utmost that under S. 48, Ben Ten. Act could be claimed would be 50 per cent in excess of the amount of the raiyat's rent which was referable upon apportionment to the land which he had sublet to the defendant. With that contention the Court had to deal. In an ordinary case, it would be too plain for argument that S. 48 could not be applied by a mere rule of three; in other words, on the assumption that all lands of a tenancy are of equal value. But the case before the Court was more reasonable than that because there the tenant prayed in aid the circumstance that his land could be shown to be of a certain class and the plaintiff under his lease was paying so much rent for every bigha of that certain class. The learned Judges Harrington and Mookerjee, JJ., were not faced with the question which is presented by the case before us. It was not suggested that it would be of any service to the defendant there to offer to pay as much rent as would equal the amount of rent paid by the raiyat for the total holding plus 50 per cent of that. What the learned Judges were struggling with was the contention that, in the special circumstances of that case, the class of land being known, the amount paid by the plaintiff with respect to the defendant's land could be taken as ascertainable. The learned Judges there said that

that argument was based on a fallacy. They then say:

It cannot be affirmed that the raiyat pays so much rent for any particular parcel. No doubt, for the purposes of the assessment of the aggregate rent certain rates were taken as the basis of the calculation by the superior landlord. Nevertheless the raiyat holds the entire lands of the holding for the aggregate amount;

and then they go on to point out that the whole rent issues out of every part of the land demised. Having given that which if taken by itself, is an accurate and adequate statement of the law, the learned Judges said:

In our opinion, S. 48, applies to cases in which the land held by the raiyat is co-extensive with the land held by the under-raiyat. The section was never intended to apply to cases of the class now before us.

That case was followed by Digam-
bur Chatterjee and Chapman, JJ. in an unreported case Second Appeal No. 2539, of 1911 (*Akram Ali v Anwar Ali*) decided in this Court on 22nd April 1914. We do not find that this latter case differed in any way from the case already dealt with. There, too, there was no question of the tenant being content to pay $1\frac{1}{2}$ times the rent paid by his landlord for the whole of the landlord's holding. But in Second Appeal No 3310 of 1915, (*Netihulla Akanda v. Bari Bepari*), decided in this Court on 15th August 1917 by Teunon and Shamsul Huda, JJ., a case arose presenting exactly the same feature as it presented in this case, and there the learned Judges pointed out that the decision of Harrington and Mookerjee, JJ., in *Nim Chandra v Joy Chandra* (1) was perfectly right if it was understood with reference to the facts with which they had to deal, but that, if it was taken that only where the two plots were absolutely co-extensive was the section to be applied at all, that would be a construction which would defeat the policy of the legislature. It seems to me that that case is exactly on all fours with the present case and I agree entirely with the judgment which was given therein. This is what was said:

In applying the case reported in *Nim Chandra v Joy Chandra* (1) to a case such as this, the learned District Judge has fallen into an error, and to hold that S. 48 applies and can be applied only where the whole of the raiyat's holding is sublet would be to defeat the policy and intention of the legislature. In the case cited, as a matter of fact, the rent for the whole holding was Rs. 21-4-0. The plain-

(1) [1912] 39 Cal. 839=15 I. C. 256=16 C. W. N. 557.

tiff claimed in respect of the portion sublet a rent of Rs. 14. To have applied in that case the principle for which the appellants before us now contend would have been to decree a rent higher than the rent claimed.

Reference is made in the judgment of *Nim Chand's* case (1) at p. 843 to certain observations of Geidt, J., in the case of *Akhil Chandra Biswas v. Amjad Ali*, (Second Appeal No. 415 of 1903). We have sent for that judgment and have perused it and there is nothing in that judgment which militates against the view which I have expressed. There is a great deal in that judgment which shows that you cannot apply S 48, Ben. Ten. Act, by assuming that all lands are of equal value and proceeding upon a simple rule of three. The truth is that the proposition that rent issues from every part of the land demised and the proposition that lands are of different quality are insufficient to base a conclusion to the effect that S 48, can only apply where the two holdings are co-extensive. These considerations affords no objection to applying S. 48 in the way which is contended for by the appellant in the present case. Accordingly, I am of opinion that this appeal should be allowed.

The result is that the decrees of the learned Judge of this Court and of the lower appellate Court are set aside and the decree of the Court of first instance is restored. The defendant must have his costs in the lower appellate Court, in the second appeal to this Court and in the appeal before us.

It was contended before us that the rent in this case was not a money rent, but on this point, the decision of the learned Judge of this Court in second appeal is I think clearly right.

Mukherji, J.—I agree.

R.K. *Appeal allowed.*

A. I. R. 1928 Calcutta 887

C. C. GHOSE AND BUCKLAND, JJ.

Gokuldas and another—Plaintiffs—Appellants.

v.

Chagan Lal and another—Defendants—Respondents.

Appeal No. 55 of 1927, Decided on 18th November 1927. from original decree of Page, J.

Civil P. C., S. 20—Tort—Suit for damages for conversion of land—Some tort-feasors residing in Calcutta—Action can be maintained in Calcutta against them—Letters Patent, (Calcutta), Cl. 12.

In a suit for damages for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the tort-feasors, who resides in Calcutta, can be properly maintained in Calcutta High Court: 13 B. L. R. 91, *Dist.* [P 888 C 2, P 889 C 1 & 2]

Sircar—for Appellants.

N N Bose and S. K. Dutt—for Respondents.

C. C. Ghose, J.—This is an appeal against a decision of my learned brother Mr. Page, J., by which he dismissed the plaintiffs' suit in the circumstances hereinafter mentioned. The suit was instituted on 23rd March 1923, and the plaint as it stood, was filed against five defendants, namely, Chagan Lal, Sohan Lal, Kanya Lal, Rukmani and Mathura Bai. Shortly stated, the plaintiffs' allegations were these: They stated that there was a dwelling house in Bhawalpore in the Punjab in which they were interested as part owners and that the said house had been sold by the defendant Chagan Lal acting for himself and as the constituted attorney of the other defendants by several conveyances in the months of March and April 1920. They further alleged that the sales were effected without the consent and knowledge of the plaintiffs or any of them and that Chagan Lal had realized a sum of Rs. 19,476. They stated also that they were entitled to one-third of the sum of Rs. 19,476, that is to say, to the sum of Rs. 6,492. In the prayer portion of the plaint, the reliefs prayed for were as follows: For leave under Cl. 12, Letters Patent to institute the suit in this Court, for a decree for the said sum of Rs. 6,492; if necessary, for a declaration of the shares of the parties in the sale proceeds of the said house and premises and for a direction upon the defendants to pay to the plaintiffs their share of the said sale proceeds, and if necessary, for an account by and under the direction of this Court of the dealings of the defendants of the moneys realized by them from the said sales and for a direction upon them to pay to the plaintiffs whatever might be found to be due to them on the taking of such accounts. In their written statement the defendants Chagan Lal and Kanya Lal stated

that the suit as framed was one for lands outside the jurisdiction of this Court and was not maintainable. They further denied that the plaintiffs had any title to the said house.

It appeared that some time in May 1926, an order was made by my learned brother Buckland, J., when he was sitting on the original side of this Court, to the effect that the plaintiffs' application for issue of a commission of which notice had been given should stand to trial, that at the hearing of the suit the plea as to jurisdiction taken by the defendants should be heard and decided first, that such plea would be decided on the basis of the plaint having regard to the contention of the defendant Chagan Lal and Kanya Lal that the plaintiffs had no title to the house and premises in Bhawalpore in the Punjab and that, in the event of the plea of jurisdiction being decided in favour of the plaintiffs, the application for issue of a commission was to be brought on before the Judge hearing the case. This order, as stated above, was made on 18th May 1926. The suit came on for hearing before Page, J., on 2nd March 1927, when Sircar who appeared on behalf of the plaintiffs intimated to the Court that his clients were not willing to proceed against defendants 3, 4 and 5. Defendants 3, 4 and 5 were thereupon dismissed from the suit the necessary orders as to their costs being made at the same time. The case thereafter proceeded as against the two remaining defendants who were residents in Calcutta, namely, Chagan Lal and Sohan Lal.

When the appeal came on for hearing before us this morning, Mr. Sircar on behalf of the appellants stated that, so far as defendant 2, Sohan Lal, was concerned, the matter had been settled with him and that he was to be dismissed from the suit and the appeal and that, so far as his costs in the first Court were concerned, the order made by that Court was not to be disturbed but, so far as his costs on appeal in this Court were concerned, one counsel's fee was to be allowed. Upon this statement being made by Mr. Sircar and upon an order being made as prayed for, counsel for Sohan Lal retired. Thereupon, there was only defendant-respondent 1 left and that is Chagan Lal for whom Mr. N. N. Bose, with Mr. S. K. Dutt (Advocate) appears.

Now, it appears from the judgment of

the learned Judge that two points taken before him, (1) that, having regard to the allegations in the plaint, the case was a suit for land and that no portion of the land being situate within the jurisdiction of this Court, the suit was entertainable, and (2) that having regard to the decision of the Court of appeal in the case of *Hadjee Ismail Hadjee Ismail v. Hadjee Mahomed Hadjee Ismail* (1), and it appearing that all the defendants were not dwelling or carrying on business within the jurisdiction of this Court, the present suit was not maintainable.

Page, J., held, on an exhaustive review of the cases relating to what is a suit for land, that the present suit was not a suit for land and he thereupon negatived the first contention raised on behalf of Chagan Lal. As regards the second of the two contentions referred to above, he held, on a consideration of the facts of this case as appearing from the plaint, that this case was covered by authority, namely the case reported in *Hadjee Ismail v. Hadjee Mahomed* (1), and that, inasmuch as all the defendants were not dwelling or carrying on business within the jurisdiction of the Court, the present suit could not be maintained at the instance of the plaintiffs. The learned Judge thereupon dismissed the entire suit.

On appeal before us it has been contended by learned counsel for the appellants that on the facts of the present case it can be distinguished from the case reported in *Hadjee Ismail v. Hadjee Mahomed* (1), in this way, namely, that whereas in that case the account prayed for could not be taken and the case finally determined because of the fact that all the defendants were residents outside the jurisdiction of this Court and that, therefore, the suit could not possibly be maintained, in the present case the plaintiffs proceeded on the footing that a tort had been committed, namely, that there had been a wrongful conversion of the property in which they were interested without their knowledge and assent and that, in law, the plaintiffs were entitled to proceed against one tort-feasor or against all the tort-feasors jointly. In this case one of the tort-feasors, namely, Chagan Lal i.e., the person who had sold the property for himself and acting as the attorney of some of the other parties

interested in the property, was dwelling, or residing within the jurisdiction of this Court, and that, therefore, the suit could properly be maintained in this Court. Mr. N. N. Bose on behalf of the respondent Chagan Lal argues that the case is covered by authority, namely, the case reported in *Hadjee Ismail v. Hadjee Mahomed* (1), and further that his client does not admit that the plaintiffs had any share whatsoever in the property in Bhawalpore referred to in the plaint and that, both on law and on facts, the suit could not be maintained in this Court.

So far as the last point is concerned, that is dependent upon an investigation of facts and this investigation has not yet been held. But for the purposes of this appeal, we must proceed upon this footing, namely, whether, it being conceded that no part of the cause of action had arisen within the jurisdiction of this Court, the suit is maintainable in this Court because of the fact that one of the tort-feasors, namely, the defendant Chagan Lal, is residing within the jurisdiction of this Court. Now, the case has been decided on demurrer and the matters referred to in Buckland, J.'s. order of 18th May 1926, have not been gone into. The position, therefore, is that the case has been decided in the Court of first instance on the footing that what is stated in the plaint must be taken to be correct. Now, it is stated in the plaint that the sale of the house in Bhawalpore was an unauthorized sale so far as the plaintiffs were concerned. It is, therefore, clear that the suit is one in tort and, if it is a suit in tort, it is elementary that the suit can be maintained at the option of the plaintiffs against one tort-feasor or against the entire body of tort-feasors. It is, therefore, not a case in which it was essential that all the defendants who had been originally made parties should be before the Court at the time the suit is heard; in other words, in my view, the case is different from the case reported in 13 B. L. R. 91. The facts in that case were as follows: The plaintiff sued H, resident in Bombay but carrying on business by his agent in Calcutta and others resident in Bombay, to set aside a release of his interest in a certain property in Bombay. The plaintiff prayed also for inventory and accounts. The learned

Chief Justice held that the real object of the suit was that an account might be taken of the property and the share of the plaintiff ascertained and provision made for his recovering it. The greater portion of the property was immovable property in Bombay. It was held that full and complete relief could not be given to the plaintiff in the absence of any of the defendants there and that the suit could not be maintained in the absence of leave under Cl. 12, Letters Patent, as the whole of the cause of action had not arisen in Calcutta. Therefore, so far as the present appeal is concerned, speaking for myself, I should be inclined to allow it because the question that is raised in the plaint is one whether or not there had been a conversion by Chagan Lal, who is resident in Calcutta, of the property in which the plaintiffs were interested and there is nothing in law to prevent the institution of a suit in the present circumstances against a tort-feasor who was resident within the jurisdiction of this Court.

Mr. Bose has, however, argued that in this case also having regard to the prayers in the plaint the question of accounts would have to be gone into. I express no opinion on the matter at the present moment but it is curious that if that was the view taken by the defendant Chagan Lal, he should not have raised the matter at the time when the other defendants were dismissed from the suit. I do not, however, wish to say anything which will preclude Mr. Bose's client from raising the questions relating to the plaintiffs' title to the property and to the other matters referred to in his written statement. They are questions which it will be open to the defendant Chagan Lal, to raise, if so advised, at a subsequent stage of the suit.

The result, therefore, is that, in my opinion, the present appeal should be allowed with costs and the case sent back to the Court of first instance for trial upon the issues arising on the pleadings. All earlier costs will follow the event.

Buckland, J.—A suit against several defendants all of whom are necessary for the determination of the questions which have to be decided in the suit must be distinguished from a suit against several defendants in which all the defendants are not necessary for the purpose of

giving the plaintiff the relief which he prays and against any one or more of whom it is open to the plaintiff at his option to proceed. The case of *Hadjee Ismail v. Hadjee Mahomed* (1) was a case of the former description. Defendant 1 in that case was a resident of Bombay and was carrying on business by his gomastha in Calcutta. But for that, as I understand the case, there was no ground upon which the Court could possibly be asked to hold that it had jurisdiction. From the judgment of the learned Chief Justice, it appears that the learned counsel for the respondent suggested that the suit should be abandoned against the parties other than defendant 1, but as the learned Chief Justice pointed out, in order to set aside the release against defendant 1, that course could not be allowed because

merely to set aside the release in a suit against defendant 1 would leave all the material questions to be decided in another suit. The real object of the suit is that an account may be taken of the property left by the deceased and the share of the plaintiff ascertained and provision made for his receiving it.

The present appeal has been argued upon the footing that the suit as framed is a suit for damages for conversion in which it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. They elected to proceed against five but eventually proceeded against two—those two who reside in Calcutta. Though the suit was dismissed in the circumstances stated by my learned brother against the other defendants, nevertheless the learned Judge has held that, upon the authority cited, this Court has no jurisdiction. In my judgment, the case cited has no application in the circumstances, treating the suit as one for conversion.

The matter, however, has not been argued from this standpoint on behalf of the respondent. The argument on behalf of the respondent is that this is not a suit for damages for conversion as stated by the learned counsel for the appellants but that it is a suit to which the five persons who originally were made defendants to the suit are necessary parties. If this is a correct view to take of the situation, then the point which the learned Judge has decided could not arise because, on 2nd March when the suit came on for hearing and the plain-

tiffs by their counsel stated that they would not proceed against defendants 3, 4 and 5, it would have been open to the learned counsel on behalf of defendants 1 and 2 then and there to have made a protest and pointed out that, if that course were adopted, the suit was not properly constituted and could not proceed. As I read the minutes, that point was never taken and, on behalf of the defendants 1 and 2 the course adopted on behalf of the plaintiffs was acquiesced in. Had the matter been discussed before the learned Judge, I cannot conceive that there would not have been some reference to it in the minutes and the learned Judge must have dealt with it in his judgment because, as I have endeavoured to point out, it goes to the root of the whole case and arises before any question of jurisdiction has to be decided. Mr. N. N. Bose for the respondent has assured us that the point was taken. I must, however, for the present purpose, treat the suit as though it were, as apparently the learned Judge did and as Mr. Sircar argues it is a suit for damages for conversion and, in that view, I agree that the appeal must succeed.

As regards the point taken on behalf of the respondent, it is not, as it appears to me, an answer to this appeal. It is a point, however, which notwithstanding the matters which I have pointed out, we have been assured was taken. In the circumstances, I agree that the defendant will be entitled to object that, on the plaint as framed, the suit is not properly constituted and that the plaintiffs cannot succeed. But, on the question of law, treating this suit as a suit for damages for conversion in which the plaintiffs have proceeded eventually exclusively against one of the tort-feasors, I am of opinion that the judgment of the learned Judge cannot be sustained and the appeal must be allowed and the suit sent back for trial as my learned brother has directed.

W.S./R.K.

Case remanded.

A. I. R. 1928 Calcutta 891

B. B. GHOSE AND GARLICK, JJ.

Aswani Kumar Dhupi and another—
Defendants 2 and 4—Appellants.

v.

Har Kumar Ghosh and others— Plain-
tiff and remaining Defendants — Res-
pondents.Appeal No. 2311 of 1925, Decided on
18th May 1928, from appellate decree
of 1st Sub-Judge, Barisal, D/- 19th
August 1925.(a) *Civil P. C., S. 100—Abandonment.*Inference from facts found as to whether
there was abandonment or not is a question of
law. [P 891 C 2](b) *Bengal Tenancy Act S. 87—Abandonment*
—Tenant of a non-transferable occupancy
holding leaving the village in Falgun 1324—
Landlord giving a settlement of the holding in
Baisakh 1325—Sub-lease by the tenant in Ashar
1325 and two days later sale of a portion of the
holding—Period was too short for abandonment
and the lease and sale did not amount to a
transfer.D was a tenant of a non-transferable occu-
pancy holding. He died in 1320, leaving R and
K as his heirs. R and K left the village in
Falgun 1324. The landlord in Baisakh 1325
gave a settlement of the tenant's holding to the
plaintiff. In Ashar 1325 R and K granted a
sub-lease to defendant 1 and delivered posses-
sion to him. Two days afterwards they sold a
15 anna share of it to defendant 2. Plaintiff
brought a suit for ejectment against R and the
defendants on the ground of abandonment.*Held:* that the period from Falgun to Bai-
shakh was too short for an abandonment. Be-
sides the granting of the sub-lease and of the
sale of 15 annas did not amount to transfer.
There was, therefore, no abandonment: 42
Cal. 172 (F.B.), *Rel. on.* [P 891 C 2]*Ramani Mohan Chatterjee* — for Ap-
pellants.*Gunada Charan Sen and Prasanta*
Bhusan Gupta—for Respondents.**Judgment.**—This is an appeal by
defendants 2 and 4 against the judgment
and decree of the Subordinate Judge of
Bakarganj, affirming the decision of the
Munsiff. The suit out of which this ap-
peal arises was for ejectment of the heirs
of a deceased tenant and their transferees
on the allegation that the tenancy was a
non-transferable occupancy holding and
with regard to another piece of land it
was an under-raiyati which the heirs of
the original tenant Dwarka have aban-
doned. The heirs are Rabi and Kanai of
whom Rabi alone has been made a party
to this suit. Evidently Kanai's interestwill not be affected in any way and per-
sons setting up the title of Kanai cannot
be affected by any decree in this suit.It is, however, necessary to examine the
decision of the Subordinate Judge. Dwarka
died in Kartik 1320. It is said that the
sons of Dwarka left the village in Falgun
1324. The plaintiff took settlement from
the landlord in Baisakh 1325 and is alleged
to have taken possession. He next al-
leged that he was dispossessed in 1330
by the present defendant. What the
Subordinate Judge finds is that the pre-
sent defendants got a sub-lease from Rabi
and Kanai dated 16th Ashar 1325 and
purported to hold possession under them.
Two days after Rabi and Kanai sold
15 annas of their interest to defen-
dant 2. The question is whether these
transactions amount to abandonment. It
is hardly necessary to point out that the
inference from facts found as to whether
there was abandonment or not is a ques-
tion of law. Can it be said that because
the sons of the original tenant had left
the village after the death of their father
for three months (that is from Falgun
to Baisakh) there was abandonment which
entitled the landlord to settle the land
with the plaintiff? The very statement
of the facts shows the absurdity of that
contention, nor can it be said that till
Ashar the sons of Dwarka had at all
abandoned the land. Some period must
elapse from the date of leaving the vil-
lage by the occupancy raiyat before it
can be definitely stated that he has aban-
doned his holding. The period in this
case is absurdly short. Then in Ashar
1325 the sublease given in favour of
defendant 4 shows that those persons
did not intend to abandon the holding
but wanted to retain a grip upon the pro-
perty by granting a sublease. The grant-
ing of the sublease cannot be considered
to be a transfer of the tenancy in ques-
tion nor can the selling the 15 annas of
the interest in the property. The pro-
position has now been finally settled by
the Full Bench case of *Daya Mohi v.*
Ananda Mohan Roy (1). It cannot there-
fore be said that the tenants have actu-
ally abandoned the land. Apart from
the question of one of the heirs of Dwarka
who would undoubtedly be a tenant
having been left out of the suit there is
no abandonment by the tenant(1) [1916] 42 Cal. 172 = 20 C. L. J. 52 = 27 I. C.
61 = 18 C. W. N. 971 (F.B.).

The appeal therefore will be decreed. The judgments and decrees of the Courts below are set aside and the suit of the plaintiff dismissed with costs in all Courts. The plaintiff's title to receive rent for the holding will not be affected by this judgment.

A. L./R.K.

Appeal decreed.

A. I. R. 1928 Calcutta 892

B. B. GHOSE AND CAMMIADÉ, JJ.

Makhan Lal Modak — Defendant 1—Appellant.

v.

Bejoy Gopal Nundy and others — Plaintiff and Defendants 2 to 6 and 8 and 9—Respondents.

Appeal No. 175 of 1925, Decided on 15th February 1928, from appellate decree of 1st Sub-Judge, Howrah, D/- 3rd September 1924.

Bengal Tenancy Act, S. 167 - Annulment of incumbrance—Application for, after one year from sale—Purchaser must prove date when he got notice of sale.

Where a purchaser in execution of a rent decree makes an application for annulling an incumbrance after one year from the date of the sale and seeks extension of that period for presenting an application to the Collector on the ground that the date when he had first notice of the incumbrance was later than the date of the sale, the purchaser is to prove the fact in order to claim the extended period in his favour and show that the application is within time : *A. I. R. 1924 Pat. 515, Expl.*

[P 893 C 1]

Biyan Kamar Mukherji and Sanat Kumar Chatterji—for Appellant.

Jidu Nath Kanjilal and Subodh Chandra Dutt—for Respondents.

Judgment—This is an appeal by defendant 1. The plaintiff sued the defendants in ejectment on the ground that he had taken a settlement of the land in question from the landlord who had purchased the holding in execution of his own rent decree. The plea of the defendant shortly stated was that he had obtained a decree in execution of a mortgage created on the holding by the previous tenant and after enforcing his mortgage he obtained a decree and purchased the property in question. He cannot therefore be ousted by the plaintiff. The plaintiff's suit was decreed by the lower appellate Court. Defendant 1 appealed to this Court and on the previous hearing a Division Bench sent

down an issue for trial on the question whether or not the landlord had knowledge of the circumstance more than one year before the date of the application under S. 167, Ben. Ten. Act for service of notice. The notice was served by the landlord after the institution of the suit out of which this appeal arises. The application was admittedly made more than a year after the date of the sale. The notice can only annul the incumbrance in favour of defendant 1 if the necessary step was taken within one year from the date on which the purchaser in execution of the rent decree had first notice of the incumbrance. The purchaser in execution of the rent decree as already stated in this case was the landlord. The Subordinate Judge has sent his finding to this Court on the issue on which his finding was required. He observed that defendant 1 has entirely failed to discharge the onus that was upon him to show that the landlord purchaser had knowledge of the incumbrance more than a year from the date of notice.

It has been contended on behalf of the defendant-appellant that the finding ought to have been in his favour, because there is absolutely no evidence on behalf of the plaintiff that the purchaser had no notice of the incumbrance previous to one year of his application for service of notice. His contention is that the Subordinate Judge has misplaced the onus of proof, and having done so he has dealt with the evidence adduced on behalf of the defendant and has come to the conclusion that the defendant has failed to discharge the burden of proof, upon him. The Subordinate Judge relied upon the case decided by Patna High Court and reported in *Nand Kishore v. Rameshwar Singh* (1) in support of his view that in every case falling within S. 167, Ben. Ten. Act it is for the incumbrancer to show that the purchaser had knowledge of the incumbrance in order to establish the fact that there has been no annulment of the incumbrance on proper service of notice. In our view the learned Subordinate Judge has misread the case which he relies upon in support of his view. That was a case in which a mortgagee sued for possession as plaintiff and the auction-purchaser pleaded that the incumbrance

(1) *A. I. R. 1924 Pat. 515.*

had been annulled by due service of notice. In order to succeed in that case the plaintiff was bound to prove that he had a subsisting right and in that view the learned Judges held that the burden of proof was upon the plaintiff to show that the incumbrance which he claimed was not annulled by proper and legal notice. In our opinion it cannot be laid down as a general rule of law that the burden of proof is on the incumbrancer to show in every case that the purchaser had knowledge of the incumbrance more than one year before his application to the Collector for service of notice for annulment of the incumbrance. The mere reading of the section in our view displaces such a contention. The section provides that the purchaser may within one year from the date of the sale or the date on which he first has notice of the incumbrance whichever is later, present to the Collector an application in writing requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled. Who is to show that the date when he has first notice of the incumbrance is later than the date of the sale? Obviously it must be the purchaser who makes the application for annulling the incumbrance. It is the purchaser who seeks the extension of one year's time for presenting the application to the Collector upon that ground and certainly he is to prove the fact in order to claim the extended period in his favour.

It is, however, contended on behalf of the respondents that in this case apart from the question of onus the evidence shows that the purchaser had knowledge of the incumbrance within a year of the presentation of his application. This evidence is said to have been given by a gomastha of the landlord. The Subordinate Judge has observed that defendant 1 admits that he never went to the house of the landlord. It is not necessary for the incumbrancer to go to the house of the landlord in order to give him notice. But it is for the landlord purchaser to give evidence that he was not aware of the incumbrance within the time specified. There being no evidence given by him to that effect we must hold that the incumbrance has not been proved to have been annulled according to law.

The result therefore is that this ap-

peal must be decreed, the judgment and decree of the lower appellate Court set aside, and the decree made by the trial Court restored with costs in all Courts.

W.S./R.K.

Appeal allowed.

* A. I. R. 1928 Calcutta 893

CUMING AND MUKHERJI, JJ.

Ambica Charan Kundu and others,—
Defendants—Appellants.

v.

Kumud Mohun Chaudhury and others—
Plaintiffs—Respondents

Appeal No. 693 of 1925, Decided on 8th February 1928, from appellate decree of Dist. Judge, Bankura, D/- 2nd February 1925.

* (a) *Evidence Act*, Ss. 32 and 35—*Sale certificate—Description of property in, is not within Ss. 32 and 35—Evidence Act*, S. 35.

A sale certificate is not a public or other official book, register or record: *A. I. R. 1924 Cal. 526*, 17 *Cal. 849*, and 18 *Al. 478*, *Rel. 10*.

Description of property given in a sale proclamation or a sale certificate does not amount to a statement within the meaning of Ss. 32 and 35. Recitals even in a judgment not inter partes, of relevant fact is not admissible under S. 35. *A. I. R. 1922 Mad. 71 (F. B.)*, *Foll.*

[P 895 C 1]

(b) *Evidence Act*, S. 11—S. 11 is controlled by S. 32—When the fact of statement, whether true or false, is material, it is relevant under S. 11—*Evidence Act*, S. 32.

As a general rule, S. 11 is controlled by S. 32 when the evidence consists of statements of persons who are dead and the test whether such statement is relevant under S. 11 though not relevant under S. 32, is that it is admissible under S. 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said. *J. Bom. L. R. 1017*, *Ref.*

[P 895 C 2]

(c) *Evidence Act*, Ss. 11, 13 and 32, Cl. (3)—*Recitals in sale certificate*.

Recitals in a sale certificate or a sale proclamation are not admissible under Ss. 11, 13 and 32, Cl. 3. *A. I. R. 1927 Cal. 230*; *A. I. R. 1924 Cal. 1007*, *Foll.*, 22 *W. R. 239* and 23 *Bom. 63*, *Dist.*

[P 895 C 2, P 896 C 2]

* (d) *Evidence Act*, S. 157—*Statements by third persons cannot be used for corroboration*.

Section 157 cannot be invoked to let in statements made by third persons as evidence for the purpose of corroboration of witness examined in a case.

[P 895 C 2]

Surendra Nath Guha and Durgendy Krishan Dutt—for Appellants

Sarat Chandra Bose and Narendra Krishna Bose—for Respondents.

Mukherji, J.—This appeal has arisen out of a suit for establishment of plain-

tiffs' nishkar right to and for possession of $4\frac{1}{2}$ bighas of land which is described in Sch. Ka to the plaint. The plaintiffs' case was that the land in suit was their ancestral nishkar, that they and predecessors possessed the same for more than 100 years in nishkar right as well as right by adverse possession, that they and their predecessors had paid road-cess and submitted road-cess returns to the Bankura Collectorate till 1905. when the Collector directed them to pay the cesses to the zemindars, but the latter refused to take the cesses only and insisted on the plaintiffs taking a jamai settlement and that the plaintiffs refused to do so. The defendants resisted the claim by alleging that they had been holding the lands from the time of their father for a period of over 25 years as tenants under the said zemindars and on payment of rent to them.

The trial Court dismissed the suit, but the lower appellate Court on appeal by the plaintiff reversed that decision and decreed the suit. The defendants have preferred this appeal.

The District Judge found that the documents on which the defendant relied in order to show their tenancy right to the land either did not relate to it or were not reliable, having been created for the purposes of the case, and that the entry in the Record-of-Rights was of little value, its presumptive value having been rebutted by the plaintiffs' evidence. He found, on the other hand, on a consideration of the cess challans and certain other documents adduced in evidence on behalf of the plaintiffs to which it is not necessary to refer specifically, that the plaintiffs' father held some land in nishkar right in the mouzah. He found, however, that in support of the plaintiffs' title by nishkar right in respect of the two plots of which the land Sch. Ka consists, there was no documentary evidence in respect of plot 1, and the only documentary evidence that there was as regards plot 2 were a sale-certificate (Ex. 9) and two kabulas (Exs. 6 and 7) relating to adjoining lands. He found also that the oral evidence of possession of the land of Sch. Ka that was adduced on the side of the plaintiffs was immensely superior to that adduced on the side of the defendants. On the oral evidence coupled with the said documents Exs. 6, 7 and 9, he held that the

defendants' evidence of possession of plot 1 was not to be accepted. In this process of reasoning he came to the conclusion that the plaintiffs had succeeded in proving possession of both plots without payment of rent and this he inferred that the plaintiffs' nishkar right to both the plots entitled the plaintiffs a decree declaring nishkar right and for recovery of possession.

The appellants contend that the documents Exs. 6, 7 and 9 are not admissible in evidence, and that the findings of the District Judge are vitiated as being based on them. It may be mentioned here that the landlords not being parties to the suit a declaration of nishkar right of very little use to the plaintiff and the finding of the Judge on the question of adverse possession could be held not having been affected by the said documents to which the appellants have taken exception the decree of the Judge could have been upheld to the extent declaring the plaintiffs' title without determination of its precise character and of giving him khas possession. But as it is, the findings on the question of nishkar right as well as on the question of adverse possession, as already indicated, rest partly at any rate, on the said documents and it, therefore, becomes necessary to consider the question of their admissibility.

Exhibit 9 is a sale-certificate in respect of an adjoining land. In it plot 1 of Sch. Ka is said to lie on the boundary of the lands to which it relates and the said plot is described as plaintiffs' nishkar. The Munsif whose signature the document bears may be and has rightly been presumed to be dead. The learned Judge is of opinion that the document is admissible under S. 32, Cl. (2) and also S. 35, Evidence Act. He held that under O. 21, R. 66, Civil P. C., a duty is upon the Court to specify as fairly and accurately as possible the property transferred in the sale-proclamation and as to the description of the property as given in the sale-certificate is a copy of that contained in the sale-proclamation, the entry of boundaries is to be regarded as having been made by the Munsif in the ordinary course of business and in the discharge of his official duty and the said entry therefore, comes under S. 32, Cl. Evidence Act. He held also that the

had been a sale-certificate is an entry made in the public record by a public servant in the discharge of his duty and, therefore, has a place under S. 35, Evidence Act, learned well. The learned Judge, in my opinion, was entirely misunderstood the meaning in both these sections. Under S. 32, not annul) applying that part of the clause in our opinion is relevant, the statement must be a general one made by a person in the ordinary course of business, or, if it is an entry, it must be an entry made by a person in books kept in the ordinary course of business or in the discharge of his professional duty. Here there is no question of an entry in any book nor is the statement in the sale-proclamation or in the sale-certificate as regards the boundaries of the land covered by them in any sense a statement of the Munsif. It is only a statement of the parties, unless there is a variance between the parties on the point, in which case it may be taken as an entry embodying a decision which may come under some other section of the Evidence Act; but there is nothing to indicate in the present case that the Munsif was ever called upon to decide as to what was the real boundary, and so the statement does not amount to a decision. Equally inapplicable is S. 35. A sale-certificate is not "a public or other official book, register or record" and is much the same as a certificate of guardianship which has been held not to answer the description: *Satis Chunder v. Mohendro Lal* (1), *Hara Kumar De v. Jogendra Krishna Ray* (2) and *Gunja Kuar v. Albakh Pande* (3). Recitals even in a judgment not inter partes, of a relevant fact is not admissible under S. 35: *Seethapati Rao v. Rokkam Venkanna* (4).

As regards the kabalas, Exs. 6 and 7, the learned Judge is of opinion that the recitals of boundaries therein are admissible under S. 32, Cl. (3), Evidence Act, the executants thereof being dead. Before us their admissibility is sought to be justified also under Ss 11, 13 and 157, Evidence Act. It will be necessary, therefore, to deal with all the four sections referred to above.

Section 11 is very widely worded but the illustrations, as has been often pointed

out, do not go beyond cases familiar to the English Law of Evidence and it has been always held that an extensive meaning was not in the mind of the Legislature; per West, J. in *R. v. Parbhudas* (5), *Queen-Empress v. Vajiram* (6) and per Mookerjee, J., in *Emperor v. Panchu Das* (7). As a general rule, this section is controlled by S. 32 where the evidence consists of statements of persons who are dead; and the test whether such statement is relevant, under this section though not relevant under S. 32 is this: it is admissible under S. 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said: *Sethna v. Mahomed Shirazi* (8). Judged by this test the statement is inadmissible under S. 11, and though there are some cases of this Court which decided to the contrary the more recent decisions are not in favour of that contrary view. As regards S. 13 both my learned brother and myself have in our judgment in the case of *Bijendra Kishore v. Mohim Chandra* (9) expressed our views as to the precise scope of that section. That view has since been endorsed by other learned Judges of this Court and in that view recitals of boundaries in documents evidencing transactions relating to adjoining lands cannot possibly be admitted under that section. As has been pointed out in a later decision of this Court in the case of *Ketabuddin v. Nafar Chandra* (10) such recitals are not admissible either under S. 11 or under S. 13.

As regards the admissibility of these recitals under S. 32, Cl. (3) there is a clear conflict of opinion so far as this Court is concerned as has been pointed out in the case last cited above. It will serve no useful purpose to discuss at length the long line of cases in which it has been held that such recitals are admissible, but I cannot help pointing out that the judgment of Couch, C. J., in *Rajah Leelanand Singh v. Lakhjutesh Thakoorain* (11) upon which the Bombay High Court purported to rely in earliest case of that Court, *v. z.*, the case of *Nin-*

(5) 11 B. H. C. R. 90.

(6) [1892] 16 Bom. 414.

(7) [1900] 47 Cal. 671=31 C.L.J. 402=58 I. C. 926=4 C. W. N. 501 (F.B.).

(8) [1907] 9 Bom. L. R. 1047.

(9) A. I. R. 1927 Cal. 1.

(10) A. I. R. 1927 Cal. 230.

(11) 22 W. R. 231.

(1) [1890] 17 Cal. 849.

(2) A. I. R. 1924 Cal. 526.

(3) [1896] 18 All. 478=(1896) A. W. N. 158.

(4) A. I. R. 1922 Mad. 71=45 Mad. 332 (F.B.).

gawa v. Bharmappa (12) which decided in favour of the admissibility of these recitals on the ground that they are against the proprietary or pecuniary interest of the maker thereof, was not a case of recitals of boundaries of any adjoining land but it was the case of a statement contained in a sannad relating to the land itself. The principle that was laid down in that case was that if as a whole it is against the interest of proprietary right of its author, such parts of it as are in his favour cannot be rejected. With all respect to the learned Judges who decided the case of *Ningawa v. Bharmappa* (12) I find it extremely difficult to extend the principle of *Rajah Leelanund Singh v. Lakhputee Thakoorain* (11) to the case of recitals of boundaries unless with the aid of the principle in the leading case of *Higham v Ridgway* (13) and I am extremely doubtful if the legislature at all intended to incorporate *Higham v Ridgway* (13) in its entirety in S. 32, Evidence Act. I am inclined to take the view that *Higham v Ridgway* (13) was taken by the Indian legislature only as illustrative of what is meant by the expression "ordinary course of business" as used in Cl. (2) of that section. These cases form the foundation of the line of cases which are in

favour of admissibility of such recitals. In view of the opinion that I hold it would probably have been necessary for us to make a reference to a Full Bench but there is one clear decision at least of this Court to the contrary, and I think I am free to follow it as I agree entirely with what has been said in it; I mean the case of *Pramatha Nath v. Krishna Chandra* (14). I hold accordingly that the recitals are not admissible under S. 32, Cl. (3).

As regards S. 157, I fail to understand how that section can be invoked to let in statements made by somebody else as evidence for the purpose of corroboration of a witness examined in the case and if the case of *Ketabuddin v. Nafar Chandra Pattak* (10) meant to lay down that it can be so invoked I have no hesitation in respectfully dissenting from it.

I am of opinion, therefore, that the recitals contained in Exs. 6 and 7 were wrongly admitted in evidence.

The result is that the appeal will be allowed and the case will be sent back to the lower appellate Court to re-hear and dispose of the appeal to that Court after excluding the document Exs 6, 7 and 9.

Costs of this appeal will abide the result.

Cuming, J.—I agree.

A. L. R. K.

Appeal allowed?

(14) A. L. R. 1924 Cal. 1067.

(12) [1899] 23 Bom. 63.

(13) 2 Sm. L. C. 318.

